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Via Electronic Mail
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July 5, 2006

Ms. Fiona Alexander
Office of International Affairs
National Telecommunications and Information Administration
1401 Constitution Avenue, N.W.
Room 4701
Washington, DC 20230

Dear Ms. Alexander:

The International Trademark Association (INTA) is pleased to respond to the May 25, 2006, request for comment on the "continuation of the transition of the technical coordination and management of the Internet domain name and addressing system (Internet DNS) to the private sector."[1] INTA (http://www.inta.org) is a not-for-profit membership association of more than 4,900 trademark owners and professionals, from more than 190 countries, dedicated to the support and advancement of trademarks and related intellectual property as elements of fair and effective national and international commerce. For more than 10 years, INTA has been the leading voice for trademark owners on the future of the Internet DNS, and we are a founding member of the Intellectual Property Constituency (IPC) of the Internet Corporation for Assigned Names and Numbers (ICANN).

Question 1: The DNS White Paper articulated principles (*i.e.*, stability; competition; private, bottom-up coordination; and representation) necessary for guiding the transition to private sector management of the Internet DNS.[2] Are these principles still relevant? Should additional principles be considered in light of: The advance in Internet technology; the expanded global reach of the Internet; the experience gained over the eight years since the Department of Commerce issued the DNS White Paper, and the international dialogue, including the discussions related to Internet governance at the United Nations World Summit on the Information Society (WSIS)?

Response: The principles articulated in the DNS White Paper (including stability; competition; private, bottom-up coordination; and representation) are still relevant principles that should guide the transition of Internet DNS to the private sector.

[1] 71 Fed. Reg. 30,388 (May 26, 2006).
[2] Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (June 10, 1998).

However, we strongly recommend that in future policy statements and agreements with ICANN, the U.S. Government (USG) reassert that stability refers to more than mere technical assurance. Indeed, the White Paper's frequent reference to matters other than Internet protocols and root servers, including the protection of trademarks in the Internet DNS,[3] strongly suggests that stability is not limited to technical efficiency, but includes the user's ability to reach his/her intended destination in cyberspace. "From a purely technical perspective it may be the root servers and protocols that make the Internet work, but it is brand awareness -- the familiarity of a 'name' by the average 'Netcitizen' -- that has made the Internet a part of so many lives and the indispensable tool that it is today."[4] Because of the undeniably important role that the Internet plays today in culture, commerce, and everyday communication, the decisions that ICANN makes cannot be looked at in an engineering vacuum.

During its early years, ICANN adhered to this principle that stability is not just about technology, but about stability in the broader sense. The best evidence of this from a trademark owner's perspective is the Uniform Dispute Resolution Policy (UDRP), which is often referred to by ICANN as one of its great successes,[5] as well as other resources, such as the Registrar Accreditation Agreement (RAA),[6] the contract outlining the responsibilities of ICANN accredited registrars, including, for example, adherence to the UDRP and public accessibility to registrant contact data (*i.e.*, Whois).

Recently, however, ICANN appears to have stepped back from this well-understood interpretation of what the White Paper meant by "stability." Today, ICANN often stresses its self-perceived narrow technical mission, preferring to inform the public that it is responsible only for "coordinating the management of the **technical** elements of the DNS."[7] But making the decision to add a new global top level domain (gTLD) to the root, accrediting a new registrar, and determining protocols for internationalized domain names (IDNs), all of which and more fall under the purview of ICANN, go beyond engineering principles. These decisions have consequences that affect every Internet user, from the online shopper to the academic to the computer professional to the corporate entity to the young person who "surfs" the Net to learn more about his or her favorite television show.

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[3] *Supra* note 1 at p. 31,746-7.

[4] Testimony of Anne Chasser, President of the International Trademark Association, Before the U.S. House of Representatives Subcommittee on Courts & Intellectual Property, at http://www.inta.org/index.php?option=com_content&task=view&id=620&Itemid=152&getcontent=3, July 28, 1999.

[5] *See*, *e.g.*, Testimony of M. Stuart Lynn Before U.S. Senate Committee on Commerce, Science, and Transportation, Subcommittee on Science, Technology, and Space, June 12, 2002, at http://www.icann.org/correspondence/lynn-testimony-12jun02.htm ("The UDRP … stands as a truly major accomplishment for which ICANN deserves great credit."); and Testimony of Vint Cerf Before U.S. House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, February 8, 2001, at http://www.icann.org/correspondence/cerf-testimony-08feb01.htm ("The UDRP is, I would submit, another very positive accomplishment of ICANN during its short existence to date.").

[6] http://www.icann.org/registrars/ra-agreement-17may01.htm.

[7] ICANN website, at http://www.icann.org/general. (emphasis added)

Moving forward, it must be articulated that ICANN's responsibility is two-fold: (1) "coordinating technical elements of the DNS"[8] and (2) anticipating and accounting for the implications to Internet users of the implementation of these technical decisions. ICANN must, for example, demand more accountability from registrars by enforcing the provisions of ICANN-registrar contracts. Certain provisions in these contracts have long been neglected, including some that directly affect the ability of trademark holders to enforce their rights, such as ensuring compliance with Whois standards by registrants. ICANN should prioritize the enforcement of its contract terms as a way to stabilize the operation of the Internet and provide uniformity across the registrar community.

In addition to reasserting what is meant by the principle of stability, we invite the USG to consider working with ICANN to clarify what is meant by the principle of representation. For example, does representation mean equal representation? We believe that it should. Today, real balance of representation within ICANN has been undermined by the weighted voting rights accorded to registrars and registries by ICANN in the council of the Generic Names Supporting Organization (GNSO), a policy development body that provides input directly to the ICANN Board of Directors. Pursuant to the ICANN bylaws, registrars and registries are afforded more votes on the GNSO Council, because "they are under contract with ICANN obligating them to implement ICANN-adopted policies."[9] This conclusion, however, disenfranchises users of the DNS who wish to participate and have a voice that will be heard and respected in the ICANN process. The dismantling of the weighted voting structure within the GNSO will ensure that the voices of all stakeholders, and specifically those whose domain name registration fees go to support ICANN, including trademark holders and business users, are guaranteed a fair process that provides for equality in representation in the adoption of ICANN policies, guidelines, and rules.

Question 2: The DNS White Paper articulated a number of actions that should be taken in order for the U.S. Government to transition its Internet DNS technical coordination and management responsibilities to the private sector. These actions appear in the MOU as a series of core tasks and milestones. Has ICANN achieved sufficient progress in its tasks, as agreed in the MOU, for the transition to take place by September 30, 2006?

Response: No. While INTA recognizes that ICANN has made progress in developing its DNS technical coordination and management responsibilities, measured against the actions identified in the DNS White Paper and ICANN's core tasks set forth in section V(C) of the Memorandum of Understanding (MOU),[10] ICANN has not achieved sufficient progress in its tasks for the transition to take place by September 30, 2006. For purposes of this response, we highlight three critical issues:

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[8] *Id.*

[9] ICANN Bylaws, Article X, Section 5(2), at http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#X-5.2.

[10] Memorandum of Understanding Between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers, Amendment 6, available at http://www.ntia.doc.gov/ntiahome/domainname/agreements/amendment6_09162003.htm.

(1) ICANN was to "[d]efine and implement a predictable strategy for selecting new TLDs using straightforward, transparent, and objective procedures that preserve the stability of the Internet."[11] Yet the introduction of each new gTLD registry tends to be fraught with uncertainty and characterized by unpredictable new criteria. And, while ICANN appears to be focused on adding new sponsored gTLDs to the root, which we believe is a preferred course over the addition of unsponsored suffixes, it must clarify what is meant by the term "sponsored gTLD." In our opinion, a sponsored gTLD "must represent communities that can be defined in absolute terms, and must be specifically tailored to a discrete and identifiable group of Internet users, *e.g.*, .travel for the travel industry. In addition, any sponsored gTLD must have mechanisms for ensuring that all registrants comply with the particular eligibility requirements at issue, and for addressing violations thereof."[12] In contrast, a number of the recent additions to the root, *e.g.*, .mobi, for owners of mobile devices, are designed to appeal to potentially infinite numbers of end users and have broad and ill-defined charter definitions outlined in the proposal.[13]

(2) The MOU also states broadly that ICANN will "implement measures to secure improved accuracy of WHOIS data."[14] Yet the accuracy of Whois has not improved. Few Internet users are aware that there is a Whois Data Problem Report System procedure for reporting inaccurate data, let alone what the procedure is.[15] (The system is not even located on the ICANN site.) Even if reported, enforcement and follow-up appear to be lacking. According to United States Government Accountability Office, 73% of the 45 error reports that it submitted to ICANN as part of its study remained unresolved after 30 days.[16] INTA recognizes and is grateful for ICANN's efforts in this area, including the Whois Data Reminder Policy, but we note that our members continue to advise us of false or missing Whois data that is not being corrected by registration authorities.

Whois not only facilitates the investigation of legal violations on the Internet, but serves a basic function in making the rule of law apply to the Internet by providing information necessary to serve notice and institute legal action against violators. The USG has consistently recognized this by stressing the importance of accurate Whois information in the MOU and setting milestones for ICANN to follow. Despite this emphasis, in early 2006, the GNSO Council voted to recommend limiting access to Whois data to the name and details of the technical contact and eliminating access to ownership contact data. This definition tacitly excludes the critical ability to contact registrants to resolve legal issues. In short, rather than provide satisfactory progress on the accuracy of Whois data,

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[11] *Id.* V(C)(8).
[12] Comments of the Intellectual Property Constituency Responding to the ICANN PDP on "Terms of Reference for New gTLDs," at http://forum.icann.org/lists/new-gtlds-pdp-comments/msg00029.html, January 31, 2006.
[13] There are "four mobile phones purchased for every one personal computer," .mobi website, at http://pc.mtld.mobi/mobilenet/index.html.
[14] *Supra* note 10 at V(C)(10).
[15] *See* Whois Data Problem Report System, http://www.internic.net.
[16] United States Government Accountability Office, Internet Management: Prevalence of False Contact Information for Registered Domain Names (Nov. 2005), available at http://www.gao.gov/new.items/d06165.pdf.

ICANN seems to be on the verge of determining that much of this crucial data will no longer be available.

(3) The MOU provides that ICANN will "[c]ontinue its efforts to achieve stable agreements with ccTLD operators," including allocating global and local policy responsibility and maintaining relationships with and among ccTLD operators. ICANN has made some progress in this area, for example, announcing the formalization of its relationships with the .de registry operator on May 31, 2006, and the .lv, .cx and .nf registry opertors on June 19, 2006. We applaud ICANN's success in reaching agreement with the operator of the largest ccTLD. In addition, in 2002, ICANN established the Country Code Name Supporting Organization (ccNSO) to try to obtain cooperation among ccTLD operators and ICANN. However, as of today, ICANN still does not have formal agreements with most of the ccTLD operators. Each ccTLD (now over 200) has its own policies for registration, operation and, in some cases, conflicting trademarks and dispute resolution. The growth of registrations in ccTLDs was over 35% in 2005 and is expected to remain strong over the years ahead.[17] These facts highlight particular need for agreements to be signed between operators of ccTLDs and ICANN so that the operators feel that they are getting value for the money associated with signing an agreement. We also note that formalized agreements between ICANN and ccTLD operators are likely to increase a much-needed revenue stream for ICANN.

Question 3: Are these core tasks and milestones still relevant to facilitate this transition and meet the goals outlined in the DNS White Paper and the U.S. Principles on the Internet's Domain Name and Addressing System? Should new or revised tasks/methods be considered in order for the transition to occur? And on what time frame and by what method should a transition occur?

Response: Yes, the core tasks and milestones in the MOU are still relevant to the transition to private sector administration of the DNS. In addition to these tasks, we recommend that future MOUs place renewed emphasis on areas such as monitoring of registrars and registries and contract enforcement. ICANN cannot be an effective mechanism for Internet governance unless it monitors and enforces the contracts on which its business is based. Of principal concern to trademark owners is registrar and registry compliance with policies regarding Whois access and accuracy and the UDRP. A more recent development is the alleged registration of hundreds of domain names by certain registrars that correspond to common misspellings of trademarks. These domain names are then reportedly parked on websites and used to attract Internet users to paid advertising. It has also been suggested that there have been offers by registrars to sell these domain names to the very trademark owners whose names are likely to be confused with the misspellings with which these names are associated.[18] ICANN must expressly prohibit such practices by registrars and conduct routine monitoring and enforcement.

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[17] Working Party on Telecomm. and Info. Serv. Policies, Org. for Econ. Co-operation & Dev., Evolution in the Management of Country-Code Top-Level Domain Names (ccTLDs), (DSTI/ICCP/TISP(2006)6), page 3, May 29-30, 2006.

[18] *See, e.g.*, Dotster named in massive cybersquatting suit, CNET News, at http://news.com.com/Dotster+named+in+massive+cybersquatting+suit/2100-1032_3-6079567.html, June 2, 2006.

As part of a renewed contract enforcement plan, we recommend that ICANN develop a graduated system of sanctions for noncompliance by registrars and registries. At present, for example, canceling a registrar's accreditation is the only sanction that ICANN can use when a registrar violates a provision of the RAA. But, cancellation can be a draconian measure, particularly where a first or relatively minor violation is involved. As a result, ICANN has been reluctant to use the only tool in its enforcement arsenal. A range of possible sanctions should be available to ICANN, and the GNSO should be tasked with developing and ICANN with implementing, in its RAA, an enforceable penalty system. For example, one workable system might be to allow ICANN to levy fines for violation of provisions of the agreement, which could escalate for subsequent violations. In the cases of repeated disregard of contractual obligations, the system should culminate, after a certain, definite number of violations, in well-deserved termination of the accreditation. Not only would such a mechanism incentivize registrars to comply, it would also provide a revenue incentive for ICANN to enforce its rules, rather than the disincentive ICANN now faces to discipline its paying registrars.

From the perspective of trademark owners, the timeframe for transition will depend on ICANN's ability to address the points raised in this comment and others in our response. If they are included as necessary elements in an extension of the MOU and then completed by ICANN, the time will be ripe for a transition. ICANN has an important role to play in private-sector governance of the Internet. However, to be ready to complete the transition, ICANN must be ready to govern. Two critical components of that governance— representation that enfranchises Internet users and not merely the registrars and registrars ICANN governs and enforcement of its rules and policies—must be addressed before the transition can be completed.

Question 4: The *DNS White Paper* listed several key stakeholder groups whose meaningful participation is necessary for effective technical coordination and management of the Internet DNS. Are all of these groups involved effectively in the ICANN process? If not, how could their involvement be improved? Are there key stakeholder groups not listed in the *DNS White Paper*, such as those with expertise in the area of Internet security or infrastructure technologies, that could provide valuable input into the technical coordination and management of the Internet DNS? If so, how could their involvement be facilitated?

Response: INTA is pleased to participate in the ICANN process through the IPC. The IPC was recognized as an ICANN constituency shortly after ICANN's founding in 1998, in part as a result the White Paper's numerous references to the protection of intellectual property and the pressing concerns expressed by intellectual property owners over the meteoric growth of trademark violations taking place in the Internet DNS (*e.g.*, cybersquatting). Immediately upon its recognition, the IPC worked with other constituencies and ICANN staff to develop the UDRP. The IPC also conducted extensive reviews of the new gTLD applications and met with and provided consultation to the applicants themselves. In the proceeding years, the IPC contributed extensively as a

member of ICANN working groups, including those dealing with the GNSO policy development process and most recently the Whois Task Force.

INTA looks forward to continuing to participate in ICANN through the IPC and believes the IPC to be a vital conduit between the intellectual property community and the rest of the ICANN community. Through the IPC, we look forward to working with ICANN on the issues identified in the MOU that remain outstanding, including the establishment of criteria for selecting new gTLDs, contract enforcement, and the accessibility and accuracy of the Whois database.

In the context of Whois, we would add that the Whois database is used frequently to identify online counterfeiters**.** The interests of law enforcement and consumer protection groups from around the world intersect with anticounterfeiting efforts and similar initiaitves, and they should also be represented in the ICANN process.

As proposed in the request for comment, we agree that groups with expertise in the area of Internet security or infrastructure technologies should also be involved in the process.

Question 5: The DNS White Paper listed principles and mechanisms for technical coordination and management of the Internet DNS to encourage meaningful participation and representation of key stakeholders. ICANN, in conjunction with many of these key stakeholders, has created various supporting organizations and committees to facilitate stakeholder participation in ICANN processes. Is participation in these organizations meeting the needs of key stakeholders and the Internet community? Are there ways to improve or expand participation in these organizations and committees?

Response: The DNS White Paper indicates that the operations of ICANN's processes should be fair and protect against capture by a narrow group of stakeholders. The weighted voting accorded to the Registrar and Registry Constituencies within the GNSO is directly contrary to this mandate, as well as the bottom-up policy development process dictated by ICANN.[19] As a result, policy developed by the GNSO has on occasion failed to accurately reflect the views of the entire Internet community. In addition, ICANN's core value of achieving broad representation of the global Internet community[20] cannot be met without the full and active participation of the ccTLD community. ICANN's inability to bring ccTLDs fully into the ICANN fold has resulted in renegade ccTLD operators whose registries have become a haven for cybersquatters.

Participation can be improved first and foremost by creating a structure that is truly bottom-up where all relevant stakeholders are at the table, and all stakeholders have an equal voice. Weighted voting removes the incentive for stakeholders to spend their time, talents and energy participating in the ICANN process, knowing the Registrar and Registry Constituencies have the power to veto anything they don't like and to push through policies that benefit their interests to the detriment to others. This imbalance of power has unmistakably increased the influence of registrars and registries to the

[19] ICANN Bylaws, *supra* note 9.
[20] *Id.*, Article I, Section 2.

detriment of all other stakeholders and has shifted debate away from issues that are critical for users of the Internet DNS.

ICANN also needs to continue to reach out to the ccTLD community to try to bring them within the ICANN structure. The ccNSO Accountability Framework Working Group and the recent relationship formalized between ICANN and ccTLD operators such as .de are positive steps in the right direction. In addition, the GNSO must reach out to experts outside the ICANN structure when tackling complex policy development issues in which the GNSO lacks the necessary expertise.

Finally, we encourage greater funding and ICANN staff support for activities of the GNSO and its working groups. This will greatly enhance the ability of the GNSO to address issues, such as the need for mechanisms to ensure contract compliance by registries and registrars.

Question 6: What methods and/or processes should be considered to encourage greater efficiency and responsiveness of government and ccTLD managers in processing root management requests to address public policy and sovereignty concerns? Please keep in mind the need to preserve the security and stability of the Internet DNS and the goal of decision-making at the local level. Are there new technology tools available that could improve this process, such as automation of request processing?

Response: Irrespective of the technological method or process adopted to increase the efficiency of root management requests, the Internet DNS must continue to require gTLD and ccTLD managers to commit to transparency, accountability, accessibility and legality in their decision-making.

A transparent DNS is key to addressing public policy and sovereignty concerns. Without transparency, there cannot be accountability, and without accountability, it is impossible to ensure equal access to the Internet DNS or legality in the decisions made. The transparency of the DNS requires the transparent management by gTLD and ccTLD managers, the transparent operation by registries and registrars, and the transparent identification of registrants, particularly those carrying on activities that are harmful to the public.

Accountability could be advanced in the following ways: (1) mandatory adoption and compliance with DNS protocols and policies by all TLD and ccTLD managers, (2) mandatory availability of dispute resolution mechanisms that are unique to the Internet covering all TLDs and ccTLDS (namely the UDRP or a similar model dispute policy for ccTLDs that recognizes variations under the particular country's laws), and (3) mandatory availability of recourse through national legal systems for legal disputes arising in connection with any gTLD or ccTLD (subject only to the national forum's willingness to assume jurisdiction).

The Internet DNS has been, and should continue to be, administered with a respect for both international and national legal systems. Intellectual property is protected nationally,

jurisdiction by jurisdiction. Accordingly, respect for national sovereignty requires respect for property ownership within each national jurisdiction, which clearly includes ownership of trademarks and rights in domain names.

Question 7: Many public and private organizations have various roles and responsibilities related to the Internet DNS, and more broadly, to Internet governance. How can information exchange, collaboration and enhanced cooperation among these organizations be achieved as called for by WSIS?

Response: INTA supports the idea of greater outreach to facilitate information exchange and consulting roles for organizations who may lend expertise to overall administration and management of the Internet. As an organization with members in more than 190 countries and in light of the ever-growing prominence around the globe of the Internet in branding practices, we are especially supportive of international cooperation.

As a first step, we recommend that the roles and responsibilities of Internet governance be identified. Having identified and agreed upon these areas, the next step is to identify a single forum that can bring those who work in these areas together on a regular basis to inform, share ideas, and consult; but, we stress, not to make any decisions or issue declarations. That would lead to a debate about who "controls" the Internet. This forum should act solely as a venue, a time and place to exchange resources and expertise, discuss, and identify areas of interdependence.

INTA invites the USG to look to a forum already established within the private sector, *e.g.*, a trade show or annual meeting of some sort, to possibly serve as the focal point for the cooperation. We believe that governments from around the world should be an integral part of the discussions in the forum and have much to contribute, particularly in the areas of law enforcement and consumer protection. We are especially grateful for the USG's leadership on matters relating to ICANN and look forward to continuing to work with officials at the Department of Commerce to ensure ICANN accomplishes the tasks that we have identified in our comments prior to any transition taking place.

Thank you for the opportunity to submit comments on the transition of the Internet DNS to private sector management. We also look forward to presenting testimony at the public meeting on July 26. In the interim if the USG has any questions concerning INTA's response, please contact Michael Heltzer at mheltzer@inta.org.

Sincerely,

Paul W. Reidl
President