

December 8, 2008

**Comments of the Intellectual Property Constituency
on the CRA International Report
“Revisiting Vertical Separation of Registries and Registrars”**

The Intellectual Property Constituency (IPC) is pleased to provide the following comments on the CRAI Report (the “Report”):

Scope, Genesis and Purpose of the CRAI Report

As a general matter, evaluating the Report is difficult because ICANN has not made clear to the community the motivation and reasons behind requesting the Report in the first instance. The background materials provided from the ICANN public announcement page, including the two cited ICANN Board Resolutions of 18 October 2006, and 26 June 2008 provide little clarity on this issue. Knowing more specifics as to why the Report was requested, the assumptions underlying the request and the specific questions ICANN was seeking to have answered, would have greatly aided commenters in evaluating the Report’s conclusions and recommendations. We urge ICANN to provide this information.

In this regard, IPC notes that the Board’s 18 October 2006 resolution called for a far more comprehensive study than the one undertaken by CRAI. The resolution stated:

Resolved (06.____), the President is directed to commission an independent study by a reputable economic consulting firm or organization to deliver findings on economic questions relating to the domain registration market, such as:

- whether the domain registration market is one market or whether each TLD functions as a separate market,
- whether registrations in different TLDs are substitutable,
- what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,
- what is the effect of the market structure and pricing on new TLD entrants, and
- whether there are other markets with similar issues, and if so how are these issues addressed and by who?

The results of such a comprehensive economic study would be valuable for a number of ICANN initiatives, including but not limited to the rollout of new gTLDs. As far as IPC is aware, this comprehensive independent economic study has never been undertaken or even commissioned, and these ICANN initiatives are weaker and more problematic as a result. IPC urges ICANN to report to the community on the status of the study called for by the Board more than two years ago.

With regard to the 26 June 2008 Board resolution, it is difficult to understand how it could have been the basis for this study, since much of the underlying research appears to have been performed prior to that date. See, e.g., footnotes 9, 19, 20, 21, 24, 26,29, 30, 32, 34, 35, 36, 37 of the Report.

The Effect of the Vertical Separation Requirements on Competition

The IPC questions the Report's equation of "consumers" with "registrants," and notes that the Report considers only the value of the equal access requirements in promoting competition among registrars by preventing certain registrars from having privileged access to domains in a particular registry. However, practical experience suggests that registrars are often registrants of vast domain portfolios, and often do not provide retail registration services to the public. Because of the growth of the pay-per-click advertising industry and extensive use of online affiliate marketing, registrars can extract value from passively holding domain names.

In other words, because several registrars own vast domain portfolios, the equal access and vertical separation requirements also have the positive effect of preventing particular *registrants* from having privileged access to domains in particular registries. Relaxing the requirements could inhibit competition in the market for domain names. Worse, it could make it essentially impossible for brand owners to prevent abusive registrations of their domains in registries where a particular registrant has a pre-emptive ability to register domains. Therefore, preventing registrants from gaining privileged access to particular registries, which was not mentioned by the Report, is a compelling reason to preserve the vertical separation requirements. This will remain true at least until such time as ICANN adopts a consensus policy limiting registrar warehousing of domain registrations, which has been envisioned since the RAA was drafted. See Registrar Accreditation Agreement 3.7.9.

Vertical Separation in Registries under Price Caps

The Report is correct that relaxing the vertical separation requirement for registries operating under a price cap is undesirable, and will remain so for at least as long as those registries, particularly .com, account for such a disproportionate volume of current registrations.

Single-Owner TLDs

With respect to relaxing the vertical separation rule for single-owner gTLDs, such a relaxation is theoretically reasonable, but the devil is definitely (as the Report recognizes) in the details. The Report states that a gTLD being operated as a money-making venture should be excluded from the single-owner model, but it is not immediately clear why this should categorically be so. The owner of a collective mark, for example, may register that mark as a gTLD and allow members to register second-level domain names. The same may be true of traditional trademark or service mark owners who have a bevy of independently-owned licensees (such as trade associations or franchisors). Such mark owners have the same interest as a private corporation achieving efficiencies by controlling the registration process. However, because they may offer the domains primarily as a service offering to their members or licensees, more than a single owner

may own the domains, and the operator may also want to turn a profit on the registration of second-level domain names.

The Report appears to implicitly assume that a corporation would only be interested in its own company name or principal trademark as a gTLD. However, if the single-owner model were applied to gTLD strings in which multiple parties may have an interest (such as a generic term), then competition would be adversely affected. In some cases, the community objection process could prevent such an application from succeeding. However, the Report's description of the single-owner model should have made clear what gTLDs should not qualify for the single-owner model.

Instead of using the new and unclearly defined rubric of "single-owner model" TLD to identify those gTLD registries where a relaxation of vertical separation might be tried, it may be more useful to define a category of gTLDs with highly restricted registration requirements. In such gTLDs, it may make sense to experiment with allowing the registry to control the registrar, or (an option not specifically discussed in the report) allowing the registry to designate an exclusive accredited registrar to administer the registration restrictions. Such gTLDs are probably already not a very attractive market for accredited registrars (see figure 3 of the report), since in order to service these registries, registrars must take on significant burdens (such as vetting and processing potential registrants, or integrating with a pre-existing database of the registry operator that identifies members or licensees eligible to own registrations). Thus, the experiment could proceed with minimal disruption to the existing marketplace.

Further Observations on Relaxation of Vertical Separation

Although there may be an economic case for relaxing the current vertical separation requirements in the very specific case of certain single-owner TLDs, the IPC agrees with the Report that relaxing the vertical separation requirement for domain names operating under a price cap is undesirable, and the single-owner model should be viewed as an exception, rather than a "test case." There should be no implication that this exception might lead to further relaxation in the future.

The hybrid model that the Report proposes is deeply flawed and should not be given serious consideration. While restricting registries from owning registrars that service only other gTLDs has some superficial appeal, the net result would be an incentive for registries owning registrars to collude to grant each other favorable treatment to the disadvantage of registrars who are not affiliated with either. Furthermore, there is no external oversight to ensure compliance with these requirements, nor any indication of who would have standing to assert claims. Without an oversight regime and meaningful penalties for violations, the Report's proposed hybrid registration model invites anticompetitive collusion.

The current regime already suffers from a problem wherein registrars are encouraged to passively register domain names incorporating well-known trademarks and populate the holding pages on those sites with pay-to-click advertisements or to enroll those sites in online affiliate marketing programs run by the trademark owner. Relaxing the current

vertical separation between registries and registrars does not appear to do anything towards ameliorating this problem, and may indeed exacerbate it.

In this regard, the Report pays little attention to one positive feature of having rigid vertical separation requirements: because they are relatively easy to enforce, they may be of value in environments where other enforcement options are lacking. If there were not a requirement for registrars and registries to be structurally separated, ICANN would have to take on many additional tasks regarding the anti-competitive harms that the requirement seeks to prevent: marketplace monitoring and auditing, investigating and responding to complaints, and promptly and consistently enforcing behavioral rules against these harms. Given ICANN's long-term track record in monitoring and enforcing compliance with its existing contracts with registrars and registries, this alternative seems unrealistic. While recent trends are positive, ICANN has not yet demonstrated sufficient commitment to and delivery on contract compliance goals to justify abandoning structural separation rules.

CONCLUSION

In sum, the IPC believes that the Report's analysis and recommendations are flawed in many respects. While the Report accurately notes that there may be an economic case for relaxing the current vertical separation requirements in very specific cases of certain single-owner gTLDs, the primary criteria (single vs. multiple registrants and profit vs. non-profit) that the Report proffers as a means of identifying appropriate cases for relaxation are insufficient. The IPC believes the hybrid integration model that the Report proposes is fundamentally flawed and should not be considered. We also call upon ICANN to undertake and publish the comprehensive independent economic study of the domain registration market that the Board called for over two years ago.

The IPC thanks ICANN for the opportunity to provide these comments. For the reasons stated above, the IPC urges that any alteration to the current vertical separation requirement be a narrowly-applied exception for only a narrow subset of TLDs for which such relaxation may be appropriate, and not a "test case" for further relaxation without a more convincing case as to the impact such a relaxation may have on the already serious problems that trademark owners encounter in disputes involving cybersquatting.