

RE: Proposed New .COM Registry Agreement

Revised Statement of Intellectual Property Constituency, 12/7/05

The Intellectual Property Constituency appreciates this opportunity to comment on the proposed settlement agreement between ICANN and Verisign, and in particular on the proposed revised .com registry agreement that forms part of this settlement.

IPC applauds the efforts of ICANN and Verisign to achieve an amicable resolution of the legal disputes between them. A successful settlement should plug, to a significant degree, the draining of limited ICANN resources into litigation. To the extent that this resource drain is responsible for ICANN's shortfalls in critical areas such as (but not limited to) contract compliance and enforcement efforts, IPC calls on ICANN to re-direct those resources constructively and efficiently. We believe the freeing up of these resources for such critical but apparently neglected tasks may be the most important consequence of the settlement for copyright and trademark owners in their relationship to ICANN and to the Domain Name System.

Beyond this, IPC has identified the following areas where the interests of its members may be directly affected by the settlement. In general, these are the areas in which further questions need to be answered, or more concrete commitments or reporting obtained. Of course, this is not necessarily an exhaustive list, and as we participate in the further discussion within ICANN about the settlement and the proposed new .com agreement, we hope to learn more that may result in additions to (or deletions from) this list.

1. Impact on ICANN finances: As we understand it, the registry fees set forth in the proposed new .com agreement are likely to have an impact on ICANN in two main ways. First, the budgetary resources ICANN can expect to have available in future years will be dramatically increased. Second, a much higher proportion of ICANN's revenue will come from a single source -- Verisign -- in comparison to the current system, in which fees paid by registrars make up the bulk of ICANN's revenue. The effect of these changes on ICANN is almost certain to be significant and may well be profound.

In order to assess this impact, it would be useful for ICANN to present to the community some projections about the size and sources of the ICANN budget over the next few years, first under the current system, and second under the funding system contemplated by the proposed .com agreement. Of course both sets of projections are subject to a

number of assumptions, but it should be possible to get at least a general picture of the magnitude of the shift.

If in fact it is correct that ICANN will, after this settlement, have much greater revenue and be much more dependent on a single source for that revenue, IPC believes that this calls for fundamental changes in the way ICANN budgets, prioritizes, and spends. Much greater transparency and accountability will be necessary than under the current system. The perception – justified or not – that “he who pays the piper calls the tune” can only be dispelled through a system in which ICANN budget and priority decision are shielded, as much as possible, from manipulation by its sole major funder. We believe it essential that the much larger pie be divided up with much greater input from ICANN’s constituencies, especially the GNSO constituencies and particularly the user constituencies, including IPC, whose members (as gTLD registrants) are the ultimate source of this funding. Indeed, the significant changes in ICANN’s funding levels and sources may call for significant restructuring of ICANN itself. In other words, we believe the Board should recognize that approving this agreement may usher in the era of ICANN 3.0.

PROPOSED RECOMMENDATION: (A) ICANN staff should develop and make public the revenue projections summarized above. (B) ICANN’S budgeting procedure should be modified to reduce the risk of perceived or actual control by a dominant single funder, and to increase the role of constituencies representing gTLD registrants. NOTE: We are not calling under this point for changes in the registry agreement but rather in ICANN policy and procedures if the new registry agreement goes into effect in its current form.

2. **Process for approval of new registry services:** IPC representatives to the GNSO Council were deeply engaged in the process of devising procedures for the approval of new registry services (indeed, an IPC proposal provided the original template for these procedures). We are engaged in a comparison between those procedures, as developed in the Policy Development Process, and the procedures put in place in the proposed new .com agreement. We are advised that ICANN staff has prepared such a comparison but it has not yet been made public.

PROPOSED RECOMMENDATION: (A) ICANN should publicly post its analysis of the differences between the contractual and PDP-approved procedures for review of new registry services. (B) The procedure for approval of new registry services in .com should be conformed as much as feasible to those adopted by the GNSO Council and approved by the Board for gTLD registries generally. The necessity for any deviations should be explicitly stated.

3. Fate of Appendix W: In an appendix to the current .com agreement, Verisign promised to invest at least \$200 million in research, development and infrastructure improvements, a “substantial proportion” of this prior to November 2007. Verisign also pledged to prioritize in this effort the design and development of “a Universal Whois Service that will allow public access and effective use of Whois across all Registries and all TLDs.” Appendix W does not appear to be carried forward in the new agreement.

PROPOSED RECOMMENDATION: (A) Verisign should account to the community for its actions to carry out Appendix W before the new .com agreement takes effect.

(B) Verisign should be asked to make a similar commitment to invest in improvements of the .com registry, and to move toward greatly improved Whois service.

4. Traffic Data: Section 3.1(f) of the proposed new .com agreement allows Verisign to make commercial use of traffic data regarding domain names for almost any purpose, and without any obligation to follow the procedure for new registry services with respect to such uses. This very broad entitlement could raise concerns about competition, protection of proprietary activities, and personal privacy, that could impact on IPC members, their business associates, and their employees. This traffic data could be an extremely valuable commercial asset, and IPC believes further discussion is warranted about whether it should be allocated to Verisign virtually without restrictions, obligations or commitments.

PROPOSED RECOMMENDATION: (A) The dividing line between traffic data used to monitor and improve the operation of the registry, and new registry services based on traffic data, should be more clearly delineated. (B) New registry services based upon traffic data should be made subject to the New Registry Services process spelled out in the agreement (and conformed to the Board-approved procedure, see (2) above). I.e., the last sentence in Section 3.1(f) of the proposed .com agreement should be deleted.

Submitted December 7, 2005

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