Comments of Intellectual Property Constituency of the GNSO
November 17, 2011

The IPC appreciates this opportunity to comment on the draft 2012-2015 Strategic Plan. These comments do not attempt to respond comprehensively to the document but emphasize areas that IPC believes are particularly important challenges for ICANN to meet in the coming three years. Most, though not all, of these are clustered in the focus area labeled "Competition, consumer trust, and consumer choice."

"Focus Areas" versus "Themes"

In the "One World. One Internet." section of the draft strategic plan, ICANN's Vision and Mission encompasses the four listed "focus areas" but also lists seven different "key themes". The IPC encourages ICANN to give thought to the appropriate relationship between the "focus areas" and the "themes" in order to bring the "key themes" into the realm of objectives that can be measured. Does each "key theme" fit within a focus area? Do certain "key themes" run across more than one "focus area"? Is a "key theme" really an objective within a focus area and if so, can concrete metrics be applied to that "theme" or "objective"? If not, what is the meaning and significance of these "themes" in the implementation of the overall Strategic Plan?

Influence versus Control

The IPC agrees with the principle that goals should be written to properly reflect an Internet eco-system where ICANN's role ranges from one of control to one of influence. We therefore encourage ICANN to involve the community in adopting very concrete and measurable strategic metrics first and foremost in areas where ICANN is well able to assert control in furtherance of its Vision and Mission and in furtherance of the Affirmation of Commitments.

The IPC appreciates that the Strategic Plan contains some specific, measurable Strategic Metrics, particularly with respect to items falling within the "DNS security and stability" focus area. However, similarly specific and quantifiably Strategic Metrics should be adopted throughout the Strategic Plan, and particularly in connection with several critical issues that are recognized in the Strategic Plan, but for which no truly measurable Strategic Metrics are articulated. Furthermore, in some areas the draft strategic plan has been overtaken by important initiatives announced in Dakar by the ICANN board under its new leadership (see items 3 and 4 below).

Specific areas where the IPC believes ICANN should focus its strategic planning efforts and where it is well able to exert control are:

1. Maintenance of Accurate and Accessible Whois Records as required by the AOC in accordance with the final recommendations of the Whois Policy Review Team.

2. Timely and Effective Implementation of Rights Protection Mechanisms in Connection with the Launch of New gTLDs, and Initiation of a Strategic Metrics Working Group across the

Stakeholder and Constituency groups that would yield concrete measures of ICANN's stated goal of encouraging competition and innovation in the new gTLD process.

3. Amendments to the Registrar Accreditation Agreement to Provide for Registrar Accountability and increased ICANN contractual enforcement powers, in accordance with the ICANN Board Resolution on this matter passed in Dakar.

4. Effective Adoption and Enforcement by ICANN of new Conflict of Interest Standards for the ICANN Board and Staff, in accordance with the Board Resolution passed in Dakar.

IPC adds some specific comments on these four points:

1. Whois: Over the 12 years of its existence, ICANN's record as steward of the critical Internet resource labeled as "Whois data" has been far less than satisfactory overall.   Whois data accuracy remains poor; the proliferation of unregulated "privacy"" and "proxy" services has exacerbated the accuracy problem and had the effect of making the Whois service much less useful than before; and the persistence of the "thin registry" model for .com and .net has had significant detrimental impacts on public access to Whois. ICANN should commit to rapidly reviewing and acting upon the recommendations of the Whois Policy review team when it reports in early 2012. It should also dedicate itself to concrete steps to improve Whois data quality and accuracy, and to re-measuring the accuracy level of gTLD Whois data within the next 3 years, using the 2009 NORC study as a baseline.

2. New gTLD Program Metrics: Crucially, the "Competition, consumer trust and consumer choice" focus area lacks meaningful and measurable Strategic Metrics relating to the launch of the New gTLD Program. The Strategic Plan rightly recognizes the importance of "benchmarking the effect of new gTLDs on competition, consumer choice, malicious conduct, rights protection and other considerations." [Strategic Plan, p. 10] However, the Strategic Metrics tied most closely to that goal are "[i]mplementation of measures of success that align with ICANN core values and original program objectives" and "[m]easure effectiveness of Rights Protection Mechanisms in New gTLD Program." [Strategic Plan, p. 11] Not only are these Strategic Metrics vague and incomplete (e.g., they do not specifically reference benchmarking with respect to competition, consumer choice, or malicious conduct), these "metrics" are not actually measurable. No specifics are provided regarding *when* or *by whom* these critical evaluations are to occur, let alone *how* to measure or evaluate the relevant issues. While the IPC recognizes the challenges presented by trying to articulate measurable metrics for these issues at this time, it also believes that the Strategic Plan should, at a minimum, set forth a more specific plan for how to develop a meaningful set of metrics to measure the effect of new gTLDs on competition, consumer choice and malicious conduct, as well as the effectiveness of RPMs in the New gTLD Program.

The IPC accordingly recommends that the "Competition, consumer trust and consumer choice" focus area include a Strategic Metric wherein ICANN commits to initiate the community development of specific, quantifiable metrics to measure the effect of new gTLDs on competition, consumer choice and malicious conduct, as well as the effectiveness of RPMs in the New gTLD Program, with such metrics to be adopted by the middle of 2013. The Strategic

Metric should further provide that the post-launch study based on these metrics be conducted "one year after the launch of the 75th new gTLD in the [first] round," which was the timeline provided in the GAC comments on the Applicant Guidebook (15 April 2011 version) for a post-launch review of the Trademark Clearinghouse, which the Board agreed to undertake in its "Rationale: Remaining areas of difference between ICANN's Board and Governmental Advisory Committee regarding implementation of the New gTLD Program" (20 June 2011).

3. <u>Contract Improvement and Compliance:</u> The draft strategic plan lists "lower registration abuse" as a strategic objective. The IPC believes that ICANN has more "control" in this area than is suggested by the language adopted in the draft Strategic Objective. The draft speaks of ICANN's goal to "support projects" that lower abuse and projects that "have the potential" to "improve the contractual compliance regime for gTLD registrars and registries". In point of fact, because no registrar or registry may maintain its accredited status with ICANN or be awarded a contract unless ICANN agrees to the award, ICANN has tremendous control in this arena. Thus, the IPC believes that dramatic results are achievable within the period of the draft Strategic Plan.

In this regard, the IPC applauds the ICANN's Board's recent resolution adopted in Dakar with the encouragement of the GAC to address needed amendments to the RAA which will hopefully be designed to increase contractual compliance and enforcement measures, thereby increasing consumer trust in the Internet. The IPC notes that ICANN compliance staff has stated on numerous occasions that its compliance enforcement efforts are frustrated by the fact that the compliance obligation they are seeking to enforce is either "not in the agreement" or "not understood by the registrar/registry staff." The simple answer to these problems is to put strong obligations in the agreement and to require the contracted party to appoint a Compliance Officer who is responsible for knowing and educating employees regarding compliance obligations. This is a model that has operated successfully across numerous industries that prefer self-regulation to increasing government regulation.

4. <u>Conflict of Interest:</u> If ICANN is to contribute to "a healthy Internet Governance eco-System" – the fourth Focus Area in the draft Strategic Plan -- it must become far more sensitive to conflicts of interest than it has been up to now. In this regard, IPC applauds the strong commitment stated by the ICANN board, under its new leadership, in Dakar, to develop within ICANN a "gold standard system" for avoiding, detecting, disclosing, and resolving conflicts of interest and the appearance of impropriety. The draft strategic plan, which was apparently drafted prior to the most recent and most forceful affirmation of this commitment, should be updated to reflect this as a strategic priority for the organization.

Thank you for considering the views of IPC in the development of the strategic plan.

Respectfully submitted,

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