



September 10, 2009

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ICANN
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RE: CROSS OWNERSHIP IN NEW TLDS

Dear ICANN Board Members,

I am writing to you on the issue of registry-registrar cross ownership in new TLDs. eNom strongly supports the limited move back towards allowing some cross ownership, as described in the current version of the Draft Applicant Guidebook (DAG). We believe these DAG provisions will bring benefits of lower prices, improved service and additional innovation to domain consumers. We think the focus of the issue should be on consumer benefits, and not the possible effects on industry vendors.

What is Being Proposed?

First, it is important to note that nobody is proposing changes to the following:

- Legal (structural) separation of registries and registrars
- Guaranteed access to a registry by any registrar who wishes to offer its names
- Non-discriminatory treatment of all such participating registrars

These safeguards will stay in place. What is being proposed is that a registry may have ownership in a registrar that offers its names. Whether necessary or not, the DAG prohibits new registration activity by such a registry-owned-registrar once that registrar exceeds 100K names. Due to the non-discrimination provision, the registry-owned-registrar may not exclusively sell the first 100K names (as some have alleged).

Is This New?

No, it is not new. Registries have been affiliated with retail registration companies for a long time without negative effects on consumers. Register.com originally owned .PRO and now Hostway (who own the registrar DomainPeople) owns this TLD, Poptel in .COOP, Melbourne IT in Neulevel (.BIZ), CORE in .CAT, GoDaddy in .ME, Verisign in DBMS and PIR's registry operator, Afilias, was 100% owned by registrars for many years.

The 2001 to 2006 BIZ (Neustar), 2001 to 2006 .INFO (Afilias) and 2003 to 2006 .ORG (PIR) registry agreements explicitly permitted those registries to own registrars in their own TLDs. In other words, full cross ownership was permitted. Unlike the current DAG proposal, those agreements did not place a limit on the number of names that could be registered by the registry-owned-registrar. Here is the language from the agreements:

3.5.3. Registry Operator shall not act as a registrar with respect to the Registry TLD. This shall not preclude Registry Operator from registering names within the domain of the Registry TLD in compliance with Subsection 3.6. This also shall not preclude an affiliate of Registry Operator from acting as a registrar with respect to the Registry TLD, provided that Registry Operator complies with the provisions of Subsections 3.5.4 and 3.5.5. (My underlined emphasis: Note that sections 3.5.4 and 3.5.5 refer to non-discriminatory treatment of all participating registrars – as the current DAG does).

Per ICANN's 2001 announcement - <http://www.icann.org/en/announcements/icann-pr01mar01-1.htm> : *"The requirement in Section 23 for the separation of legal ownership of the VeriSign registry and registrar businesses would be eliminated, but VeriSign would agree to continue the structural separation described above for the term of the Agreements. The present structural separation would be reinforced by the requirement that VeriSign's operations be placed in a separate subsidiary company. 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."*

The 2001 to 2009 .AERO, 2001 to 2007 .COOP and 2001 to 2007 .MUSEUM agreements were silent on the issue of registry-registrar ownership, indicating permissibility. The 2001 to 2007 .NAME registry agreement explicitly permitted cross ownership of registry and registrar. Finally, the 2002 .PRO agreement explicitly allowed for cross ownership integration. That agreement is still in effect. In summary, there is an extensive history of cross ownership in gTLD registry agreements.

What Process Has Been Followed on This Issue?

Although its members discussed the issue of cross ownership the GNSO's *'Board Report on Introduction of New Generic Top-Level Domains'* was not explicit on this issue. The report did require exclusive use of registrars (structural separation) but did not address registrar ownership. As in many areas of the report, implementation details were appropriately left to the ICANN staff.

Subsequently, in 2008, staff hired the well respected economic analysts CRA International, Inc. to examine cross ownership. The CRAI Report concluded that, except in cases where price caps exist, ICANN should cautiously move forward in liberalizing cross ownership restrictions. Based on that Report, and on public consultations and constituency input, staff included a draft DAG provision that would permit registry-owned registrars to register up to 100K names in the TLD.

At the 2009 Sydney meeting ICANN sponsored a forum at which two, world renowned competition experts from different schools of economic thought both argued the significant consumer benefits (price, quality and range of services) that generally flow from cross ownership. The key concern of these economists to cross ownership was any situation where a registry-registrar exercised 'market power'. The economists are further studying the issue of market power in the domain industry.

What are the Arguments in Favor of Cross Ownership?

Benefits to Consumers. Cross ownership results in more competition and increased distribution efficiency, which means lower prices to consumers. Vertically integrated (cross-owned) industries tend to offer more innovative services to consumers. For example, an entrepreneur who wants to introduce a new service tied to domains (say spam inhibition) is more likely to do so if able to market the service directly to consumers (as well as via other registrars) rather than being forced to only use 3rd party registrars who may not support or understand the product.

Its Been Happening for Years in the Domain Industry Without Harm. As previously discussed, there is a long and deep history of cross ownership in ICANN registry agreements. Over the eight years that such agreements have been in place there have not been complaints or issues raised about such cross ownership.

It is the Norm in Almost Every Other Industry. Forced ownership separation of wholesale and retail operations (not permitting cross ownership) is a rare occurrence in most industries. Typically it occurs when there are exceptional circumstances such as monopoly market power and price controls, or public safety issues (as with pharmacies and liquor distribution). Also, the legal/regulatory burden is typically on the party proposing the separation rules. For example, Dell was not forced to seek regulatory approval when it decided to sell PCs direct to the public. Dell impacted the business models of established market players by introducing operational efficiencies—and the consumer benefited with lower pricing and broader choice.

Helps Small Registries. In an environment where potentially many TLDs are launched over the same period, these TLDs will have to compete for attention from existing registrars. Registrars will tend to focus on the TLDs they perceive as having the broadest market appeal and least complexity. Some TLDs will not meet these criteria. What will a new registry do if its TLD is not offered by registrars? Such TLDs are likely to fail. The limited cross ownership rule currently proposed in the DAG will solve this problem.

Those Opposing it Are Not the Intended Beneficiaries. The purpose of the original cross ownership rule was to protect against a price capped registry favoring its affiliated registrar at the expense of other registrars. Registrars, who are the supposed beneficiaries of this needed protection, are for the most part not complaining about ICANN's proposed new rule. Rather, the primary opponents are existing, mid-sized registries. Every one of these registries operated for years with contracts that permitted unlimited cross ownership in their TLDs. Indeed, these registries got their start with the assistance of affiliated registrars (e.g. Melbourne IT was a partner of NeuLevel, the registry operator for .biz). These registries had the advantage of using affiliated registrars when they got their start in 2001, but refuse to let new registries enjoy the same advantages. Why not? Because in the face of increased competition for back-end registry services they are now arguing that such cross ownership is bad. For example Afilias, who signed the recent letter opposing cross ownership, launched and grew its .INFO TLD with 100% registrar ownership of its registry and an ICANN contract that allowed unlimited name sales by registry-owned registrars. There is hypocrisy at play here.

What Arguments Are Being Used Against Cross Ownership?

Principle opposition comes from three existing registries, Afilias, Neustar and PIR. Their arguments are at this site – www.registryregistrarseparation.org. Their main arguments are:

1. A vertically integrated service provider would have an unfair pricing advantage;
2. A vertically integrated service provider would have unfair access to competitors' confidential data; and
3. A vertically integrated service provider could unfairly use proprietary registry data.

We believe these arguments are flawed. First, and most foremost, they are not arguments about consumer benefit but rather about 'fairness' between competitors. As explained by Professors Salop and Wright in Sydney, new competition can be disruptive to incumbent market players: *"STEVE SALOP: That always happens, yes, it is the airlines. You have United Airlines, American Airlines saddled with higher legacy costs. And they were disadvantaged relative to the new carriers that didn't have union contracts. American Airlines, United Airlines had the wrong sized planes for the deregulated market because with deregulation the airlines started to have these hub-and-spoke systems where the*

smaller planes made more sense. The older legacy airlines had airplanes that were higher cost, you know, less efficient users of fuel. That's always true in the economy”.

If the issue was ‘fairness’ between competitors then we (the new TLD entrants) could argue it is unfair for existing registries to be allowed to compete for back-end TLD deals as they can offer customers a track record of registry operation which we were denied (because we were not allowed TLDs in previous rounds). Or, we could argue it is unfair for them to be allowed more TLDs when they already have a head start in the market with their existing TLDs (for nine years with INFO, BIZ and ORG). Or we could argue MySpace or Amazon should not become registries because they have more market reach than most existing domain players. In fact these discussions of ‘fairness’ miss the point. The debate should be about consumer benefit and more competition. Such competition, disruptive as it can be to vendors, is of benefit to consumers.

In specific response to the three concerns on their website: (1) Any pricing advantage will be to the benefit of consumers and any registrar who adds value to the distribution and support of names will be rewarded with margins. For reasons I will discuss shortly, no economically rational registry will try to become the sole registrar for its TLD; (2) The Thick registry data described by them is publicly available information that can be accessed by any party regardless whether the TLD has cross ownership or not, and most name availability checks by registrars can be performed using the DNS so that information may remain unknown to registries; (3) Registrar DNS traffic data is not available to Registries (and due to the TTL and other factors registry-level DNS traffic data is unreliable data), bulk WhoIs data is publicly available regardless of cross ownership rules, and access to independent registrar sales data can be, and has been, mitigated by structural separation of registry and registrar (which will remain in place) as well as by confidentiality provisions. Finally, this cross ownership scenario has existed for years in the current marketplace without the negative consequences these registries are drumming up.

Will it Put Other Registrars Out of Business?

The existence of the 100K limit on registry-registrar names will ensure this does not happen, however there is a more compelling reason why independent registrars will remain in business: they add value to TLDs. Registrars have sales, marketing, customer service, and product capabilities that registries want and need, and it is in the economic interest of registries to have the broadest possible range of registrars selling their names. Where registry pricing is not capped there is no logical, economic reason why a registry would want to limit the number of names sold by other registrars. Registries are incented to have more registrars sell more names because they make more money by doing so.

This same economic logic explains why Sears, which has its own line of products, also retails the products of other manufacturers; why Dell sells direct but also distributes through channels such as Staples; and why GoDaddy, who control a portion of the .ME TLD, still aggressively market other TLDs and encourage other registrars to sell .ME names. Why does all this happen? Because absent market power, vertically integrated markets (those with cross ownership) benefit consumers, manufacturers and distributors.

Our Conclusion

Cross ownership has been common in the gTLD industry and is the norm in most other industries. Established economic theory shows it is likely to benefit domain consumers through lower prices, increased efficiency, greater competition and innovation. Providing some measure of cross ownership will be important to the success of new TLDs, especially those without broad market appeal. The only situations where cross ownership may not be appropriate is where price caps exist, or where a supplier has 'market power'.

ICANN staff, after extensive public and expert consultation over an 18 month period, proposed a limited cross ownership rule that caps names at 100K. This approach offers less cross ownership to new TLDs than was offered to most TLDs launched since 2001, and also less than was available to the COM, NET and ORG registries before 2001.

Finally, is This a PDP Issue?

For the following reasons we don't believe it is a PDP issue:

- a) Allowing cross ownership is not a new policy or a change in policy as there have been, and still are, various registry contracts with cross ownership provisions;
- b) As an issue of 'ownership', ultimately this is about whom the shareholders of corporations, sometimes public corporations, can be. We believe this falls outside the picket fence;
- c) In most countries there are national laws that cover competition and consumer protection. We do not believe ICANN should develop and implement policy that may conflict with such laws; and
- d) The issue was discussed in the GNSO's new TLD deliberations but was left open in the Report, as were many issues, for staff implementation. The Report's Implementation Guideline J specifically indicated "*The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing marketplace.*"

Thank you for your consideration of this issue. We would appreciate you sharing this letter with your Board colleagues for their consideration as well.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Richard Tindal', with a stylized, cursive script.

Richard Tindal
Senior Vice President
eNom Inc.

cc. Kurt Pritz, SVP ICANN