

IPC Comments on FY 12 Operating Plan and Budget

June 16, 2011

The Intellectual Property Constituency (“IPC”) appreciates this opportunity to comment on the draft FY 12 Operating Plan and Budget (“Budget”). See <http://www.icann.org/en/financials/proposed-opplan-budget-v1-fy12-17may11-en.pdf>. These comments build on those submitted by IPC on April 4, 2011 regarding the “proposed framework” document for the FY12 budget, see <http://forum.icann.org/lists/op-budget-fy2012/msg00006.html>.

1. The Process

At the outset, IPC reiterates its view that the process ICANN uses to prepare its budget and operating plan lacks accountability and transparency, and raises serious questions about ICANN’s fulfillment of its obligations in this regard under the Affirmation of Commitments. As spelled out in our April 4 comments, ICANN is not revealing its more detailed budget plans and spending priorities until considerably later in the annual process than it used to do. The community’s first opportunity for meaningful comments now closes June 17, barely a week before the Board is scheduled to approve the budget, and less than two weeks before the beginning of the FY12 fiscal year (July 1). We fully expect to be told at the Singapore meeting that it is too late to make any significant changes in the budget and operating plan. Thus, the following comments are submitted in order to make our concerns plain on the record, whether or not they will be heeded.

2. Contract Compliance

Now that the veil has been lifted to some extent, we are glad to see that ICANN plans to increase its expenditures on contract compliance by 25% over the FY11 budget, that it will hire additional contract compliance staff, and that it will seek to improve flawed existing programs such as the Whois Data Problem Reporting System (Budget, pp. 14-15). IPC has long enjoyed a close working relationship with ICANN contract compliance staff, which we look forward to maintaining and strengthening in FY 12. It is essential that this staff be provided not only the needed financial resources, but also the legal and political support required for them to carry out their job effectively.

We are disappointed, however, that we could not find any reference to the dramatically increased challenges to contract compliance that will inevitably flow from the roll-out of hundreds or more new gTLDs. In chapter 7 of the budget, which describes how the ICANN budget will change if the new gTLD program launches in FY 12, contract compliance is not mentioned. In other words, there seems to be no plan to spend anything in FY12 on contract compliance in the new gTLDs.

We understand that, even if the program does launch in FY12, few if any contracts with new gTLD registries can be expected to come into force by June 30, 2012. If, however, in the

following fiscal year, hundreds of new contracts will become operative, it is unrealistic to expect the contract compliance function to come immediately up to high speed from a standstill.

Furthermore, there is an important role for contract compliance to play even during the early phases of the new gTLD launch. During and after the “communications period” that will precede opening of the new gTLD application window, contract compliance efforts would help in educating would-be new gTLD registry operators about what contractual obligations they will take on and how compliance with them will be enforced.

As discussed below, we believe that some of the \$18 million surplus that ICANN will accrue in FY12 from the new gTLD launch should be allocated to this critical function, beginning in FY12.

3. Policy Development

We learned for the first time from the budget (page 21) that ICANN plans to increase its spending on policy development support by only 6.3%. IPC leadership was also advised in a June 10 phone call from the ICANN COO and Controller that all IPC’s requests for additional budget support for its activities had been rejected, in part because some of these support services would be provided in the “toolkit” being offered to GNSO stakeholder groups and constituencies. We take this as a commitment that the “toolkit” services will be fully deliverable to IPC and the other constituencies and stakeholder groups once FY12 begins, and look forward to working with staff assigned to provide these services (and/or to compensate IPC if it procures these services elsewhere).

Since the budget provides relatively little detail on how these policy development funds are planned to be spent, we urge ICANN to take into account, in setting the final budget figure, that the recently launched UDRP review may require some expenditures for expert services, travel, and other costs.

4. ccTLD revenue projections

In our April comments, we asked why, if ICANN expected to collect only \$835,000 from ccTLDs in FY 11, it was budgeting for \$1.6 million in collections again in FY12. ICANN’s response was to change the projected FY11 collections figure to \$1.6 million, with the statement that its earlier projection was “conservative” and that it would “vigorously pursue additional ccTLD contributions through the end of the fiscal year in an effort to meet the budgeted amount.” (Budget, page 68). We look forward to learning how much ICANN actually collects from ccTLDs in FY11.

5. ATRT implementation

IPC strongly supports full implementation of the recommendations of the Accountability and Transparency Review Team, and notes that ATRT implementation seems to account for the lion’s share of proposed FY12 project work in the budget, amounting to \$2.6 million (Budget, page 30). Further detail would be very useful in evaluating this budget proposal. For example, the budget states that four additional full-time personnel will be needed to implement the ATRT recommendations, but does not spell out what these new employees would do, and to which

ATRT recommendations these new positions correlate. The same is true of the asserted need for additional professional services (other than translation, which is listed separately) to carry out “numerous ATRT recommendations.” According to page 48 of the budget, these professional services will cost \$1.2 million, or nearly half the total project expenses. Page 49 lists three areas in which these services will be procured, including “Public Comment Forum Improvements.” IPC looks forward to receiving more detail on how ICANN plans to implement the ATRT recommendations and how this impacts ICANN’s budget.

6. Successor to Whois

Although IPC members have participated actively in a number of ICANN initiatives regarding improvement of Whois, we learned for the first time from the budget document that ICANN plans to “develop ... a new Registration Data Directory Service .. that will not be limited by the issues that current Whois has (e.g., supports internationalized registration data) and is extensible to support a wide array of policies present and future.” (Budget, page 32) While in general we view this as a positive step, and are supportive of efforts to overcome the technical shortcomings of the current Whois system, we look forward to learning more about what role ICANN staff will be playing in this initiative; how it relates to ongoing ICANN work such as the Internationalized Registration Data Working Group and the planned Whois survey based on the Whois inventory report; the respective roles of ICANN, the Internet Engineering Task Force, and other entities; and the anticipated timetable for development of the service.

7. Professional services

IPC appreciates receiving the detailed list (pages 48-51) of topics to be addressed in this fast-growing area of the ICANN budget. We note this includes \$1 million for “Whois and other studies,” which includes an unspecified amount for “economic studies to complete new gTLD implementation.” Since the ICANN Board has apparently made the decision to shelve, at least for now, the advice of its economic consultants for a more focused and targeted new gTLD rollout, IPC would like to know more about what further economic studies ICANN plans to commission in FY12 with respect to new gTLD implementation, and what will be their focus and goals. (As noted above, since by the end of the coming fiscal year few if any new gTLD registries can be expected to commence operations, these studies realistically cannot be oriented toward evaluating their operations).

8. Revenue from new gTLD launch

In its April comments, IPC noted that about \$18.7 million of projected new gTLD application fee revenue remained unaccounted for in the budget framework presented at that time. The budget document now under review clarifies the fate of this sum, but raises more questions.

According to figure 7-2 on page 61 of the budget, without a new gTLD launch, ICANN’s projected operating income for FY12 is \$58,000. If the new gTLD launch takes place, ICANN expects to have operating income of \$18,743,000. This sum is not expected to be spent in the further new gTLD application processing activities expected in FY 13; \$17.625 million is already set aside for that. Nor does this figure represent a sum that is sequestered for risk

management purposes; there is a separate \$30 million line item for that. Nor is any of this money going into the currently under-funded Reserve Fund; according to page 57 of the budget, this falls under the “recovered historical costs included in application fees,” which is a separate line item in Figure 7-2.

The budget certainly suggests that ICANN is simply going to treat the \$18.7 million excess of revenue over (current and anticipated) expenses in the new gTLD program as an asset that it can, in the future, spend for anything within the organization’s mission. If so, this casts doubt on a number of statements repeatedly made about the new gTLD program, and reiterated again on page 60 of the budget:

- “The new gTLD program is a revenue-cost-neutral program.” The budget figures contradict this, showing an \$18.7 million excess of revenue over costs.
- “The fees collected and the costs expended for new gTLD applications are to be accounted for separately from ICANN’s general funds.” Figure 7-2 contradicts this statement by treating the \$18.7 million excess as a net asset of the corporation, commingled with the \$58,000 operating income ICANN projects in the absence of a new gTLD launch.
- “It is expected that through the end of the application round, expenses will match the proceeds of evaluation fees.” This statement would be true only if ICANN anticipates that expenses for the impending new gTLD round that accrue after June 30, 2013 will amount to \$18.7 million (in excess of the \$30 million risk management reserve). On the surface, at least, this appears unlikely for a process that launches some 18 months or so earlier (around the middle of FY 12).

IPC urges ICANN to clarify, as promptly and as fully as possible, what it plans to do with the \$18.7 million of excess revenue that it projects to harvest from the new gTLD program. IPC’s view is that a considerable proportion of this sum – perhaps one-third -- ought to be allocated to the huge task of enforcing the hundreds of new contracts that the corporation will be entering into with new registry operators (and, in all likelihood, with new accredited registrars as well) as a result of the new gTLD launch. Depending on whether ICANN is of the view that these funds must be allocated within the new gTLD program, ICANN could either allocate some of these funds to the existing contractual compliance budget, or create a line item within the gTLD budget to track and account for the additional contractual compliance costs that will arise as a direct result of the program

Consideration should also be given to using some of this excess revenue to increasing the level of support provided to components of the non-contracted party house of the GNSO. (Based on the chart on page 19-20 of the budget, as supplemented by the decision orally communicated to IPC leadership on June 10 to deny budget request FY12-42, it appears that none of the ten funding support requests made by components of this house were granted.)

Thank you for considering the views of the IPC.

Steve Metalitz, IPC Vice President