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

Comments on “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 Federal Register 62220 (November 2, 2007)

Dear Ms. Sene:

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to offer comments regarding the progress achieved by the Internet Corporation for Assigned Names and Numbers (ICANN) toward the goals identified in the Joint Project Agreement (JPA) between NTIA and ICANN signed on September 29, 2006 and endorsed by ICANN’s Board of Directors.

AIPLA is a national bar association whose more than 17,000 members are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of trademark, copyright, patent, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property.

#### Preliminary Comments

As one of the leading organizations representing the intellectual property (IP) community, AIPLA is concerned with safeguarding intellectual property in the context of the internet. Strong internet intellectual property protections are crucial for IP owners and, importantly, provide vital security for consumers and enhance the U.S. economy. There is, unfortunately, rampant trademark and copyright infringement taking place on the internet in the form of trademark cybersquatting, sale of counterfeit merchandise, unauthorized music and video downloads, etc. Criminal activity, including phishing (identity theft) and child pornography, continues and is growing. The ability to quickly identify and contact the operators of websites involved in these activities is critical to effective IP and law enforcement efforts.

AIPLA is a member of and actively participates in the Intellectual Property Constituency (IPC) of ICANN’s Generic Names Supporting Organization (GNSO). We have observed that, while ICANN has made progress toward the goals established by the JPA, there are several disturbing trends, and certain forms of abuse, including those noted above, which are on the rise.

We note that, in its submission to NTIA and in other fora, ICANN claims to have met, or virtually met, all ten of the JPA goals, and has stated that the time has come for ICANN to be freed from the “confines” of the JPA. Respectfully, we believe that continued U.S. government involvement is critical to insuring the stability, integrity, and security of the internet; the enforcement of registrar contracts to ensure that abusers of the domain name system and other infringers are disciplined; and the continuation and enhancement of meaningful and effective private sector input into the management of the domain name system. We oppose any attempt to dilute private sector input by moving ICANN outside U.S. court jurisdiction and/or transitioning to a United Nations-like oversight and management regime.

## ICANN's Performance

Our comments are primarily related to questions 2, 3, 5, 6, and 10 of the JPA, as set forth in NTIA's request for comments.

Questions 2, 3 and 6 ask for views on ICANN's progress in achieving its undertakings to improve the methods, procedures, openness, accessibility and accountability under which it considers and adopts policies, including fostering enhanced input and participation by stakeholders through existing advisory committees, supporting organizations, and other methods. AIPLA agrees with ICANN that it has made progress in these areas, but feels strongly that more can and should be done. Too often, stakeholders, after lengthy studies and reviews, are faced with unreasonably short time periods in which to comment on proposed new policies and procedures emanating from various entities in, or associated with, ICANN. At times, the sheer number and complexity of such proposals can overwhelm the ability of private and public sectors, including the IP community, to respond in an effective and timely manner.

By way of example, the recent proposal by the Board Governance Committee Working Group on GNSO Restructuring contains a number of proposals which, if implemented, would have the effect of reducing the ability of IP stakeholders to influence critical policy decisions through the IPC and the Generic Names Supporting Organization (GNSO). In a similar vein, the controversial and since defeated “OPOC” (Operational Point of Contact) WHOIS proposal was the product of a prolonged incubation period. One must wonder, however, whether a more rational process might have uncovered the lack of consensus support for this proposal at an earlier stage. This would have reduced the enormous time and effort that went into crafting and responding to OPOC during its various stages of development.

Too often, working groups and other lower-level policy committees seem to be vulnerable to hijacking by segmented interest groups that do not adequately consider whether a consensus for a particular proposal can realistically be developed. ICANN and the Department of Commerce should engage in an assessment of ICANN's policy development mechanisms with a goal toward assuring that adequate and timely notice is provided to comment on proposals, and that proposals be more thoroughly vetted at earlier stages to avoid spending time on those which may not have consensus support among the ICANN community and stakeholders. Indeed, in the case of OPOC, it is likely that the proposal, if implemented, could have contravened ICANN's obligations under the JPA as well as created enormous enforcement problems for IP owners and law enforcement officials.

Questions 5 and 10 are of intense interest to the IP community. Without a doubt, one of ICANN's greatest achievements has been the adoption and implementation of the Uniform Domain Name Dispute Resolution Policy (UDRP). There is no question that, collectively, the UDRP has saved IP owners and domain name registrants millions of dollars in legal fees and has

established a fair and effective process, which balances the rights of IP owners and the rights of businesses and persons who wish to register domain names. The UDRP facilitates the enforcement of rights against potential abusers while, at the same time, safeguarding legitimate and fair uses of noninfringing domain names. AIPLA also applauds ICANN's successful efforts in encouraging the adoption of UDRP-like procedures for ccTLDs.

At the same time, IP stakeholders are very concerned about the all but certain proliferation of hundreds of new gTLDs, and the implications of this for trademark owners. ICANN must insist that all new TLDs, including internationalized domain names (IDNs), adhere to existing WHOIS policy and requirements. Especially important is the obligation that ICANN undertook in the JPA to provide continued unrestricted public access to accurate and complete WHOIS information, including registrant, technical billing, and administrative contact information as outlined in question 5.

Question 10, noting that ICANN agreed in the JPA to undertake a review of, and make necessary changes in, corporate administrative structure to ensure stability, including devoting adequate resources to contract enforcement, asks what progress ICANN has made in this regard. AIPLA believes that the establishment by ICANN of an Office of Contract Compliance is clearly progress toward this undertaking. However, we are concerned that this office currently lacks adequate staffing and tools to effectively enforce contracts between ICANN and registrars, and between registrars and domain name registrants. Our members consistently report serious problems relating to the accuracy and currency of WHOIS information. There are numerous examples of domain names being granted to individuals and entities that provide blatantly and obviously false information. This must not be allowed to continue. With respect to proxy services, some fail miserably in their obligations to respond to complaints of abuse and to reveal the contact information of the beneficial owner of a domain name. This continues because of inadequate contract enforcement by ICANN.

Regarding the obligation ICANN undertook to adopt industry best practices with regard to corporate responsibility and governance, also mentioned in question 10, more can be done in this area. ICANN board members have a variety of outside interests and loyalties, some of which may conflict with their neutrality on certain policy discussions. ICANN should adopt a clear policy to ensure that any board member with a conflict be excused from and not participate in board debates on topics where such a conflict exists.

In its January 9, 2008 submission to NTIA in connection with this mid-term review process, at p. 1, ICANN contends that it is meeting its responsibilities under the JPA and that "the JPA is no longer necessary." ICANN further states that the U.S. government can continue to have a role in internet domain name governance through participation in the Governmental Advisory Committee (GAC).

Respectfully, we do feel that ICANN has made sufficient progress in a number of areas to contend that the JPA is no longer necessary. It has been no easy task to effectively manage the explosive growth of the domain name system over the last several years. AIPLA acknowledges that ICANN has, by and large, successfully performed this function, which is crucial to the future economic growth of many industries and global economies, as well as in providing an effective forum for personal expression, entertainment, and commerce. However, ICANN must do more to contain and prevent abuses, such as trademark and copyright infringement, criminal conduct, phishing, domain tasting, and other fraud. Even in the area of domain name security and stability (the ICANN undertaking addressed in Question 1), we question whether ICANN has implemented

adequate and effective safety measures to prevent, for example, a terrorist-induced attack on the internet's infrastructure.

In sum, we disagree with ICANN that it has met its responsibilities under the JPA so as to warrant its termination. ICANN's claim that U.S. government participation via the GAC is an effective substitute for the current arrangement is disingenuous. The GAC is, as its name implies, just an advisory committee whose advice need not be heeded by ICANN. The critical importance of the domain name system, and the historic role of the United States in creating and fostering that system, dictates that the interests of the U.S. government (and by extension its citizens) be protected to a greater extent.

The only justification provided by ICANN in its submission (at p. 7) for termination of the JPA seems to be that the JPA "contributes to a misperception that the DNS is managed and overseen on a daily basis by the U.S. government." Too much is at stake to warrant termination of the JPA simply to avoid a "misperception" by some. While the current level of U.S. government involvement may, at the end of the three-year JPA term, take on another form, terminating the JPA at this time would clearly be premature.

AIPLA urges that the Department of Commerce and ICANN work together at a senior level and utilize the second half of the JPA to begin planning now for October, 2009. There should be a greater focus on ICANN achieving results, rather than simply addressing topics. Clear benchmarks, rather than mere "progress," toward the ten obligations undertaken by ICANN in the JPA that are addressed in the ten questions listed in the Federal Register notice, should be set. ICANN should demonstrate how it has achieved those benchmarks at the end of the full contract term. There should be a continuing role for the U.S. government in the post-JPA world and, additionally, the role of the private sector should be preserved and strengthened.

Finally, ICANN has mentioned its desire to consider a change of its corporate status, which it perceives could contribute to a more "internationalized" image. As lawyers, we urge the Department of Commerce to recognize that the United States has one of the most highly developed legal systems and body of laws in the world, including especially intellectual property protections. ICANN's registry and registrar contracts are governed by U.S. law and, we believe, it is essential that this continue through 2009 and beyond.

We appreciate this opportunity to provide comments on the progress achieved on the Responsibilities undertaken by ICANN in the JPA, and stand ready to assist the Department of Commerce and ICANN as we move forward through the second phase of the JPA.

Respectfully submitted,



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Executive Director  
AIPLA