June 24, 2009

The Honorable John Conyers
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC  20515

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC  20525

Dear Chairman Conyers and Ranking Member Smith:

As you are aware, the U.S. Government recently requested input on its role in the management of the Internet as the existing Memorandum of Understanding with the Internet Corporation for Assigned Names and Numbers (ICANN) expires at the end of September. We responded in a written submission to the National Telecommunications and Information Administration (NTIA) and now take this opportunity to inform the Committee of our concerns, most of which have implications for the preservation of intellectual property rights. Following are the International Trademark Association’s (INTA) views on behalf of its 5500 members.

INTA has supported the goal of an eventual transition to private-sector management of the Internet domain name system (DNS) and understands the current concerns with having ICANN tethered to a single national government. However, the overriding issue is ensuring the continued stability and security of the Internet for the benefit of the public—businesses, consumers, and other individuals who rely on the Internet.

We believe that ICANN cannot be held fully accountable to the public without governmental oversight. More importantly for present purposes, we also believe there is insufficient time to develop a new and viable oversight model to replace the Joint Project Agreement (JPA) prior to its pending expiration in September 2009. Accordingly, and in view of the NTIA’s more than ten-year history of successful partnership with ICANN, it is our judgment that the NTIA must maintain its present oversight through the JPA until new accountability mechanisms for ICANN can be designed, and NTIA’s responsibilities are effectively and seamlessly transferred.

The extension of the JPA is particularly important given the potential for instability posed by such current ICANN initiatives as its planned roll-out of new generic Top-Level Domains (gTLDs) and the potential reconstitution of the Generic Names Supporting Organization (GNSO). For the NTIA to sever its relationship with ICANN now would pose too great a risk to the interest of all stakeholders, including the U.S. government, in ensuring the stable and secure development of Internet commerce and communication.
During an extension of the JPA, the NTIA and ICANN should continue working on the issues that remain unresolved or unaddressed following the most recent mid-term review of the JPA, including:

- **Representation** – Substantial work remains for ICANN to develop an organizational governance structure that provides for the adequate representation of commercial Internet users, including trademark owners, within ICANN's governance. Representation is a critical issue to the question of whether ICANN is competent as a private-sector regulatory body of the DNS. INTA believes that ICANN has moved in the wrong direction in regards to representation issues since the mid-term review of the JPA. ICANN's latest plan to reserve half of the representation on its GNSO Council to the registrars and registries it oversees is as fundamentally flawed as if half of the seats on the Federal Communications Commission or half of the rulemaking leadership of the Food and Drug Administration were reserved for the industries that those agencies regulate.

- **Contract Compliance** – Contract enforcement is central to ICANN's competence as an Internet governance body, and, while some limited progress has been made, ICANN has repeatedly demonstrated inadequate enforcement of even its most fundamental and longest-standing contractual policies. ICANN's lack of commitment and resources with respect to contractual enforcement has directly led to conduct that translates into DNS instability, e.g., lax compliance by registrars with respect to their obligations under the Registration Accreditation Agreement, tolerance of inaccurate Whois information, and a lack of uniformity and cooperation with respect to proxy registrations.

- **TLD Management** -- ICANN's proposed methodology for introducing new gTLDs raises numerous intellectual property, consumer protection and public safety concerns. ICANN's new gTLD program contemplates the introduction of a potentially unlimited number of new gTLDs and presents an array of complicated challenges and obstacles that ICANN has not sufficiently addressed.

- **Accountability** – Neither ICANN's proposals for new accountability mechanisms, nor the fact that it is headquartered in the United States, are sufficient for providing the community with real oversight and accountability over ICANN's decisions. While the Internet Assigned Names Authority (IANA) services contract maintained by ICANN is a critical technical Internet infrastructure management agreement, the contract does not provide the community with sufficient accountability over ICANN's governance, especially in view of the range of technical and policy matters under ICANN's purview, and the limited efficacy that would result from utilizing the IANA function if NTIA became dissatisfied with
ICANN's progress. INTA encourages NTIA and ICANN to work in conjunction in extending the Joint Project Agreement in order to explore whether sustainable accountability mechanisms can be developed that are acceptable to all stakeholders.

As noted at the outset of this letter, INTA does not believe that ICANN has achieved sufficient progress for a transition to take place, and structural deficiencies in the areas of contract compliance, representation, and coordination necessitate the extension of the JPA. Given that the DNS is fundamental to the stable and secure development of Internet commerce and communication, NTIA's role as ICANN's steward should continue. Given the potential for instability posed by such current ICANN initiatives such as its planned roll-out of new gTLDs and the potential reconstitution of the GNSO, the JPA should be extended to allow ample time for the prospect of a new accountability mechanism to be explored further.


INTA is grateful to your attention to our views on this matter. If we can provide further information, please contact Michelle Sara King at our Washington office (202-223-0989).

Sincerely,

Alan C. Drewsen
Executive Director