

VIRTUALAW LLC

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By E-mail to: op-budget-fy13@icann.org

Internet Corporation for Assigned Names and Numbers (ICANN)
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601

Re: ICANN Draft FY13 Operating Plan and Budget

Dear ICANN:

I am writing on behalf of the members of the Internet Commerce Association (ICA) in regard to ICANN's comment period on the Draft FY 13 Operating Plan and Budget. This Comment Period was opened on May 1st and closes today, May 24th.

ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNS) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers.

Executive Summary

- ICA does not oppose funding for final implementation of the Trademark Clearinghouse but questions whether \$438,000 is actually needed for this task, and therefore requests a more detailed explanation of how that figure was arrived at and what expenditures are contemplated.
- ICA strenuously opposes the \$175,000 allocated for URS "reconfiguration" as the contemplated process is vague and undefined, appears to represent the reopening of key URS policies through a non-standard mechanism rather than being mere technical implementation, will likely cause substantial delay in the opening of new gTLDs, and has been arrived at through closed staff consultation with a narrow group of trademark-related interests rather than open dialogue with a broad cross-section of community members interested in fair and effective implementation. This budget item should be struck in its entirety.
- Given that ICANN will realize a net gain in assets of at least \$31 million from the first round of the new gTLD program – and that the actual amount could be double or triple that conservative estimate – we believe that a PDP regarding the allocation and use of these substantial excess funds should be initiated during FY13.

Allocated Sums for New Rights Protection Mechanisms (RPMs)

At page 59 the Draft FY 13 Budget contains the following provisions:

23. Trademark Clearinghouse – \$438K

Implement Trademark Clearinghouse to support rights protection mechanisms in New gTLD registries by working with service providers to build key Clearinghouse processes, complete required contract execution with service providers, and execute process testing phase with participation from stakeholders along with communications and outreach activities.

24. Uniform Rapid Suspension (URS) – \$175K

At present there is a significant gap between the features specified for the URS procedure and the desired cost. In order to bridge this gap we will: hold two summit sessions to reconfigure the URS to arrive at a lower cost model (one session in FY12 budget and another in this FY13 plan), conduct a process to develop and finalize URS Model in consultation with current UDRP providers and community members; and conduct RFP based on URS Model and select URS

providers. The goal is have a URS program in place and providers contracted and onboard by June 2013.

The ICA has no objection to the allocation of funds to facilitate the final implementation of the Trademark Clearinghouse (TMCh). An implementation Advisory Group (IAG) was established for the TMC between the Singapore and Dakar meetings and I have been monitoring and participating in it on behalf of ICA. The dedicated members of that IAG have accomplished substantial and beneficial work, although additional fine-tuning and final launch details of the TMC need to be completed along with the selection of one or more service providers. We do however question whether nearly one-half million dollars is required for these final TMC implementation steps and request that ICANN provide the community with a far more detailed explanation of how this budget figure was arrived at and what contemplated activities it encompasses.

On the other hand, the ICA strenuously objects to the request of \$175,000 earmarked for "URS Summits" and related matters and strongly urges that this item be entirely struck from the Proposed FY 13 Budget. Our reasons include the following:

- The proposed steps will lead to further unwarranted delay in implementation and may well delay the opening of new gTLD registrations to the general public, given that the URS is a required RPM for all new gTLDs. ICANN has wasted nearly one year without taking any meaningful steps toward an open and transparent URS implementation process similar to that which is nearly complete for the TMC. We asked ICANN staff in public session at the October 2011 Dakar meeting when such implementation would commence and were told that it would be initiated the following month; that assertion was not borne out. Similarly, we raised the same question with more urgency at the March 2012 San Jose meeting and were told that a request for proposals (RFP) for URS providers would be issued the following month; again, no such action was taken. While the above referenced budget item states that "The goal is have a URS program in place and providers contracted and onboard by June 2013," our overall experience with ICANN processes and with the workings of the TMC IAG leads us to believe that this goal is unduly optimistic and that the proposed actions could well delay the contractual securing of URS providers and the opening of new gTLDs until well into 2014 – especially since what is actually contemplated is not implementation of the existing URS policy but the broad reopening of that policy. We note that past community discussions of URS elements have been extended and divisive.

- One of the "summits" or substitute event is designated to occur in FY12, yet no explanation or justification is provided in regard to what monies in the current FY12 budget will be utilized for that event.
- The "Summits" are but a placeholder for an unknown process with unidentified participants. Following the publication of the Proposed Budget the GNSO Council, concerned that "reconfiguration" of the URS might intrude upon its gTLD policymaking role, requested a fuller explanation of the "Summits" from ICANN staff in advance of its May 10th meeting. In response, Kurt Pritz, ICANN's Senior Vice President for Stakeholder Relations, sent an e-mail to the Council providing this explanation of the Summits line item in the Budget (<http://gnso.icann.org/mailing-lists/archives/council/msg13030.html>):

Uniform Rapid Suspension:

There is a budget line item identified as "URS Summit" implementation work conducted on the URS to date indicates that the implementation will not attain the cost target of \$300-\$500 in URS fee per case. This is based on discussions with WIPO staff, direct communication with the IPC, and examples understood from the ICM registry and Nominet. Because the fee target is a primary goal of the URS, additional work and study should be undertaken to determine if amendments to the program might attain the fee goal and retain the safeguards and other features of the program. This study must be undertaken by a community group. While the scope of the effort is not yet defined, it was necessary to reserve resources for the work in the ICANN's FY13 budget. The line item in the budget is the placeholder for those resources while the best way to accomplish the work can be designed. Again, the work will be done through a bottom-up, community discussion similar to the work done to create and review the URS in the first instance. The timing of the budgeting process required that we create the line item before planning for this work could be drafted and worked through the community.

Parsing this explanation we can glean the following:

1. The \$175,000 allocated to the "Summits" in the budget is just a placeholder for the resources estimated to be required for reexamination and possible reconfiguration of the URS, and no commitment has been made to hold "Summits" nor have any details of their possible operation been developed. No budget funds should be allocated to a "slush fund" for such an amorphous and undefined process.

2. URS implementation work has been done to date but has not been open to the full community. ICANN staff have apparently discussed implementation of the URS with only a narrow select group of trademark interests, including WIPO and

the IPC, but not with other third parties and ICANN constituencies having a strong and substantial stake in its operation. The decision that the URS requires "reconfiguration" has been made by staff without any attempt at discussion with all concerned members of the community, and the "implementation" process that has taken place to date has been closed, opaque, and in our view illegitimate.

3. Any work and study undertaken to reconfigure the URS will ostensibly seek to balance the goal of a low fee with retention of safeguards and other features. However, it is the inability to reach the unrealistic price goal of \$300-\$500 per filing (including multiple filings for names owned controlled by the same registrant) that is clearly driving this "reconfiguration" concept. The fact that the existing URS policy cannot be implemented at that price point is hardly a surprise, as ICANN staff conceded under public questioning in Dakar that both WIPO and NAF had already indicated that they would not bid to be URS providers at that price. In any event, policy should dictate pricing and not the other way around (because adequate and credible due process should be the paramount concern), yet this budget item clearly contemplates policy "reconfiguration" driven by pricing concerns. Overall, the scope of the effort to be undertaken has not yet been defined and therefore no realistic budget estimate can be made for it; further, the proposed reconfiguration is at odds with ICANN's standard policy development and refinement process.

4. Further study of the URS will be undertaken by a "community group" and "done through a bottom-up, community discussion similar to the work done to create and review the URS in the first instance". We are concerned that the reference to "the work done to create and review the URS in the first instance" refers to the initial work of the IRT – which we believe did not have adequate breadth of community participation and operated in violation of relevant ICANN policies, particularly in regard to transparency – as well to the follow-up work of the STI-RT, which was formed after community outcry over the IRT's methodology, composition, and recommendations. This IRT/STI-RT model is not one that should be followed as it was significantly flawed. Further, that prior process was for the purpose of formulating RPM policy, while we should now be far past that policy stage and well into practical implementation of the existing URS policy if new gTLDs are to open in any reasonable time frame.

To be clear, ICA has no desire to make the URS unnecessarily expensive for rights holders, who have legitimate concerns about potential cybersquatting at new gTLDs, but we remain highly skeptical that a very low fee is compatible with the retention of adequate safeguards for registrants. In our view, the first thing that is now required is a community-wide discussion of whether the URS should be reopened at all, or whether the price of a URS procedure should just be

adjusted to accommodate the present policy model. It is jumping the gun to set ICANN on a course to reconfigure the URS based solely on discussions with the IPC and WIPO. At a minimum, details and documentation should be provided to the entire community in regard to what aspects of the current URS model require higher pricing, and exactly what the cost estimate is for the current model. In short, reopening the URS at this point in the new gTLD launch process is a critical threshold policy question that should be decided by the entire ICANN community that participated in shaping the URS – and the URS should only be reopened for reconfiguration if there is a community consensus to do so. Budgeting for a “reconfiguration” process in advance of and as a substitute for such community consideration is wholly unwarranted.

Utilization of Excess Funds received from the New gTLD Program

While the public revelation of the total number of first round new gTLD applications has been delayed due to unanticipated problems with the TAS system, ICANN has already noted that more than 2,000 registrations in the TAS system have been made. Therefore, the potential budget implications of such a large number of applications are best described by the “Scenario: 2,000 Applications” chart found at page 64 of the Proposed Budget. That chart indicates anticipated gross new gTLD application fees totaling \$368 million plus ICANN’s \$2 million applicant support payment, and net application fees (after refunds of approximately \$33 million) of \$337 million.

We believe that the anticipated level of refunds is exaggerated and will not be borne out in reality. In addition, the Operating Expenses portion of that chart anticipates \$2.5 million for string contentions – but the chart contains no estimate for the proceeds of string auctions, which we believe could well total several tens of \$ millions for the first application round. We therefore estimate that ICANN’s actual net income from the first round will be in the range of \$375-\$400 million. We also believe that your estimated total of approximately \$150 million in net operating expenses is very much on the high side, especially in regard to the \$120 million allocated to undefined “Risk Costs” (presumably potential litigation expenses – although we recognize that such projections are prudent for budgetary purposes). Nonetheless, you conservatively estimate a net gain in assets of only \$31 million from the first application round – while we would guess it will more likely be substantially higher, perhaps even double or more.

On page 67 of the Proposed Budget you estimate that Total Historical development costs for the new gTLD program have been \$29.9 million to date. Those costs have been recovered twelve times over by the gross new gTLD applicant fees that have been received – and the very conservative net asset gain of \$31 million estimated in a 2,000 application scenario is already net of all those expenses being fully recovered.

The text on page 67 then continues as follows:

Excess Funds

Although the New gTLD Application fee structure was calculated based on the principles of cost recovery, the possibility exists that a surplus of funds may be realized either during the application processing period or upon its completion. This surplus may exist as a result of any of the following:

- Unused risk contingency funds
- Lower than expected application processing costs
- An over-allocation of historical development repayment funds, and
- Any potential auction proceeds

In the event that the New gTLD Program results in a surplus of funds from any source, staff will initiate a policy development process to define with the community the purpose and mechanism of administration of such excess. (Emphasis added)

Given that the first round of the new gTLD program will result in a minimum net addition to ICANN assets of \$31 million, and quite possibly a gain of as much as \$50-\$100 million, we believe it is clear that substantial excess funds will exist. Therefore, ICANN staff should initiate a PDP during FY13 so that the full community can engage in discussion of how these very considerable excess funds should be utilized.

Conclusion

ICA appreciates this opportunity to file this reply comment regarding the proposed FY 13 Budget.

In particular, we reemphasize our opposition to the earmarking of any funds for placeholder URS "Summits" as they are far too undefined and appear to be a non-standard mechanism for reopening URS policy matters, rather than devoted to actual implementation of the existing policy that has been adopted and affirmed by the community and the Board after protracted discussion and consideration.

Thank you for considering our views in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Philip S. Corwin".

Philip S. Corwin

Counsel, Internet Commerce Association