



IPC COMMENTS ON DRAFT FY16 OPERATING PLAN & BUDGET

April 30, 2015

The Intellectual Property Constituency (IPC) of ICANN's Generic Names Supporting Organization submits the following comments on ICANN's Draft FY16 Operating Plan & Budget. See <https://www.icann.org/public-comments/op-budget-fy16-2015-03-18-en>.

To a great extent, these comments consist of questions and comments posed to the drafters of the plan. Though ICANN no longer allows a reply round, we look forward to receiving responses from ICANN staff to these questions and comments. In any event, IPC reserves the right to supplement these comments at any time. The IPC's questions and comments include the following (page references are to the draft plan at <https://www.icann.org/en/system/files/files/proposed-opplan-budget-fy16-18mar15-en.pdf>):

General Comments and Questions:

- To ensure that the Board and Staff remain accountable to the community, the IPC believes that the community should explore a challenge mechanism whereby the GNSO Council, with sufficient votes, could adjust or eliminate certain line items which it believes are either contrary to public interest or are either over or underfunded.
- The timeline (p. 5 and many other iterations) calls for a 5-year operating plan and budget to be approved in April, which is prior to the close of the comment deadline on the FY16 Operating Plan & Budget ("FY16 Budget"). However, the 5-year operating plan was not approved by the Board until just before the end of the comment period on the FY16 Budget (the resolution of approval, at <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en#2.f>, was disseminated April 29), and as of the time of this submission, it does not appear that the final text of the 5-year operating plan has been posted by ICANN. Since the IPC (and others) raised numerous concerns and questions about the 5-year operating plan (the IPC filed two sets of comments, see <http://forum.icann.org/lists/comments-op-budget-2016-2020-11nov14/msg00002.html>, <http://forum.icann.org/lists/comments-op-budget-2016-2020-11nov14/msg00001.html>), we ask that the comment period on the FY16 Budget be re-opened (or extended) so that we can see how our concerns were addressed. This request is entirely consistent with ICANN's stated position that the FY16 Budget will be "informed by" the 5-year plan. (See p. 26.)

- Where a budget entry shows “0.0” (e.g., portfolio 5.1.2 on “public interest decision making”), does this mean no activity is planned on this topic in FY16? (The same entry recurs on many other portfolios, e.g., 2.3.3, 2.3.4, etc.)

Specific Comments and Questions:

P. 13: We are glad to see “expansion of contractual compliance” identified as a “priority area” for baseline budget. See more specific comments below.

Pp. 15–17: The “initiative” on “defining public interest for ICANN” is quite important and is being allocated considerable resources (\$2.5 million), but the vast majority of that is for staff and “professional services” (which should be clarified; we assume these are outside consultant fees). A more detailed plan is needed to ensure that this does not become a staff-driven and consultant-dominated exercise, and that it involves all sectors of the community. The last sentence on p. 17 indicates that neither activities nor funding have yet been identified or allocated. This is concerning if ICANN intends to devote considerable resources to this initiative in the fiscal year that begins in two months.

Pp. 19–23, New gTLD Program Generally: ICANN has stated that approximately 1/3 of the total fee (\$60,000) for each new gTLD application is attributable to a risk reserve to defray the costs of expected litigation. See ICANN’s Response to Rep. Greg Walden’s Letter to ICANN, Jan. 20, 2012, <http://www.icann.org/en/correspondence/pritz-to-walden-20jan12-en.pdf>. There does not seem to be any reference to such a reserve in this budget even though ICANN is currently embroiled in various Requests for Reconsideration, CEP processes and IRP proceedings relating to the New gTLD Program, any one of which could lead to significant litigation costs. How is this reserve now being accounted for?

P. 30, \$3.4 million for “raising stakeholder awareness of ICANN worldwide”: This is almost 1/2 of the entire allocation for Goal 1.1. How will this be coordinated with entities within ICANN that represent certain sectors of “stakeholders,” e.g., intellectual property interests? To date, ICANN’s record of such coordination needs significant improvement.

P. 32, \$7.4 million for “integrated digital tools to inform and enable engagement and collaboration with ICANN stakeholders”: Since this is by far the largest single allocation under Objective 1, much bigger than the entire budget (\$6.5 million) for supporting policy development and all policy-related activities (pp. 32–33), much more detail is needed about what these tools are, what they are intended to do, and what role current active stakeholders will have in their design, deployment, etc. Importantly, the IPC would like to see transparency in the process of bidding and contracting for these tools, given ICANN’s patchy history at selecting vendors whose systems suffer various embarrassing “glitches” and/or the content of whose contracts – to this day – remain a secret.

P. 33: The IPC previously questioned the metrics that will be used regarding supporting the policy development process. These concerns were raised in our comments in December

2014 on the 5-year operating plan -- to which we have not received substantive responses. *See* <http://forum.icann.org/lists/comments-op-budget-2016-2020-11nov14/msg00001.html>. For example, simply counting the number of participants in WGs or the number of public comments received equates lurkers and “+1 addicts” with active, constructive contributors. The reference to a “quality of service index” is ambiguous but welcomed if this includes qualitative evaluation components in this metric. More detail and explanation is needed.

P. 34: How exactly will ICANN be spending money to “facilitate the development and publication of academic research on the multi-stakeholder model for DNS coordination, Internet policy development and governance”? Will ICANN be offering research grants? Will ICANN financial support for academic research on itself be disclosed? How will the academic researchers be selected? Will they be drawn from current participants in the ICANN process, who may be tempted to use the funds to advance specific policy initiatives within ICANN, or will they be drawn from outside of the ICANN community, thus running the risk of research that is flawed due to a lack of understanding of the ICANN model by the selected academics? How will ICANN balance and control for those risks in the spending of those funds? How will ICANN ensure that the process is open and transparent?

P. 41, Technical Reputation Index: As we noted in our comments on the 5-year Operating Plan, some of the metrics ICANN proposes here, while potentially useful, risk confusing ICANN’s appropriate role with the activities of a trade association for the domain name registration industry. Stability and reliability of the Domain Name System are ICANN’s job; building “trust and confidence of the Internet community in the Domain Name Marketplace” might be, depending on how this broad goal is interpreted; but growing the domain name registration business is not. While knowing total domain name registration figures and rate of second level domain renewals may be useful data, we caution ICANN against any bias toward the view that increases in these figures—both of which could be artificially inflated through registry or registrar behavior that may not be in the public interest—is necessarily a positive indicator, or that a failure to increase them is necessarily a demerit for ICANN.

Measuring “number of registrants impacted by registrar termination v. total registrations” could, again, provide some useful data, but if ICANN makes it a goal to put this ratio on a downward trend, then that could be a powerful disincentive for vigorous ICANN compliance activity toward large registrars. ICANN should not assume that there is any necessary correlation between number of domain names under sponsorship and level of compliance with contractual obligations to ICANN. ICANN should continually guard against a “too big to fail” mentality in its contract compliance activities.

The IPC has already expressed its concerns with the metric listed as A.4 on page 41. In our comments on the draft 5-year operating plan, <http://forum.icann.org/lists/comments-op-budget-2016-2020-11nov14/msg00001.html>, we stated,

measuring ‘# of abuse incidents compared to the # of registrants’ could be misleading on both ends. This metric could unjustifiably favor registries (or

registrars) with high-volume registration models, since a given number of incidents would have comparatively less impact on this ratio. At the same time, unless ‘abuse incident’ is more specifically defined, the numerator of this ratio could lump together technical, ‘paperwork’ type violations with truly serious problems. How does ICANN propose to avoid these pitfalls?

ICANN did not provide any substantive response to this concern, which we renew here, along with the additional question of how ICANN proposes to measure the incidence of abuse across “all TLDs” including ccTLDs where complaints of such abuse would not go to ICANN?

Contract compliance: We note that \$5.3 million in total would be devoted to contractual compliance “functions, initiatives and improvements, and consumer safeguards.” (P. 40, summing 2.3.5, .6, and .7). How does this compare to FY15? How does this compare with spend prior to the new gTLD program? Has contract compliance spending scaled up along with the number of registries, or is ICANN spending less per registry now than it did prior to the new gTLD program?

P. 42: The IPC commends ICANN for recognizing (in portfolio 2.3.6) that resources should be devoted to greater clarity of contractual obligations (“addressing contractual compliance interpretation issues”) and greater transparency in enforcement of those obligations (“improve transparency and reporting of contractual compliance”). Specifically, the IPC has recently raised concerns about Section 3.18.1 of the 2013 RAA and what it does and does not require registrars to do when they receive well-documented complaints of abuse involving the use of domain names that they sponsor carrying out intellectual property infringements. We have also expressed concerns about opaque responses to complaints, such as conclusory dismissals because the “registrar has responded appropriately,” when to the complainant’s knowledge the registrar did not respond at all. If this portfolio is intended to address both these problems, then the IPC strongly supports it, but more detail is needed about how the \$1.1 million allocated to this activity would be expended.

P. 50: A goal is stated to “increase % participation rates from documented baseline established in FY 2015.” Whose participation is being measured: ICANN staff or ICANN stakeholder entities? And specifically what activities related to “the existing Internet governance ecosystem” are being counted in calculating these participation rates? Flying ICANN staff around the world to participate in various duplicative fora addressing Internet governance issues far removed from ICANN’s core mission is not an activity to be encouraged. More detail is needed.

P. 50 et seq.: Some metrics proposed under Goals 4.1 through 4.3 are taken almost verbatim from the 5-year operating plan. The IPC raised concerns about some of these metrics in our December 2014 comments on the 5-year operating plan, to which we have not received substantive responses. See generally <http://forum.icann.org/lists/comments-op-budget-2016-2020-11nov14/msg00001.html>. Specifically:

- “Measuring the number of cooperation agreements or formal recognitions . . . with international organizations” (P. 50) As we asked in December 2014, “the number of MOUs between ICANN and ‘international organizations’ is certainly countable, but does this metric take into consideration how meaningful any particular MOU might be in practice?” What is ICANN’s response?
- Similar questions apply to the metric of “increase in # of partnerships and agreements with respective Internet organizations and regional and national multistakeholder Internet Governance structures” (P. 53). Is this strictly a quantitative measure or does the content of the “partnership and agreement” make a difference?
- “Increase in # of communities (government, private sector, and civil society) willing to have a national multistakeholder distributed Internet Governance approach” (P. 51). As we asked in December 2014, “Why is the metric ‘willing to have’ rather than ‘having’? Who determines this willingness? Who decides whether a particular nation’s ‘IG structure’ (or the structure a particular stakeholder or government is ‘willing to have’) meets these criteria?” What is ICANN’s response?

P. 59, n.1: The IPC agrees that holding seven organizational reviews in FY16 would be a misallocation of resources and of the mental and physical bandwidth of community participants. “Board and staff” are apparently now deciding which will be undertaken and which will be delayed. What role will the community and entities such as the IPC have in making these decisions? The IPC looks forward to having an opportunity to weigh in on priorities in this area. Also, the footnote refers to a \$1.1 million allocation, but the chart on p. 57 has a \$1.9 million entry for portfolio 5.2.8. Which figure is correct?

As stated above, the IPC looks forward to meaningful responses to these questions and a reopening or extension of the comment period for the FY16 Budget so that the final Board-approved 5-year plan can be analyzed.

Respectfully submitted,

Intellectual Property Constituency

By Steve Metalitz, Vice President