

COMMENTS OF GNSO INTELLECTUAL PROPERTY CONSTITUENCY

June 16, 2008

The Intellectual Property Constituency (IPC) welcomes this opportunity to comment on ICANN's Proposed FY09 Operating Plan and Budget ("Plan"), as issued May 17. These comments are based upon a review of the Plan, as well as upon an informative briefing presented by Doug Brent and Kevin Wilson to the IPC on June 2.

1. Contract Compliance

For many years, IPC has been urging ICANN to implement a credible, comprehensive program to monitor compliance with, and to enforce, its contracts with gTLD registries and with accredited registrars. The entire ICANN experiment depends on using contractual agreements as a substitute for government regulation. The viability of that experiment remains in question so long as those agreements are not consistently and predictably enforced. We applauded ICANN's long-overdue decision two years ago to establish a contract compliance department, and have worked closely with its staff. However, in our view ICANN has just begun the task of bringing credibility and respect to its compliance efforts, and much more remains to be done.

We commend ICANN for including in the Plan a substantial increase of resources for contract compliance activities. We have some difficulty discerning the precise scope of this increase. When ICANN issued its "Initial Operating Plan and Budget Framework for Fiscal Year 2009," in February, it provided a 2008 budget figure of \$495,000 for compliance activities, which it proposed to increase to \$1.397 million for 2009. In the Plan as released in May, a 2008 budget figure of \$795,000 is provided, with a proposed increase to \$2 million. Evidently there has been a change in definition between February and May, which makes it difficult to compare the two budgets. We urge the staff to explain the change, so that more meaningful comparisons can be made. We note the assurances of the staff, provided at our June 2 briefing, that the proposed increase in the Plan is roughly comparable to what was contained in the February document.

Increased compliance resources are indispensable, but we were also heartened by the comments of ICANN staff in our briefing about the importance of creating a "culture of compliance" throughout ICANN, rather than confining compliance issues to a single department within the staff. We fully agree that more concerted efforts are needed to raise dramatically the profile of compliance issues from the viewpoint of contracted parties; to strengthen the fledgling efforts of ICANN to communicate to the public about its compliance activities; and to adopt a more strategic approach which focuses on compliance efforts that will deliver the greatest impact for domain name registrants and Internet users. We look forward to working closely with the ICANN staff to advance these goals.

2. The Role of Contracted Parties, and “Private Sector Leadership”

The charts on page 29 of the Plan graphically demonstrate ICANN’s complete financial dependence on revenue channeled through gTLD registries and accredited registrars. In 2009, 93% of ICANN’s revenue (up from 91% in 2008) is labeled as coming from these sources. In fact, virtually all this revenue ultimately derives from fees paid by domain name registrants. But because these payments are negotiated by ICANN with registries and registrars, who write the checks that provide ICANN with nearly all its revenue, there is a real and persistent risk that these entities will dominate or capture the policy making processes and oversight activities that ICANN should be conducting on behalf of the Internet community as a whole, including domain name registrants and Internet users. Indeed, the perception is widespread that this risk of capture has been realized, and IPC believes that perception has a basis in reality.

Under these circumstances, IPC believes that ICANN must be constantly vigilant in guarding against this risk of capture. Its ongoing reviews of its various components ought to consider, as a priority matter, how to structure the organization to reduce that risk. Unfortunately, the opposite sometimes seems to be the case, particularly with regard to the GNSO restructuring plan approved by the Board’s Governance Committee. This plan would marginalize the role of independent business interests within ICANN (i.e., those not under contract to ICANN), and thus weaken what has been the most effective countervailing force against the risk of capture by contracted parties. Adoption of the restructuring plan approved by the BGC working group majority would send exactly the wrong signal to intellectual property owners about the value of investing time and resources in participating in the ICANN policy processes. We also believe it would be the wrong response to the challenge of ensuring “private sector leadership” for ICANN, a task that the U.S. Department of Commerce has accurately identified as an area where “important work remains to increase institutional confidence” in ICANN. See http://www.ntia.doc.gov/ntiahome/domainname/ICANN_JPA_080402.html.

The Operating Plan does not reflect any significant awareness of the risk of capture by contracted parties, nor does it contain sufficient programs to counter it. Indeed, in some ways it appears to assume that a main goal of the organization is to cater to the needs of contracted parties. To provide just one notable example, the Plan foresees ICANN “[w]ith the registrar constituency, re-writing the Registrar Accreditation Agreement to better define acceptable forms of operation” (page 32, emphasis added). The implication that registrars are the only parties with an interest in the terms and conditions under which registrars are empowered to offer registration services to the public must be dispelled.

We appreciate that one of the “Key Initiatives” in the Plan is to “[b]roaden [p]articipation” in ICANN, an objective we strongly support and which the Plan accurately calls “a core part of ICANN’s mission.” However, the specific justification the Plan offers for “improv[ing] ICANN’s accessibility to the business community” is that “the majority of networks that make up the Internet are privately owned.” (Page 10). This is true, but it reflects a seriously incomplete understanding of the importance of business participation in ICANN. While some IPC members, and the companies and associations they represent, own networks that are part of the Internet, the stake of IPC members in ICANN decision-making extends far beyond any network owner role, especially with regard to the protection of intellectual property rights on behalf of creators and consumers.

3. ICANN's Service Levels

The experience of IPC members with the quality of ICANN's service is decidedly mixed. Staff is sometimes highly responsive and prompt, but in other cases inquiries from IPC members and leadership go unanswered and even unacknowledged, at least until multiple inquiries are made over a period of weeks. Such inconsistency reflects poorly on ICANN, especially at a time when ICANN's spending on public relations and outreach is increasing substantially. As part of the "administrative improvements" that ICANN has identified as among its top priorities for FY 2009, consideration should be given to establishing service levels for staff that deal with members of the community (e.g., maximum times for acknowledgement of requests).

4. New gTLD Budget

IPC notes that most of the projected revenue and expenses for operating the new gTLD program, once launched, has been taken "off-budget" for purposes of the Plan, and will be addressed in a separate budget later, when the parameters of the program are more clearly defined. We believe this is a sensible approach, but urge that the community be given the maximum feasible opportunity to review this supplemental budget, which could approach or even surpass the entire annual operating budget of ICANN as set forth in the Plan.

Respectfully submitted,

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