

**SUBMISSION OF DNSO INTELLECTUAL PROPERTY CONSTITUENCY
To ICANN Evolution and Reform Committee
April 29, 2002**

The Intellectual Property Constituency (IPC), one of the seven constituencies of the Domain Name Supporting Organization (DNSO), charged with the responsibility of advising the ICANN Board on policy issues relating to the management of the domain name system, is pleased to respond to the ICANN Evolution and Reform Committee's request for public input on the ongoing review of ICANN's mission. We intend to supplement the following summary submission in the weeks ahead.

ICANN's Mission

ICANN's mission is to coordinate technical and policy functions of the DNS in order to promote a safe, stable and commercially viable domain name system, promote competition, and achieve broad representation of global Internet communities. As the 1998 "White Paper" clearly stated, "In order to promote continuity and reasonable predictability in functions related to the root zone, the development of policies for the addition, allocation, and management of gTLD's ... should be coordinated."¹ These coordinated functions stand in stark contrast to the *ad hoc* basis on which many of these key issues were handled by U.S. government contractors and grantees, and a wide network of volunteers. While this informal structure represented the spirit and culture of the research community in which the Internet was developed, the growing international and commercial importance of the Internet necessitated the creation of a technical management and policy development body such as ICANN. From the outset of the process of privatizing the domain name system, well-defined intellectual property considerations essential to the coordinated functions identified in the White Paper have been a consistent part of ICANN's policy functions. Consistent with the framework set out by the White Paper, ICANN has implemented the following examples of essential coordinated functions:

- * Adoption of gTLD registry and registrar accreditation agreements that are the basis for assuring global standards for "access to searchable databases of registered domain names that provide information necessary to contact a domain name registrant when a conflict arises" that provide consistent information in technical databases available to anyone on the Internet and included in all registry databases.
- * Development and consistent implementation of the Uniform Domain Name Dispute Resolution Policy (UDRP) in domain registration and registrar agreements.
- * Promulgation of consistent domain name registration policies, including provisions aimed at assuring the accuracy and reliability of registrant contact data.

¹ "Management of Internet Names and Addresses", US Department of Commerce Statement of Policy, June 5, 1998 at page 18. ("White Paper"). See: http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm

These examples of coordinated functions have been hallmarks for promoting confidence in the domain name system and must continue to be a part of ICANN to realize its mission.

To carry out these objectives effectively, the intellectual property community, through its voice in the IPC, has worked directly with ICANN to fulfill the corporation's stated goals. The direct participation of the IP community as established stakeholders in the Internet community and in ICANN must be continued if ICANN is to reach consensus in carrying out its coordinated functions.

The IPC's support has been demonstrated time and again by our financial support and willingness to work cooperatively with the ICANN staff and board and to reach out to others who seek, as we do, a safe, stable, and commercially viable DNS. As such, it is the IPC's position that intellectual property considerations must continue to be a part of ICANN's core mission. The Internet, after all, is not a static medium; it is constantly evolving. There will likely be new gTLDs in the future, and issues like the accuracy of WHOIS data, ccTLD best practices, domain name transfers and IDNs remain a part of the overall DNS debate. A solution that fails to address intellectual property policy concerns inherent in these issues is a failed solution that will reduce consumer confidence in the DNS. Our collective goal should be to prevent such an outcome.

ICANN Structure

IPC agrees with the fundamental critique in the Lynn report: despite notable successes, process concerns threaten to overwhelm the ability of ICANN to continue to carry out its mission. Structural reform, not mere tinkering, is needed to overcome this problem. A more professional, more broadly representative, and more expert Board of Directors must be accorded explicit responsibility for managing the policy development process, and must seek to work more closely with governments in doing so. At the same time, ICANN should remain an organization that seeks to identify and implement consensus solutions, and that is led by the private sector.

IPC does not have a specific formula to propose regarding the membership or allocation of seats on the Board. A substantial number of Board members should be chosen by the stakeholders in the DNS, among them intellectual property interests, but also including ccTLDs that agree to come under the ICANN umbrella. The proposal for governments to appoint Board members does not appear feasible at this time and could be an undesirable change to ICANN's status as a private sector-led organization. Accordingly, a nominating committee made up both of Board members and of respected experts in fields of importance to the fulfillment of ICANN's mission, including intellectual property issues, should choose "at-large" Board members from the ranks of the private sector. The nominating committee should carry out its work according to a charter that stresses the need to select professional and experienced individuals, and to avoid domination of the Board by a particular geographic region or industry sector. Consideration should also be given to according ex officio Board status to representatives of expert institutions, including both intergovernmental bodies (e.g., WIPO, ITU) and non-governmental groups (e.g.,

IETF or IAB), if it is believed that such ex officio seats would contribute to the capability of the Board to manage the policy development function in the public interest.

The ICANN Board should manage the policy development process within the scope of ICANN's mission, and should make the ultimate decision on these issues after obtaining full input from interested stakeholders and relevant experts. On the stakeholder side, advisory bodies organized within the ICANN framework would play a critical role in identifying and framing policy issues for ultimate resolution by the Board. These advisory bodies, organized roughly along the jurisdictional lines of the existing Supporting Organizations (perhaps with separate bodies for gTLD and ccTLD issues), would be open to participation by all interested parties. To maximize efficiency and fairness in the process, a professional public participation manager employed by ICANN would manage the stakeholder issue identification aspect of the policy development process as carried out by the advisory bodies.

In order to obtain expert input on issues identified and framed by the advisory bodies (or by the Board itself), the Board would be empowered to "export" specific policy questions to outside expert groups, either pre-existing or ad hoc, that would commit to following a process of seeking public input and making recommendations back to the ICANN Board, within a strict time limit. (For intellectual property matters, the entity to which the issue is "exported" could be WIPO, or could be some other organization, or an ad hoc group appointed by the ICANN Board. A similar procedure could be followed for other issues which ICANN must resolve but for which the application of outside or specialized expertise would be essential.) The details of the required public consultation process and the format and deadlines for recommendations would be established by negotiation between ICANN and the expert group, based upon a standard template. The expert group would be responsible for managing public participation in its deliberations, except when the group is organized ad hoc by ICANN, in which case the professional public participation manager would be employed. Upon completion of the expert group's process, its recommendations would be re-"imported" to ICANN, and, after an appropriate period for further public comment, acted upon by the ICANN Board. Both with regard to stakeholder input and expert input, the ICANN Board would be expected to show deference to the recommendations it receives, but it would retain the ability to modify or reject those recommendations, perhaps on a supermajority basis. In no case would the final decision on policy be exported or outsourced.

ICANN Funding

IPC also agrees with the Lynn report that, in order to efficiently carry out its mandate, ICANN's funding must be increased. No matter how good the policies ICANN develops and promulgates, or how inclusive the process that is used to develop them, ICANN cannot fulfill its mission unless it has the resources and staff expertise to enforce these policies effectively and efficiently. This is not the case under current funding levels.

Today, the vast majority of ICANN funding is provided indirectly by registrants in the gTLD registries. While registrants are certainly not the only beneficiaries of the stable and

secure DNS that ICANN is established to ensure, they do benefit directly from ICANN activities. Speaking on behalf of intellectual property owners, who register literally millions of domain names in the gTLDs, IPC believes this continued reliance upon funding from registrants is appropriate and should form the major element in a long-term resolution of ICANN's funding problem.

IPC recognizes that short-term solutions are also needed with respect to ICANN funding. We believe that government funding for specific ICANN projects (such as those regarding security) may be feasible and, if implemented appropriately, would not be inconsistent with preserving ICANN's status as a private sector-led entity.

Conclusion

The IPC is pleased to be an active participant in the ICANN restructuring process and is grateful for the opportunity to have provided this submission. We look forward to working with the evolution and reform committee and with ICANN staff to develop alternatives that will result in an ICANN that can meet future challenges and accomplish ICANN's mission: to coordinate technical and policy functions of the DNS in order to promote a safe, stable and commercially viable domain name system, promote competition, and achieve broad representation of global Internet communities.