

IPC Comments on Proposed .BIZ, .INFO and .ORG Registry Agreements

The Intellectual Property Constituency of the GNSO appreciates the opportunity to offer its comments on the three draft agreements posted July 28. See <http://www.icann.org/announcements/announcement-2-28jul06.htm>.

These drafts appear to be aimed at conforming the registry agreements for these three gTLDs to the proposed new registry agreement for .COM. To that extent, IPC has some of the same concerns about these agreements as it expressed about the proposed .COM agreement, most recently in its submission of February 19, 2006, see <http://www.ipconstituency.org/PDFs/IPC%20Position%20Statement%20on%20New%20.com%20Registry%20Agreement%2021906.pdf>.

Specifically with regard to new registry services, IPC believes that all such services should be subject to the procedure for approval of new registry services spelled out in ICANN's Consensus Policy on this subject, see <http://www.icann.org/registries/rsep/rsep.html>. We are not aware of any justification to deviate from this newly adopted policy, and so to the extent, if any, that the approval process set out in Section 3.1.d.iv of the draft agreements differs from the consensus policy, the latter should prevail.

In particular, we are concerned that Section 3.1(f) of the draft agreements would allow the registry operators to "mak[e] commercial use of ... traffic data regarding domain names or non-existent domain names for purposes such as, without limitation promoting the sale of domain names," and that "the process for the introduction of new Registry Services shall not apply to such traffic data" (which we presume is intended to mean that the process is inapplicable to services based on such data). As we have stated in at least two previous submissions, we strongly believe that the same new registry services review procedure should apply to new registry services that involve the use of traffic data. The apparent total exemption of such new services from any review procedure remains unjustified, in our view.

The practice of "domain tasting" has attracted considerable attention and controversy in recent months and was one of the topics explored at a well-attended workshop at the ICANN meeting in Marrakech last June. We note with some concern that section 3.1(f) of the draft agreements would allow registry operators, without any scrutiny or review whatsoever, to provide a commercial service to identify "pre-tasted" domain names – those non-existent names within an particular gTLD that have attracted the most traffic during the preceding weeks or months. Without pre-judging the merits of such a service or its potential impact on cybersquatting, trademark infringement, and other adverse consequences that have already been observed to result from the "domain tasting" phenomenon, IPC is confident that such a service would at the very least merit some review under the new registry services procedure. Under the draft agreements it would apparently receive none. This is a significant flaw.

(Parenthetically, we also note that the provision in question is described on the ICANN website as allowing "use for statistical purposes only of "traffic data."" <http://www.icann.org/announcements/announcement-2-28jul06.htm>. In fact, section 3.1(f)

contains no such limitation and indeed explicitly allows ANY commercial use of traffic data so long as personal data is not inappropriately disclosed. It would be an understatement to describe ICANN's characterization as misleading.)

The "domain tasting" phenomenon has also been described as an abuse of the add grace period, in which registrars handling the bulk registration of tens or hundreds of thousands of domain names receive full refunds for all names (usually the vast majority) which the registrants decide to delete after a few days because they have not generated sufficient traffic. We are pleased to note that Section 3.1.1 of Appendix 7 of the draft agreements empowers registry operators to impose a fee on registrars for deletes during the add grace period. However, IPC believes the agreements should go further and require registry operators to impose monetary penalties and take other steps to discourage abuse of the add grace period.

We note the concern that has been raised that the draft agreements, by eschewing all price controls, would allow registry operators to raise the renewal prices of successful domain names to exorbitant levels. See, e.g., <http://forum.icann.org/lists/biz-tld-agreement/msg00012.html> . In effect, under some circumstances such behavior would enable the registry operator to unilaterally appropriate to itself much of the brand value of the domain name that has resulted solely from the investment and other efforts of the registrant. The agreements should contain safeguards against the potential for such behavior. As IPC has previously noted in its constituency statement on registry contract provisions (see <http://www.ipconstituency.org/PDFs/IPC%20Position%20Statement%20on%20Registry%20Contracts%20PDP%20Feb%2006%20050506.pdf>), in such contracts there should be a general presumption in favor of price controls that prevent discrimination among registrars; the same principle should apply to discrimination among registrants in the circumstances described in this paragraph.

Finally, regarding renewal, we note that section 4.2 of the draft agreements entitles registry operators to renewal on terms "similar" to the terms of "the 5 most reasonably comparable gTLDs," and that if there are not five such comparable registries, .com shall be deemed comparable to all the registries in question. As the IPC has previously stated, "it is a fact that not all gTLD registries are comparably situated, with regard to size or dominance, and it is not always appropriate to treat them as if they were." See <http://www.ipconstituency.org/PDFs/IPC%20Position%20Statement%20on%20Registry%20Contracts%20PDP%20Feb%2006%20050506.pdf> . Contract renewal terms may be one of the situations in which such treatment is inappropriate. While this may not always be the case, currently .com is so much larger and more dominant than the three gTLDs under consideration here that "similarity" of contract terms should not necessarily trump other considerations. The criterion of "reasonable comparability" should be applied based on the facts at the time of contract renewal, and .com should not automatically be treated as comparable to .biz, .info or .org.

The IPC thanks the ICANN Board for its consideration of our views.