

Mr. Paul Twomey
President and CEO
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601
USA

Re: Demand Media's Comment on Module 5

Dear Mr. Twomey:

This RFP will initiate the first truly open round of TLDs since ICANN was established ten years ago. We believe these TLDs will inject innovation, investment, and new competition to the DNS to the strong benefit of consumers, businesses, Governments and the DNS itself.

Some have asked why we need new TLDs at all, suggesting that consumers are not clamoring for them. We think such arguments display a misunderstanding of the nature of innovation. The most productive and beneficial developments in science and business have rarely been the result of broad public demand for a specific development. Rather, the very concept of innovation means that most people did not think of the idea until after its introduction.

We are reminded of the introduction of FM radio when some questioned the need for change on the grounds '*we already have radio*', since AM already existed. We believe just as FM and its following technologies resulted in higher quality service and choice for consumers, new TLDs will also begin a second phase of innovation and service improvement for DNS users.

We also think it is illogical to argue against TLDs because they might result in consumer confusion. Using this approach we would stop all new services and brands in other industries. No one can predict what improvements will come as a result of new TLDs and the products bundled with them, but history indicates there will be improvements. The process of achieving this innovation will not be a free-for-all. ICANN has balanced innovation with strong contractual and technical safeguards to protect registrants and trademark holders, and to ensure DNS security and stability.

This RFP has been in development a long time. Over the past months and years there has been a huge amount of input, discussion and study resulting in the document we now all see. We believe the document is a very well crafted synthesis of the inputs received. It proposes strong and practical solutions to the many issues raised during the process.

We think the RFP is solid in almost all respects and we encourage ICANN to not let perfection become the enemy of good. We encourage the timely review of comments on this current draft, prompt issue of the final version and swift progress to the bid submission phase. In particular, we recommend the four month 'global communications campaign' start concurrent with issue of the next RFP draft (planned for February 2009). Some argue that this communications campaign should not start until after the RFP is finalized in May 2009. We believe this would unnecessarily delay the process by four months, as well as denying the audience for the campaign an opportunity to meaningfully comment on the RFP.

Failure to stick with a Q2 2009 commencement for application submission will put some of the anticipated competition and innovation benefits to consumers at-risk. Like many others we have investors and business plans that rely on timely implementation of this process.

Comments on Module 5

Section 1.1 Domain and Designation

This section is indefinite. Specifically, ICANN's designation is "*subject to the requirements and necessary approvals for delegation of the TLD and entry into the root-zone*". In order to make the section definite, we recommend the final sentence read "*subject to the requirements and necessary approvals for delegation of the TLD and entry into the root-zone as set forth herein.*" By clarifying the section, ICANN assure an applicant there are no hidden requirements which will not be made known until the end of the application evaluation process, after an applicant's filing fee has been paid and is no longer refundable. It also complies with ICANN's stated position that its operations be open and transparent.

Section 1.2 Technical Feasibility of String

Uses an inconsistent verb tense. "*Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement*" should be replaced with "*Registry Operator has satisfied itself of the technical feasibility of the TLD string.*"

Section 1.3 Statements

Should be made mutual and should relate only to material statements upon which another party may reasonably rely. Presumably, all of ICANN's statements will be true and correct and remain so at the time of the execution of the registry agreement. This change is consistent with ICANN's stated position that all of its operations be open and transparent. A replacement paragraph should read:

"Each party hereto represents and warrants to the other party hereto that all material information provided and material statements made in connection with the registry TLD application, the registry TLD application process, and during the negotiations of this Agreement upon which the other party may reasonably rely were true and correct in all material respects, and that such information or statements continue to be true and correct in all material respects as of the Effective Date."

Sections 2.3 Reporting and 2.6 Audit

We think quarterly audit rights are onerous and unnecessary. Semi-annual rights would better serve the interests of all parties.

Section 2.7 Protection of Legal Rights of Third Parties

This section is indefinite. What is the definition of "Legal Rights of Third Parties"? Any rights protection mechanisms ICANN wish to see adopted should be spelled out, in more detail, in the Guidebook prior to the application deadline so applicants fully understand what is, or is not, an acceptable prior rights mechanism. Further, in order to provide maximum predictability to this process, the requirements of this section would be better suited as a part of the application review process, rather than

as a term of this agreement. Section 1.3 of the agreement would ensure that compliance with the prior rights protection mechanism would be an enforceable term of the agreement.

Section 2.8 Registrar Relations

This section is not yet completed and cites the CRA International report by reference (*'Revisiting Vertical Separation of Registries and Registrars'*).

The CRA Report addresses a market construct that was developed many years ago to address the .COM monopoly. Aspects of the old construct do not apply to competitive new TLDs, and in fact will harm the adoption of these TLDs.

There are four distinct issues at stake:

1. ***Should there be legal separation of registry and registrar entities?*** As ICANN contracts, policies and processes are built around the notion of separate registry and registrar entities we see no advantage in changing this requirement.
2. ***Should all interested registrars be allowed access to a registry's TLD?*** Although it is unusual in other industries to mandate that a manufacturer must use certain distribution channels we understand the argument that some TLDs are a 'public resource'. We have no problem with the idea that interested registrars must be able to sell the TLD
3. ***Should all participating registrars be treated equitably?*** Again, it is unusual to mandate how a manufacturer treats his distribution channels, but we have no problem that all registrars must be treated equitably.
4. ***Should the registry be allowed to sell its own TLD to the public (i.e. should the registry be allowed to own one of the participating registrars)?*** Consistent with the findings of the CRA Report we believe the answer to this is yes. We can find no economic or public policy principle that shows benefit to consumers from preventing a manufacturer selling its own product. To the contrary, we believe the objective of enhanced competition in TLDs will be harmed if TLD operators are not allowed (under equal terms) to also promote their TLD at the retail level via an accredited registrar which is owned by the registry.

Throughout the report CRA finds that registries without price controls (which will be all new registries) generally better serve efficiency and registrant interests if they are allowed to own a registrar for their TLD. We agree that legal separation of registries and registrars in new TLDs is important (each should be in a separate legal entity) and we also agree that registrars and registries should be allowed to own one another. The majority of the body of the CRA report supports our view. Here are examples from the report:

Page 2: *"While ICANN's approach has generally supported and stimulated registrar competition, economic theory and practical experience in many other industries have shown that mandating ownership separation can sometimes hinder, rather than foster, effective market competition"*

We agree.

Page 3: *"Experience has shown that the experimentation and innovation that often result when firms are free to operate without vertical restrictions can produce significant benefits for consumers. ICANN's*

policies may affect multiple aspects of registry and registrar services, including service variety, innovation, and prices of domain name registrations”

We agree.

“We find that there can be various, sometimes subtle, economic incentives for a registry to discriminate among registrars in a manner that harms consumers (registrants). Those incentives are especially clear and strong when a registry is operating under a binding price cap. Under those circumstances, vertical separation and equal access requirements are useful tools for limiting the possibility of such harmful discrimination. For registries not operating under a binding price cap, the arguments in favor of vertical separation and equal access requirements are less clear cut. We would recommend that ICANN take steps towards relaxing one or both of these requirements”.

We agree.

Page 13: *“Importantly, the unsponsored registry agreements for .info, .biz, .name, and .pro (finalized in 2001 and 2002) required legal, but not ownership, separation of registry and registrar functions”.* (We agree, Also note: the report does not cite any problems that occurred with BIZ, INFO, NAME and PRO due to this cross ownership freedom)

We agree

Page 15: *“On March 1, 2001, ICANN announced that it had reached an agreement with VeriSign that did not require ownership separation for VeriSign’s registry and registrar businesses but did require “structural separation -- According to ICANN, the rationale is that ownership separation is no longer necessary or useful in promoting competition, so long as the structural separation is effective in accomplishing the basic purpose. A relevant fact in this regard is that the registry agreement that has been developed for other global TLDs requires only structural, not ownership, separation of registrar functions from registry functions. This reflects ICANN’s belief that there is little if any additional competitive value under today’s market circumstances in forbidding the registry operator from also being a registrar, so long as it is done in such a way so as not to discriminate against other competitive registrars.*

We agree.

Page 16: *“ICANN has received no substantial complaints about discriminatory access to the registries operated by VeriSign, and there is no indication or evidence that has come to the attention of ICANN that VeriSign has not fully and effectively erected a complete firewall that prevents any discriminatory information flow to its registrar business”.* (We agree, also note: On page 17 the report does address an FTC investigation of Network Solutions for improper use of WhoIs data but this issue is unrelated to registry activity, especially as the COM database is thin and hence does not include registrant contact information).

Page 17: Cites concerns from industry executives that registries could discriminate in favor of their own registrar but all of these concerns are based on the registry breaching its equal treatment obligations. This would be a perilous and potentially disastrous course of action for any registry as contracts can adequately cover this.

Page 25: *“5.4. Vertical Integration Could Facilitate Registry Innovation”. Ownership separation may work to disadvantage new or narrowly focused registries by making innovation in registry services harder to implement. Large registrars that serve a TLD may effectively have “veto power” over registry*

proposals for new marketing strategies or applications. If the registry's volume is too small to justify the cost to registrars of implementing the proposal, the registry may be forced to abandon it..... As a

result, smaller registries may be unable to successfully differentiate their services and compete more effectively with VeriSign in ways that would potentially benefit registrants”.

We agree.

Page 27: *“The potential benefits of vertical integration briefly identified in Section 6 offer a clear argument in favor of a relaxation of the vertical separation requirement where the competitive concerns described above are not strong and there is no price cap. We would encourage ICANN to consider a full liberalization of this requirement.”*

Again, we agree.

After the report convincingly argues why ownership separation is not desirable in new TLDs, pages 28 and 29 then make the contradictory recommendation that such liberalization should only occur for TLDs where names are not available to the public (“Single Owner TLDs”). The rationale for this contradictory recommendation appears to be ‘sweeping reform may not be feasible’ and “reform once taken would be difficult to reverse”.

We support the conclusion of the report – for new TLDs, registries should be allowed to own registrars, and vice versa.

We think CRA have made a strong case why cross ownership of registries and registrars should be allowed in new TLDs, as they were in many existing TLD introductions (such as .biz and .info cited in the report) in the past. We cannot think of a reason why this is ‘not feasible’ and the report makes no argument why it is not feasible. It seems to us the bulk of the report argues why it is both feasible and desirable.

As a final comment on this issue we also note that many comments opposing vertical integration, and opposing price freedom for new registries, are based wholly on concerns that similar provisions will flow to .COM and existing TLDs. These concerns come from the ‘Equitable Treatment’ clause in the COM agreement. We think these concerns are unwarranted. The clause makes clear that COM will be treated equitably “*unless justified by substantial and reasonable cause.*” We think the size and tenure of .COM is more than adequate justification for non-equal treatment regarding pricing and other provisions. Therefore, for these and the other reasons stated in the report which we cite above, we agree with the following conclusion of the report: “*For registries operating under a price cap, the current regime of vertical separation and equal access requirements should be maintained.*”

Section 2.10 Audit

This section appears to overlap with other audit sections and is inconsistent in relationship to the number of audits, the amount of notice, and the party to bear the cost. We recommend all audit provisions be consolidated into a single section so applicants can fully understand the requirements. Additionally, we believe 5 days is insufficient notice of an onsite visit. We request this be made 15 days.

Section 4.3 Term and Termination

In the event that Section 7 stays ‘as is’ in the contract, Registry Operator should have a termination right in the event that ICANN makes changes to the Registry Agreement which changes would impose costs on

Registry Operator, including fees to ICANN, that make continued operations by Registry Operator overly burdensome, impractical, or cost prohibitive.

Section 5.2 Arbitration

We believe the following provision, is too severe and should be deleted: *"In any proceeding, ICANN may request the appointed arbitrator award punitive or exemplary damages in the event Registry Operator shall be shown to have been repeatedly and willfully in fundamental and material breach of this Agreement."* Alternatively, should ICANN believe the provision is necessary in order to fulfill its duties under the agreement, the section should be made mutual: *"In any proceeding, either party may request the appointed arbitrator award it punitive or exemplary damages in the event the other party shall be shown to have been repeatedly and willfully in fundamental and material breach of this Agreement."* In the event that this section is not made mutual, the following language should be deleted from Section 5.3: *"and punitive and exemplary damages, if any, in accordance with Section 5.2"*. If Section 5.2 is changed to make mutual, ICANN should decide on either "or" or "and" as the conjunction of choice between the terms *"punitive"* and *"exemplary."* The current conjunctions found in Sections 5.2 and 5.3 are inconsistent with each other.

Also, the provision requiring that all litigation involving ICANN, presumably even if they are only named as a necessary party, take place in a court in LA County is unrealistic since a third party defendant may not be subject to personal jurisdiction in LA County. By agreeing to this provision, an applicant may be, in effect, waiving its right to seek relief against third parties from the courts.

Section 6.1 Registry Level Fees

We think the proposed annual fee of \$75,000 or 5% of sales, whichever is higher, is unjustified by data, unreasonable given the workload on ICANN, and anti-competitive. Although there is detailed justification for the \$185,000 Evaluation Fee there is no data justifying the Annual Registry Fee. Given that all new registries will operate under very similar contracts, and that ICANN policies will generally apply to all registries, we think it extremely unlikely ICANN will incur anything like \$75K+ per year in costs per TLD. In our opinion, based on known work to manage its contracts and policies, ICANN will spend below half of this amount per TLD. We think the costs to ICANN are even less when one registry entity has multiple TLDs because for ICANN, it is more efficient to deal with one entry and say 3 TLDs, than for it to deal with 3 separate entities each with its own TLD.

We also think the proposed fees are anti-competitive. On a proportionate basis they are considerable higher than the fees imposed by ICANN on its existing TLDs. New TLDs will compete with existing TLDs, especially .COM, yet ICANN propose a higher fee burden on each new TLD than they apply to COM. We think ICANN should incent new TLDs with lower fee burdens than those paid by the incumbent registries, not higher fees.

If ICANN is concerned about high workload during the first 12 months of new TLD implementation we recommend the \$75,000 or 5% remain in place for year-one and **that this burden is reduced to \$30,000 USD per TLD or 2.5% in subsequent years.**

In addition, the 5% fee applies to *"all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration."* We think we understand ICANN's objective here (to prevent gaming by the registry so it does not pay its fair share of registration revenue to ICANN) but this language will have hugely dampening effects on innovative proposals that bundle domains with other, high priced goods. Hypothetically, if Ford Motor Company wanted to obtain .FORD and offer a domain with each car sold ICANN would require them to pay

ICANN 5% of the price of each motor vehicle. We think this language needs to be amended to protect registries that legitimately bundle domains with other services.

Finally, the contract is not explicit about when the fee 'clock' would begin. We recommend the clock start at TLD launch, which we define as the day registrations are first offered for registration.

Article 7 Changes

Article 7 should be deleted in its entirety.

This is an extraordinarily onerous provision. It effectively lets ICANN staff make any changes to the contract on 90 days notice. The burden is then on two thirds of affected registries to successfully persuade the Board the changes are not required for stability or security.

All registries are subject to consensus policies and this has been a well established means for ICANN to introduce needed changes to contracts. This new provision short-cuts the consensus method and introduces terrible business unpredictability and risk to registry operators. Registry operators should only have to agree to conform to new bottom-up consensus policies in which they had the option of policy development.

If this Section 7 must stay in the Registry Agreement, then we request the following changes:

1. The term "Affected Registries" is unclear and should be defined. We believe that "Affected Registry Operator" should be defined as "a TLD Operator that is materially impacted by such proposed change."
2. ICANN should then provide notice to those TLD Operators that ICANN has determined are the Affected Registry Operators who are entitled to vote.
3. ICANN should publish a list of those TLD Operators that ICANN has determined are the Affected Registry Operators.
4. There should be a challenge process and dispute resolution process in the event that a party does not agree with ICANN's assessment of who constitutes an Affected Registry Operator.
5. The vote to disapprove the proposed changes to the Registry Agreement should be 51% of the Affected Registry Operators, not 2/3 vote.
6. In the event that the proposed change is disapproved by the Affected Registry Operators, the ICANN Board vote to override such disapproval shall be by 2/3 vote of the ICANN Board.

Section 8.1 Indemnification

Should be made mutual or should be deleted.

Section 8.5 Amendments and waivers

Should be amended to make it consistent with the deletion of Article 7, specifically the following language should be deleted: "Except as set forth in Article 7"; and "Irrespective of the provisions of Article 7"

Section 8.7 General Notices

Should be modified to add the following language at the end of the sentence ending in "at the designated URL": "and an electronic mail sent to the Registry Operator announcing the posting."

Special Terms for Community Registries

Successful Community applicants will be bound by special requirements for their ‘Dedicated Registration Policies’ (e.g. registrant eligibility and authentication, name selection and use restrictions). The contract should address these special requirements and should make clear the restrictions can only be changed in extreme and unusual circumstances, and then only due to compelling and unforeseen changes in the community itself, rather than any unforeseen changes in the registry operator’s business model.

Registry Use Names

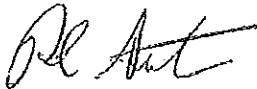
There does not appear to be a provision in the contract for registries to use second level names for their own purposes.

Attachment 7: Rights Protection Mechanisms

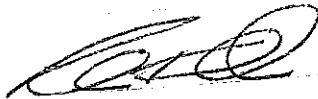
“Registry Operator is responsible for developing and implementing processes or mechanisms for the purpose of protecting legal rights of third parties”

Strict interpretation of the word ‘developing’ would mean each registry must create its own, new method for rights protection. The intent here is probably that registries can use methods previously developed by others. We recommend the term ‘developing’ be removed from this sentence.

Regards,



Paul Stahura
Chief Strategy Officer
Demand Media, Inc.



Richard Tindal
Senior Vice President, Registry
Demand Media, Inc.