



November 9, 2012

Mr. Kurt Pritz – (*drawing-prioritization@icann.org*)  
Senior Vice President, Stakeholder Relations  
Internet Corporation for Assigned Names and Numbers (ICANN)  
**Via E-Mail Only**

RE: IPC Comments on Use of a Drawing for Prioritizing New gTLD Applications

The Intellectual Property Constituency (“IPC”) is a constituency of the Generic Names Supporting Organization (“GNSO”) and represents the full range of trademark and other intellectual property interests relating to the DNS. IPC members are international, regional and national intellectual property organizations from around the world, corporate entities with intellectual property interests (often as owners of intellectual property), and individuals with an interest in intellectual property matters. The IPC appreciates this opportunity to provide its comments on use of a drawing for prioritization of new gTLD applications posted for comment on October 10, 2012 at <http://www.icann.org/en/news/public-comment/drawing-prioritization-10Oct12-en.htm>.

### **Summary**

We commend ICANN for recognizing in this instance that, in response to the reality of the unanticipated large volume of new gTLD applications, it is necessary to adjust the implementation of the new gTLD program in order to facilitate achieving ICANN’s overarching goals. This is true even though the prioritization draw method directly contradicts some provisions of the Final Applicant Guidebook. As a result, the expectations of some applicants at the time they prepared their applications may be disrupted; but this fact does not somehow elevate what is clearly an implementation decision to the level of a policy change.

We urge ICANN to reject the notion that the Applicant Guidebook is itself a statement of policy that cannot be contradicted or significantly changed without invoking the entire policy development process apparatus. The Applicant Guidebook is not a statement of policy; it is a central implementation document for ICANN’s new gTLD policy. Today, ICANN is in a position to shape and improve its implementation of that policy, based not on speculation and prediction (as was the case at the time the Applicant Guidebook was released), but based on actual facts about the volume, mix and other characteristics of the application pool. Under these circumstances, ICANN would be remiss in its responsibilities to the community if it did not consider reasonable implementation changes, even though these require significant changes to the provisions of the Applicant Guidebook.

The same procedure ought to apply to any other implementation adjustments that ICANN may choose to make in order to advance its stated policy goals for the new gTLD program, including but not limited to the goal of adequately safeguarding the intellectual property rights of third parties.



The IPC views the present thirty-day public comment period, absent any reply period, as insufficient for full community discussion of this entirely new prioritization proposal developed by staff.

***The Application Objection Period Should Extend Until Completion Of All Initial Evaluations***

The prioritization draw method clarifies that “given recent discussion regarding the length of the objection period and how it applies to the time necessary to process 1923 applications, it has been determined to terminate the objection period on March 13, 2012.”

The IPC requests that the objection period extend until completion of all initial evaluations to ensure that all potential objections on all strings benefit from the results of initial evaluation. Potential objectors should not be forced to incur the expense of fully preparing and filing a formal objection unless the application to which they object first passes the hurdle of initial evaluation. If the application is rejected by the evaluators, filing a formal objection would be unnecessary and a pointless waste of resources. To serve the public interest, the implementation of new gTLDs should be guided by the principle of minimizing external costs imposed on the public. As indicated above, this can be accomplished by ensuring the results of initial evaluation are published at least two weeks prior to the close of the objection period.

***Provisions Of The Standard Form Registry Agreement Must Be Revisited Prior To Negotiation***

The prioritization draw method “will include an incentive for applicants to accept the published, standard form registry agreement rather than negotiate alternative terms.” The IPC cautions against this approach and further recommends that the community take this opportunity to examine the standard form Registry Agreement in light of the fact that nearly half of the applications have been submitted by trademark holders.

Merely by way of illustration, some issues that could be addressed in such an examination could include confidentiality provisions, damages/limitation of liability provisions, IP rights, winding up, changing registry business models, or the code of conduct.

Thank you for considering our views on these important issues.

Kristina Rosette  
President, Intellectual Property Constituency