

VIA ELECTRONIC MAIL: JPAMidTermReview@ntia.doc.gov

TO: Ms. Suzanne R. Sene, Office of International Affairs, National
Telecommunications and Information Administration

FM: Richard Nessary, Associate General Counsel, eBay Inc.

RE: Response to Notice of Inquiry, Docket No. 07102363-7617-01

DT: February 15, 2008

eBay Inc. is pleased to submit these comments in response to NTIA's Notice of Inquiry (NOI) on mid-term review of the Joint Project Agreement (JPA) between the Department of Commerce and the Internet Corporation for Assigned Names and Numbers (ICANN).

Summary

eBay has been an active participant in the work of ICANN throughout the organization's history. We support the basic framework of ICANN as an independent entity charged with management of the domain name and addressing systems. We also acknowledge the considerable progress ICANN has recently made to improve its effectiveness and its transparency. However, we do not agree with ICANN's contention that it has fully executed all the tasks that it assigned itself in the Annex to the JPA (reflecting an "Affirmation of Responsibilities" adopted by the ICANN Board in September 2006).¹ This is especially the case in areas such as private sector leadership within the organization, and contract compliance. Accordingly, eBay believes that the JPA should not be terminated at this time. Instead, ICANN should be encouraged to take further steps to increase its engagement with the private sector, to improve contract compliance, and otherwise to meet the goals it set for itself in the JPA. The US government should make use of its relationship with ICANN under the JPA to advance this objective in the remaining 18-month term of the agreement.

eBay and ICANN

eBay is the world's largest online trading community and has the world's leading e-commerce brand. The future and growth of the Internet depends on the effective technical management of resources such as domain names and addresses – ICANN's job. Policy decisions made by ICANN, and the implementation of those decisions by domain name registrars, registries and other parties, can have a significant impact on eBay's ability to serve its community and to provide the online marketplace in which millions of people participate. For that reason, eBay has participated actively in the ICANN process for several years, including as an active member of the GNSO's business constituency. eBay companies have filed numerous submissions to ICANN in response to solicitations for comments, mostly on the issue of public access to Whois data.

¹ See ICANN's submission in this proceeding at http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_004.pdf.

Private sector leadership

In the “Affirmation of Responsibilities,” ICANN pledged “to increase engagement with the Private Sector by developing additional mechanisms for involvement of those affected by the ICANN policies” (#6). NTIA should carefully review what has happened in the year and one-half since this affirmation was adopted. At one level, private sector engagement with ICANN has increased; but this is primarily attributable to deep and growing private sector concerns about a step that ICANN was considering taking. When the private sector, using the engagement mechanisms provided by ICANN, spoke out, ICANN was very slow to listen. From our perspective, this does not constitute fulfillment of the responsibility that ICANN set for itself in the Affirmation.

We are referring here to the proposal to dramatically change the Whois service that has been a feature of the Domain Name System since its inception. In late 2006, ICANN initiated a public comment period on a proposal called OPOC (Operational Point of Contact), under which the publicly accessible information about domain name registrations via Whois would have been substantially curtailed. By the comment deadline of January 2007, scores of companies, trade associations, non-profit organizations and other private sector entities had submitted comments raising serious concerns about this proposal. A wide range of industry sectors was represented, as well as leading charitable groups. E-commerce companies, including eBay, joined this chorus of concern. The comments have been archived at <http://forum.icann.org/lists/whois-services-comments>; for eBay’s comment, see <http://forum.icann.org/lists/whois-services-comments/msg00018.html>.)

The recipient within ICANN of these numerous public comments was the GNSO Council. The Council’s response was to create a new Working Group to plan for the implementation of the OPOC proposal, on which the private sector had just expressed its concerns. Only after this Working Group operated for months, held dozens of conference calls, and consumed literally thousands of additional person-hours of participants (including an eBay employee), did the GNSO council finally decide, in October 2007, not to move forward with the OPOC proposal.

In one sense, the OPOC proposal did succeed in “engaging” private sector interests with ICANN, both those entities that were already involved with the organization (such as eBay), and a number of new players (such as the financial services sector, for instance). But the “engagement” left a decidedly negative impression. The perception is widespread, among many of the companies, associations and charities that spoke up in opposition to OPOC, that their voices were not heard.

In the lengthy Annex to ICANN’s submission in this proceeding, ICANN explains that it has fulfilled this aspect of the Affirmation of Responsibilities by “engag[ing] in face to face meetings with the global business community.” These outreach efforts are certainly important, but they are in no way a substitute for giving the business community a meaningful voice within ICANN regarding decisions by the organization that may significantly affect business.

Some elements of the private sector already have a very strong voice within ICANN: the accredited domain name registrars, and the domain name registries.² This strong voice is institutionalized in the unfair “weighted voting” system in the GNSO council, in which registry and registrar representatives’ votes are counted twice in tallying the views of council members. (Weighted voting accelerated the forward progress of the OPOC proposal, even after strong opposition to it was expressed in public comments.) The result is that companies whose businesses are based on the contractual status with ICANN have grossly disproportionate influence on its decision making processes. We doubt that this is what the authors of the founding documents of ICANN had in mind when they referred to private sector leadership as a key feature of the organization.

We urge ICANN to step up to the responsibility it set for itself in the Affirmation, and to take on the challenge of fashioning a practical, accessible mechanism for business and private sector input into ICANN decision making. The goal should be to have put this mechanism in place well before the expiration of the term of the JPA in September 2009.

Contract compliance

eBay is concerned about ICANN’s fulfillment of other aspects of the JPA as well. For instance, in the Affirmation of Responsibility, ICANN pledged to “devot[e] adequate resources to contract enforcement,” (#10), and specifically to “enforce existing policy relating to Whois” (#5). As we police our trademarks online, and seek to prevent online frauds that threaten our community, eBay consistently encounters activity by ICANN-accredited registrars, and by domain name registries, that suggests non-compliance with contracts that these entities have signed with ICANN. These problems include, but are by no means limited to, compliance with contractual provisions relating to Whois.

We recognize that ICANN has done much more since the JPA was adopted to bolster its contract compliance capabilities than was done in previous years; and we welcome plans just announced by ICANN to further enhance those capabilities through additional staff and resources. While ICANN is headed in the right direction, it has far to go before it can say that it is devoting adequate resources to compliance, as measured by the credibility of its compliance program, and whether widespread violations of the contracts are effectively dealt with. This would be another fruitful area for ICANN focus -- and for US government attention under the JPA – over the next eighteen months.

While current contractual provisions on Whois must be enforced, eBay is not simply calling for the status quo. As we have noted in several submissions to ICANN, we believe that the current Whois system can and must be improved, especially with regard to the accuracy of Whois data, and with regard to the hiding of this data through proxy and private registration services. We hope that this project – long delayed and diverted by opposition from some

² The registries for country code TLDs have succeeded in barring ICANN from playing virtually any role in their registration policies. Regrettably, this largely eliminates ICANN as a potential forum for addressing the significant problems, including cybersquatting, trademark infringement, and other online misconduct, in some of the ccTLD registries.

domain name registrars and registries – can also be undertaken during the remaining term of the JPA.

Conclusion

If ICANN can make meaningful concrete progress, at a minimum in the areas noted above over the next 18 months, eBay would support a review of the relationship between ICANN and the U.S. government at that time. This could involve a transition from the JPA to documenting that relationship in some other form. It could also be constructive to begin the conversation now about what a post-JPA relationship might look like, and eBay would follow such a conversation with great interest. However, there is no justification for terminating the JPA now, as ICANN requests.

Thank you for considering eBay's views. For further information concerning eBay's views, please contact the undersigned.

Respectfully submitted,

Richard Nessary

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eBay Inc.