

COMMENTS OF GNSO INTELLECTUAL PROPERTY CONSTITUENCY

April 28, 2009

The Intellectual Property Constituency (IPC) welcomes this opportunity to comment on ICANN's Proposed FY10 Operating Plan and Budget ("Plan"), as issued February 17 and posted at <http://www.icann.org/en/planning/ops-budget-framework-10-en.pdf>. These comments are based upon a review of the Plan, as well as upon an informative briefing presented by ICANN CFO Kevin Wilson to the IPC on March 31.

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 three 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. Once again, we have some difficulty discerning the precise scope of this increase. The figure provided on page 9 as the FY09 Budget figure for contract compliance-- \$2.457 million – differs substantially from the figure listed in the approved FY09 budget as posted by ICANN last July -- \$2 million. See <http://www.icann.org/en/financials/adopted-opplan-budget-v3-fy09-25jun08-en.pdf>, page 11. Such puzzling discrepancies are a recurring feature of ICANN budgets, and IPC would welcome some definitive explanation of them.

In any event, the FY10 Plan asserts that there will be an increase of 31%, to \$3.219 million, for contract compliance. Increased compliance resources are certainly necessary, but will not be sufficient to create the "culture of compliance" throughout ICANN that ICANN senior staff has told the IPC was its goal. We reiterate 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. There has been progress on some of these fronts over the past year, but the question of strategy, which is probably the most important one, has advanced the least so far. We look forward to working closely with the ICANN staff over the next year to advance these goals.

The detail provided on page 25 of the Plan raises some questions about how ICANN proposes to spend the increased resources it is allocating. For example, an “external ICANN contract compliance advisory council” could be of great value, but not if its primary goal is to “increase external communication to global stakeholders, regulators and media.” ICANN should not be constituting a group to serve as a cheerleader to tell the outside world how well it is performing the job of contract compliance; instead, an advisory council should be given the role of frankly evaluating ICANN’s successes and shortcomings in this field, and recommending what tough steps ought to be taken to improve the track record and build the “culture of compliance”. Rather than seeking to draw one advisory council member from each existing GNSO constituency, the advisory council should be populated by reaching out to law enforcement, corporate compliance specialists, and auditing organizations, as well as experts in combating online fraud, cybercrime, counterfeiting, piracy, and similar misconduct. A council so constituted could provide a real-world perspective on how ICANN can do a better job of enforcing its contracts.

IPC welcomes the plan to hire a Whois compliance manager. Hiring, training and supporting auditors in three additional global regions could be useful, but only if those auditors are fully backed up with enforcement resources so that they are able to gain access to the materials they need and to demand changes in registrar or registry practices where they are required. The contract compliance department’s role in conducting “studies” should be more closely tied to its primary job – enforcing ICANN’s contracts – rather than consuming significant resources for a study (such as the Whois data accuracy study) whose ultimate impact on improving the enforcement environment remains unclear. As for the perennially problematic but recently enhanced Whois data problems reporting system (WDPRS), IPC repeats formally the suggestion made informally at a recent ICANN meeting: devote some of the massive increase in ICANN’s public relations spending to publicizing the availability of this system, among consumers, domain name registrants, anti-phishing and other anti-fraud organizations, and civil and criminal law enforcement agencies, with the goal of making its use routine, not exceptional, whenever users encounter registrant contact data that appear false.

Finally, IPC applauds the statement made on page 18 of the plan document that “a key focus in FY10 will be asking the community to consider what contractual/policy tools are necessary to make compliance efforts even more effective and more cost efficient in the long term.” We believe there is considerable potential for advancing this goal through improved contract terms, both in the Registrar Accreditation Agreement at the registrar level, and in the various registry agreements, notably those that are being prepared for applicants to operate new gTLD registries. IPC would welcome the proactive involvement of ICANN staff in achieving stronger contractual provisions in both these arenas.

2. IANA and Technology Operations/Security, Stability and Resiliency/DNS Operations

These three budget areas are all slated for spending increases in excess of 10% (and as high as 20%) in FY 2010. IPC has some difficulty, even after the briefing provided by ICANN staff, in discerning the boundaries of these three areas, as well as in understanding just which entities within the ICANN volunteer structure are responsible for overseeing, commenting on, or having input into how these increased expenditure levels are implemented. There appears to be considerable overlap: for example, the SSR budget item is said to include “professional services

for DNSSEC” (page 11), but “deploy[ing] production-quality DNSSEC services” and “certify[ing] DNSSEC-signing facility” are accounted for under the “DNS Operations” budget item (page 30), while the IANA budget line includes “support [for] DNSSEC signing for root zone” and “continu[ing] present signing activities” (page 23). A clearer delineation of these functions would be useful to ensure that duplication has been minimized, as well as to get a better sense of the overall cost of these initiatives. In addition, we note that an “ICANN Plan to Enhance Internet SSR” is supposed to be approved by the community and by the Board by October 2009. Presumably this plan will establish priorities for ICANN spending in this area. However, since no draft plan has yet been released for public comment, it is impossible to assess whether the operating plan conforms to the established priorities, or even those that the ICANN staff wishes to propose.

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

The chart on page 19 of the Plan clearly demonstrates ICANN’s continued and increasing financial dependence on revenue channeled through gTLD registries and accredited registrar, creeping up above the 93% level. 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. 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, cannot be focused exclusively, or even primarily, upon those parties in contractual relationship with the organization. See http://www.ntia.doc.gov/ntiahome/domainname/ICANN_JPA_080402.html.

The 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 the main goal of the organization is to cater to the needs of contracted parties. To provide just one notable example, the description (page 11) for the budget category of “constituency support,” slated to grow by 7% over FY09, to \$6.27 million, does not contain a single reference to any GNSO constituency other than registries and registrars. The detailed list of deliverables on pages 26-27 maintains the same tone. For example, according to page 26, the “Registry and Registrar departments” will conduct “outreach to constituencies through at least 3 regional gatherings, industry events, etc.” Neither our constituency, nor any other within the “Commercial Stakeholder Group, ” receives anything like this level of support: there is not a single dedicated staff person, much less a “department,” allocated to these constituencies; nor does ICANN conduct “regional gatherings” to discuss current issues with the business institutions representing the private sector companies that built the Internet, lead the way in legitimate e-commerce, and are deeply affected by ICANN decisions in their ability to serve

their customers and protect their intellectual property online. This must change, and it is disappointing that the Plan does not acknowledge this.

4. Broadening Participation and the Role of Business

The FY09 Operating Plan identified “broadening participation” in ICANN as a “key initiative,” and referred to it as “a core part of ICANN’s mission.” FY09 plan at 13. This focus seems to have been diluted (or at least shifted significantly) in the Plan this year. While there is a budget area identified for the commendable goals of “Global Engagement and Increased International Participation,” which IPC supports, there seems to be no reference whatever to outreach to the business community, in contrast to the FY09 plan. While we were critical last year of how ICANN’s draft operating plan characterized and justified its business outreach initiatives – focusing them on “private ownership of networks,” while ignoring the role of the private sector as users of the domain name system and owners of intellectual property – we were surprised and disappointed by the FY10 draft plan’s silence on the issue.

5. Administrative Improvement/Role of Reviews

The second largest spending increase called for in a single budget area is “administrative improvement,” where a 28% increase to almost \$1.9 million is foreseen. Very little detail is provided in the plan, but it appears that this increase is entirely attributable to “funding the implementation of organizational reviews.” (page 13).

It has become increasingly clear to IPC, as well as to other constituencies in the non-commercial stakeholder group, that ICANN must find a better way to improve its functioning than through the constant barrage of reiterative reviews of its various organs and functions. Perhaps our perspective on this is somewhat skewed by our experience in the GNSO review. Whatever amount ICANN itself has spent on this initiative is dwarfed by the amount of time, energy, bandwidth and other resources that IPC members, and their counterparts in the other constituencies, have been forced to devote to participating in and responding to it. In nearly every case, this was a diversion of resources that could have been used more productively in addressing real problems with the management of the domain name system. Now that this review has moved – for the most part – to an implementation phase, the demands on volunteers to service it have only increased. Opinions may differ about the value that has been derived so far from the GNSO review exercise, but within the IPC at least, the spectrum seems to range from “virtually nothing” to “far less than justified by the costs.” In the meantime, so many other reviews are underway within ICANN (5 are active at the moment) that it has proven impossible for the IPC itself, or for its members, to participate meaningfully in them.

The FY10 plan document asks us to identify “areas of ICANN work that could be streamlined, reduced, or deferred.” Organizational reviews would be an excellent place to start.

In our comments on last year’s operational plan, IPC identified within the “administrative improvement” bailiwick that it would valuable to consider “establishing service levels for staff that deal with members of the community (e.g., maximum times for acknowledgement of requests).” Although anecdotally it appears that the responsiveness of ICANN staff has improved somewhat over the past year, this concept is still worth considering.

6. New gTLD and IDN ccTLD Budgets

As with last year's budget, the FY10 budget (page 4) excludes both the revenue and the costs "to actually implement application processing" for the new gTLDs (and for the cc IDN program).(page 4) The same page states that there will be a separate budget submission "near the time of program launch" for new gTLDs, 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, since it could approach or even surpass the entire annual operating budget of ICANN as set forth in the Plan. We also urge ICANN to clarify when the budget for application processing for ccIDNs will be released, considering that the operating plan calls for "delegation of IDN ccTLDs in the root zone during FY 10." (page 22)

Thank you in advance for your consideration of, and response to, these comments.

Respectfully submitted,

Steve Metalitz, IPC president

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