



AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION
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July 31, 2008

Mr. Peter Dengate-Thrush
Chairman of the Board of Directors
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Ray, CA 90292-6601

Dear Chairman Dengate-Thrush:

The American Intellectual Property Law Association (AIPLA) offers the following preliminary comments on the *Transition Action Plan, Improving Institutional Confidence in ICANN* and *FAQ* released by the President's Strategy Committee of the Internet Corporation for Assigned Names and Numbers (ICANN) on 16 June, 2008.

Introduction

AIPLA is a national bar association whose more than 16,000 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.

Due to the preliminary nature of the published documents, AIPLA will not, at this time, submit detailed comprehensive comments to the three above-identified documents released by the President's Strategy Committee (PSC). We understand, in fact, that these documents will be revised and that an additional comment period will be provided in the fall. We are gratified that ICANN also intends to solicit input in other fora and in public meetings. We encourage ICANN to extend comment periods beyond what is currently proposed and to more actively solicit input from the user community, including especially businesses and IP owners. Given that these documents contain proposals that deal with core issues of the operation, governance and security of the internet, and the fact that we are in the summer months, when many affected individuals are on vacation, we believe the current time frames are too compressed. Further, no one will be prejudiced by their expansion. There is no reason not to provide a more extended, multi-tiered comment period, with provisions for responses to comments and replies to responses.

AIPLA submitted detailed comments in connection with the Joint Project Agreement (JPA) mid-term review process, and they are attached for the convenience of the reader. In our preliminary statement, we noted the following:

...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.

The PSC documents reflect an understanding that much work is needed in order to meet the ten JPA goals, and the documents are a laudable step in the right direction. Yet, the PSC does not seem to recognize one fundamental necessary implication of the critical comments made by so many in the user community during the mid-term review process: ICANN was, and remains, rather far away from meeting a number of the key JPA goals. It is not just a matter of fine tuning over a few months – taking steps in the right direction and checking off boxes. In our opinion, ICANN will *not* be able to implement *and see the results of* measures sufficient to satisfy its fundamental responsibilities by the time the JPA ends.

Further, we are concerned that the PSC seeks to redefine ICANN's responsibilities under the JPA into five "areas" which may not completely cover the ten JPA goals. Also, as recognized in the July 30, 2008 submission by the US Department of Commerce, the PSC documents do not adequately address ICANN's need to work harder toward ensuring continued private sector leadership, increased contract compliance, and enhanced competition, three key areas that were addressed in the JPA mid-term review.

Accordingly, AIPLA takes issue with a primary underlying assumption in the PSC documents, namely, that, after the expiration of the current JPA, there will be no further JPA or MOU between ICANN and the US Government. We disagree with ICANN's position that the JPA relationship with the US Government is "confining" or somehow incompatible with ICANN's mission. Indeed, all five of the key areas/requirements identified in the PSC documents are completely compatible with, and will be enhanced by, a renewed agreement between ICANN and the US Government.

Preliminary Comments on the Five Key Areas Identified by the PSC

1. Safeguarding ICANN Against Capture

We agree with the PSC that ICANN's current committee structure and processes provide strong counters to capture. We are therefore concerned by ongoing discussions and deliberations which could result in a reduction in the influence of non-contracting parties and members of the user community under the guise of "GNSO reform." We urge the PSC to bear in mind the need to maintain and enhance robust and representational Advisory Committees and Supporting Organizations.

We have the following comments on the PSC's proposed bylaws amendments: We believe it is often important for the same individual or organization to participate in more than one Advisory Committee or Supporting Organization. We have not yet reached a final position on the proposal to deny a vote to such overlapping persons or groups in more than one forum and need additional time to do so. We do strongly support the proposal to require statements of interest from individuals, and public disclosure of the same. Additionally, someone with a clear conflict of interest should not be allowed to remain present during a discussion impacting on that interest.

2. Strengthening Accountability to the Multi-Stakeholder Community

We agree that a high threshold should be required to force the Board to reverse a decision it has made, or to remove any Board member, and urge care in the adoption of any measure that could undermine the structure and power of a duly elected Board. However, mere *reexamination* of a decision is not so serious that it should require near-insurmountable barriers.

3. Internationalizing ICANN

ICANN's current operation *is* international, and bylaws amendments are not required to achieve this. We are gratified by the firm statement by the PSC that ICANN's status as a California-based not-for-profit corporation will not change. Further, we support the establishment of satellite

ICANN offices in other countries where there is a demonstrated advantage or need for this, subject to budgetary constraints. We believe there could be a number of benefits from such offices. We do not, however, understand the proposal for “global *legal* presences,” and we would oppose the establishment of additional legal entities in other countries.

4. Insuring Financial and Operational Security

We agree with the proposal to establish alternative sources of funding, subject to the details of any specific proposal.

5. Maintaining Secure and Stable Operations

We are not sure there is a need for any bylaws amendments in this area, as ICANN’s mission certainly already includes this goal and the existing bylaws appear to allow sufficient tools to meet this goal. With regard to the IANA function and the management of the authoritative root zone file, we defer to the position of the US Department of Commerce and note that it has interpreted ICANN’s authority and responsibility in this area differently than has the PSC.

Consultation Topics and Timeline for Consultation

The *Transition Action Plan* document concludes with three “key questions,” to which AIPLA responds as follows:

A. The five key elements identified above and in the PSC documents are appropriate areas for discussion. However, it is equally important to focus on the ten goals of the JPA.

B. Some of the initiatives proposed in the PSC documents will be very helpful in meeting the objectives set forth by the PSC as well as the ten JPA goals. However, the true test will come in evaluating ICANN’s success in implementing these initiatives and others that are similarly goal-focused.

C. The proposed timeline, as noted above, is much too compressed and should be expanded, with provisions for more give and take with the user community and its representatives.

Conclusion

There are a number of good ideas in the PSC documents. More time is needed to evaluate the proposals. In the meantime, ICANN has been well-informed, via the JPA mid-term review process, of the JPA goals which are currently unmet, and many measures can and should be taken immediately, without the necessity of bylaws amendments or other structural changes, to work concretely toward those goals. Certainly, self-analysis and future planning needs to take place, but continued action and investment in measures which can yield concrete results is crucial if ICANN is to continue to move toward fulfillment of its mission.

Respectfully submitted,



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February 13, 2008

Suzanne R. Sene
Office of International Affairs
National Telecommunications and
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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 not 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,



Michael K. Kirk
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