

September 30, 2005



1634 I Street, NW Suite 1100  
Washington, DC 20006  
202.637.9800  
fax 202.637.0968  
<http://www.cdt.org>

Michael D. Gallagher  
Assistant Secretary of Commerce for Communications and Information  
National Telecommunications and Information Administration  
United States Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

Dear Mr. Gallagher,

On behalf of the Center for Democracy and Technology, we write to express our deep concern about the Commerce Department's decision to seek delay in the approval of a ".xxx" Internet domain. We understand that on August 11, 2005, you sent a letter to Dr. Vinton Cerf, the chairman of the board of directors for the Internet Corporation for Assigned Names and Numbers (ICANN), requesting this delay. Although CDT neither supports nor opposes the creation of a .xxx domain, we believe this action sets a troubling and potentially destabilizing precedent for direct U.S. Government intervention in the day-to-day management of the Internet's global addressing system. Furthermore, because the delay appears to be sought in this instance specifically because of the content of the speech for which the .xxx domain is intended, the demand for a delay in approval treads dangerously close to crossing a well settled First Amendment line -- potentially stifling the creation of a forum intended for a specific type of constitutionally protected speech. For these reasons we urge the Commerce Department to remove itself from the .xxx decision-making process, and take no further action to prevent ICANN from fulfilling its duties as manager of the Domain Name System (DNS).

### **The U.S. Government Must Tread Lightly in Internet Governance**

The U.S. Government has played a unique and sensitive role in the management of the Internet. Although American tax dollars funded the creation of the Internet's worldwide addressing system, government leaders wisely concluded by 1998 that the system had become a global resource and needed to be overseen by a more internationally representative body. Since its inception, ICANN has managed the DNS with the government -- and your office specifically -- serving in an oversight capacity. As you are aware, that relationship has been a source of tension in the international community,

where many leaders -- including some staunch U.S. allies -- complain that the United States exercises undue influence over the Internet.

For those of us in the public interest community who support retaining the ICANN process and reforming it to respond to the legitimate concerns of the international community, one of our strongest arguments in favor of preserving the existing structure has been that the U.S. Government has taken a deliberately hands-off approach to overseeing the internationally representative body. Continued intervention by the U.S. Government on .xxx could render that argument untenable at one of the most precarious moments in the brief history of Internet governance.

For the past two years, U.S. negotiators have been defending the ICANN structure against United Nations member states pushing for greater involvement by world governments in the Internet management process. Earlier this year, the UN-sponsored Working Group on Internet Governance issued a report recommending several new approaches to Internet management that involve the creation of new intergovernmental bureaucracies designed either to replace ICANN outright or oversee the organization. Those proposals are being discussed now in advance of the final meeting of the World Summit on the Information Society in November. CDT has long been a vocal critic of the lack of transparency and openness associated with ICANN's decision-making process and has vigorously supported efforts at reform, but we believe that the alternatives that have been proposed pose far greater risks for the Internet's continued growth.

Already, nations like Brazil that are seeking to wrest authority from ICANN, have seized on the Commerce Department's .xxx comments as a rallying point to garner greater support for their positions. In light of these concerns and developments, we believe that it is strongly in the national interest for your office to permit the ICANN process related to .xxx to go forward.

### **U.S. Involvement in .XXX Raises First Amendment Concerns**

We are also concerned with the Commerce Department's action because it appears, by all accounts, to be entirely based on the anticipated content of the proposed domain. Such a content-based action to block or suppress the creation of a new space for lawful speech would directly violate the First Amendment. Whatever the controversy about the content in xxx -- and representatives from across the political spectrum have expressed concerns -- the content that would be hosted through the domain would be constitutionally protected speech. In the absence of evidence that the proposed .xxx operator lacks the financial and technological wherewithal to operate the domain, or that other established rules or procedures were circumvented, the government should not intervene.

We understand the concerns, voiced by several other civil liberties groups, that creating the domain could open the door to new laws restricting constitutionally protected speech on the Internet. CDT would actively oppose any governmental effort to force adult content providers into the Internet equivalent of a 'red-light' district. But the decision to approve .xxx as a privately run domain does not, in our view, raise a similar concern. By

contrast, the Commerce Department's content-based intervention in .xxx decision process raises immediate constitutional concerns regarding free speech and freedom of association, which we urge that you resolve by dropping any effort to delay approval.

## **Conclusion**

NTIA has been a shining example of how a government agency should operate in the digital age. Your office has been remarkably sensitive to the changing nature of technology and has striven to preserve an environment conducive to innovation. In the Internet governance space, NTIA has dispatched its oversight role while maintaining a respectful distance from the ICANN process. Despite legitimate concerns about .xxx, we urge you to maintain that posture and to allow the ICANN process to continue to function unfettered. As the number of Internet domains increases, the market should weed out those that don't provide a valuable or worthwhile service. While .xxx may or may not help to protect children from Internet pornography, it certainly will not increase their exposure. Blocking the domain, on the other hand, will create ripples throughout the world, and could undermine the United States' unique role in Internet oversight.

Sincerely,

John Morris  
Staff Counsel  
The Center for Democracy & Technology