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12 COALITION FOR ICANN TRANSPARENCY INC.

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION

16 COALITION FOR ICANN TRANSPARENCY
17 INC., a Delaware corporation,

18 Plaintiff,

19 v.

20 VERISIGN, INC., a Delaware corporation;
21 INTERNET CORPORATION FOR ASSIGNED
22 NAMES AND NUMBERS, a California
23 corporation,

24 Defendants.

Case No.

25 **DECLARATION OF DR.
26 MICHAEL A. GEIST IN SUPPORT
27 OF THE COALITION FOR ICANN
28 TRANSPARENCY'S *EX PARTE*
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER**

I, Dr. Michael A. Geist, hereby declare:

1. I am a law professor at the University of Ottawa, Faculty of Law, where I hold the Canada Research Chair in Internet and E-Commerce Law, a Director of the Canadian Internet Registration Authority, and a member of the Advisory Council to the .org Public Interest Registry. I have studied, lectured, and written extensively about Internet issues, including the domain name registration system since 1997. A copy of my curriculum vitae is attached hereto as Exhibit A. As a result of my extensive work in this field, I am familiar with the history and operation of the domain name registration system and with the registry agreements governing the

1 operation of the .com and .net registries, including the proposed .com agreement. I have personal
2 knowledge of the facts stated herein and could testify competently to them if called to do so.

3 **A Brief Explanation of the Internet Address System**

4 2. The Internet is a network of interconnected computers, each of which has a unique
5 numerical address used to communicate with other computers when connected to the Internet.
6 These addresses are known as Internet Protocol ("IP") addresses and each one consists of a string
7 of four sets of numbers, separated by periods. 64.233.161.147 is an example of an IP address.

8 3. These numerical IP addresses are difficult for Internet users to remember, so a user
9 friendly system was developed, overlaying the actual IP address system with an alpha-numeric
10 domain name system. Under this system, a single alpha-numeric domain name is associated with
11 specific IP address. For example, IP address 64.233.161.147 is more commonly known as
12 google.com.

13 4. These alpha-numeric domain names are also separated by periods (or dots). Top-
14 level domains ("TLDs") are found to the right of the period. They are either generic TLDs, such
15 as .com, .gov, .net, .mil, and .biz, or country code TLDs, such as .us, .uk, and .ca. Second-level
16 domains ("SLDs") are those domains immediately to the left of the top-level domains, such as
17 "uscourts" in "uscourts.gov." The SLDs identify the host computers and individual websites
18 under each top level domain. Some of the TLDs (such as .gov, .edu., and .mil) are restricted to
19 certain types of organizations, while other TLDs (such as .org, .net, and .info) were designed to
20 indicate the type of organization that is likely to use them but may be owned by anyone. The
21 .com and .biz TLDs are most commonly used by commercial enterprises.

22 5. Because each domain name refers to a single IP address, each alpha-numeric
23 domain name must be unique. For the system to work, a framework is needed to track which
24 alpha-numeric domain name is associated with which IP address. That function is performed by a
25 domain name registry. The registry is responsible for maintaining a database of domain names
26 and associated IP addresses within a single TLD.

1 **Historical Control of the Internet Address System**

2 6. The Internet as we know it today grew out of a system that was set up and operated
3 by the U.S. military, with all costs borne by the U.S. military. In the early 1990's the U.S.
4 military contracted with the National Science Foundation ("NSF") to take over administrative
5 functions for the civilian Internet (including the .com, .net, .org, .edu, and .gov. top level
6 domains), and NSF solicited bids for the services necessary to fulfill its contractual obligations.
7 Network Solutions bid for and received the contract for registration services, touting its previous
8 experience providing similar services to the military Internet (the .mil top level domain). As a
9 result of this successful bid, Network Solutions became responsible for both registering domain
10 names (registrar services) and maintaining the registry linking domain names to specific IP
11 addresses (registry services), in essence, controlling the internet root server system for the .com,
12 .net, and .org domains.

13 7. There was initially no charge to register a domain name through Network
14 Solutions, but NSF permitted Network Solutions to begin charging fees to register.com, .net, and
15 .org domain names in the mid-1990's. The initial registration fee was \$100 for two years.

16 8. In 1997 the Clinton Administration chose the Department of Commerce to take
17 over the role of NSF, and a July 1, 1997 directive issued by President Clinton authorized the
18 Secretary of Commerce to "support efforts to make the governance of the domain name system
19 private and competitive and to create a contractually based self-regulatory regime that deals with
20 potential conflicts between domain name usage and trademark laws on a global basis." The
21 Department of Commerce proposed and eventually created a private not-for-profit corporation
22 that would be responsible for overseeing the policy and operation of the domain name and IP
23 address system: the Internet Corporation for Assigned Names and Numbers ("ICANN").

24 9. Under a Memorandum of Understanding (the "MOU") between the Department of
25 Commerce and ICANN, ICANN administers policy for the domain name and IP address system
26 subject to the principles set forth in the MOU: stability; competition; private, bottom-up
27 coordination; and representation. The MOU prohibits ICANN from "unjustifiably or arbitrarily"
28 injuring "particular persons or entities or particular categories of persons or entities" or acting "in

1 a non-arbitrary and reasonable manner with respect to ... any ... activity related to the DNS
2 project.” Attached hereto as Exhibit B is a true and correct copy of the MOU.

3 10. ICANN’s bylaws also explicitly recognize “core values,” which “should guide the
4 decisions and actions of ICANN,” including:

5 a. “Where feasible and appropriate, depending on market mechanisms to promote
6 and sustain a competitive environment.”

7 b. “Introducing and promoting competition in the registration of domain names
8 where practicable and beneficial in the public interest.”
9

10 Attached hereto as Exhibit C is a true and correct copy of excerpts from ICANN’s bylaws.

11 11. ICANN’s mandate was set in response, at least in part, to the express interests of a
12 large number of stakeholders, including Internet users, domain name registrars, technical groups,
13 and intellectual property law associations. To ensure that ICANN adequately represented the
14 interests of the various stakeholders in its decision-making process, ICANN was designed as a
15 self-regulated (i.e., no government interference) entity with a consensus-based approach in which
16 public policy discussion was open to all. The governance structure was also designed to ensure
17 that all stakeholders were represented at the board level either through direct appointment from
18 stakeholder constituencies, or through an on-line election to permit Internet users to elect board
19 representatives on a regional basis. ICANN, however, did not fulfill its end of the bargain as it
20 failed to hold on-line elections for several seats, and ultimately altered its governance structure,
21 eliminating on-line elections in the process.

22 12. At about the same time, NSF and Network Solutions amended their agreement to
23 require Network Solutions to design a shared registry system that would allow competing
24 accredited registrars to register .com, .net, and .org domain names. Although Network Solutions
25 was permitted to become an accredited registrar in the shared registry system, its registry contract
26 with ICANN was purportedly renewable only if it divested itself of its registrar business.

27 13. By 2001, ICANN had accredited over 180 registrars who were able to compete to
28 provide domain name registrations to end users. Also in 2001, ICANN and VeriSign (the

1 successor to Network Solutions) entered into three new registry agreements for the .com, .net, and
2 .org domains. These contracts permitted VeriSign to continue to operate the registries for these
3 domains without divesting itself of its registrar business, but required some structural separation
4 of VeriSign's registry and registrar businesses. The .org agreement was set to expire first, with
5 the intention that VeriSign would relinquish its right to operate the .org registry. The .net
6 agreement was set to expire on June 30, 2005, with the intention that ICANN would then solicit
7 competitive proposals to operate the registry. The .com agreement was set to expire in 2007, with
8 a presumption favoring renewal of VeriSign's right to operate the .com registry, but also allowing
9 ICANN to solicit competing proposals under certain circumstances, including a material breach
10 of the .com registry agreement by VeriSign. ICANN has, in fact, alleged that VeriSign has taken
11 actions inconsistent with material provisions of the .com registry agreement and that these actions
12 constitute multiple breaches of the agreement.

13 The Present

14 14. Prior to the expiration of the .net registry agreement earlier this year, ICANN
15 solicited and received five competing bids to operate the .net registry. VeriSign submitted the
16 winning bid, and signed a new .net registry agreement with ICANN. Although public comment
17 was solicited on a draft agreement, important provisions were altered in the final agreement,
18 which was signed by ICANN's board without further opportunity for public review or comment.
19 The provisions that were added or significantly altered included the fee provision, the renewal
20 provision, the termination provision, and the definition of consensus policies. Attached as
21 Exhibit D is a computer-generated comparison of the draft agreement that was distributed for
22 public comment and the final .net registry agreement that was approved by ICANN. After the
23 completion of the competitive bidding process, the .net registry fees fell from \$6.00 (under the
24 2001 agreement) to \$4.25 for the first 18 months under the 2005 agreement. However, beginning
25 in 2007, the price controls set forth in the 2005 .net Agreement will be eliminated, and the only
26 restriction will be that VeriSign is required to charge the same price to all registrars and to offer a
27 volume discount only if the same opportunities to participate are offered to all ICANN-accredited
28 registrars. Six months' prior notice is also required for any price adjustments.

1 15. Many of the remaining provisions in the 2005 .net registry agreement mirror the
2 provisions in the proposed 2005 .com registry agreement, discussed below, and differ materially
3 from the current .com registry agreement. I have highlighted some of the differences between the
4 current .com registry agreement and the proposed 2005 .com registry agreement in a chart,
5 attached hereto as Exhibit E.

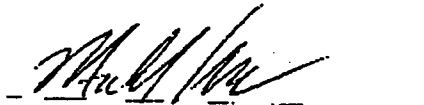
6 16. After ICANN and VeriSign engaged in extensive disputes and ultimately litigation
7 over the scope of the definition of "registry services" in the 2001 .com registry agreement, the
8 two parties entered into a settlement agreement. As part of the settlement, ICANN and VeriSign
9 proposed extensive changes to the .com registry agreement that go far beyond their dispute over
10 the definition of "registry services." Instead of merely resolving their dispute, on October 24,
11 2005, ICANN and VeriSign announced that they had agreed to terms for the new .com registry
12 agreement to take effect immediately upon its execution, even though the existing .com registry
13 agreement is not set to expire until 2007. The proposed 2005 .com registry agreement not only
14 expands the definition of "registry services," but includes unrelated provisions that substantially
15 increase registration fees and establish a virtually perpetual renewal of the agreement without
16 allowing competitive bidding, among other provisions as described more fully in Exhibit E.

17 17. ICANN set a period of approximately two weeks for public review and comment,
18 prior to approval by ICANN's Board of Directors. ICANN has received an outpouring of public
19 comment on the agreement, with most of the comments focusing on (1.) the increase in registry
20 fees proposed under the new agreement, (2.) the renewal provision of the agreement, which all
21 but eliminates the possibility that there will ever be competitive bidding for the .com registry in
22 the future, (3.) the expanded definition of registry services that will permit VeriSign to profit by
23 leveraging its unique and complete control of the registry, (4.) ICANN's abdication of its duty to
24 support competition, and (5.) the lack of public involvement prior to the release of the proposed
25 2005 .com registry agreement. Presumably in light of the outpouring of comments, ICANN has
26 since extended the public comment period until its next meeting in Vancouver, British Columbia,
27 scheduled to begin on November 30, 2005. The ICANN Board of Directors is scheduled to meet
28 during the Vancouver meeting.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 23rd day of November, 2005, in Ottawa, Ontario, Canada.



Dr. Michael A. Geist

EXHIBIT A

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A. Education

J.S.D., Columbia University, School of Law, 2002

LL.M., Columbia University, School of Law, 1998

LL.M. in Commercial and European Union Law, Wolfson College, University of Cambridge, 1994

Graduate Legal Research Scholar (“Kenkyusei”), Kobe University Faculty of Law, 1992-93

LL.B., Osgoode Hall Law School, York University, 1992

Chinese Law Summer Program, East China Institute of Politics and Law, Shanghai, PRC, 1990

Political Science Major, University of Western Ontario, 1987-89

B. Employment

Canada Research Chair in Internet and E-commerce Law, University of Ottawa, Faculty of Law, Common Law Section, 2003 - present

Associate Professor, University of Ottawa, Faculty of Law, Common Law Section, 2002 – present

Technology Counsel, Osler, Hoskin & Harcourt LLP, 2002 - 2004

Assistant Professor, University of Ottawa, Faculty of Law, Common Law Section, 1998-2002

Acting Director, Ontario Research Network for E-commerce (ORNEC), 2001 - 2002

Director of E-Commerce Law, Goodmans LLP, Toronto, 2000 – 2002

Associate-in-Law, Columbia University, School of Law, 1996-98

Assistant Professor, Dalhousie University, Faculty of Law, 1995-96

Articling Associate, Goodman Phillips & Vineberg, Toronto, Ontario 1994-95

C. Publications

I. Books

Michael Geist, Internet Law in Canada, 3rd Edition, Captus Press, 2002 (925 pp.)

Michael Geist, Internet Law in Canada, 2nd Edition, Captus Press, 2001 (876 pp.)

Michael Geist, Internet Law in Canada, Captus Press, 2000 (747 pp.)

II. Book Chapters

National Governments and Country Code Top Level Domains: A Global Survey, in Internet Governance: A Grand Collaboration (D. MacLean, ed.) (New York, UN ICT Task Force) 282 – 90 (2004).

The Shift Toward “Targeting” For Internet Jurisdiction in Who Rules the Net? Essays on Internet Governance and Jurisdiction (A. Thierer and C. Wayne Crews Jr. eds.) (Washington, DC: Cato Institute) 91 - 118 (2003).

On Target? The Shifting Standards for Determining Internet Jurisdiction in Communications Policy and Information Technology: Promises, Problems, Prospects (L.F. Cranor and S. Greenstein, eds.) (Boston: MIT Press) 65 – 102 (2002).

III. Scholarly Articles

The Long Arm of the USA Patriot Act: A Threat to Canadian Privacy, co-authored with Milana Homs, forthcoming UNB Law Journal (2005)

Untouchable? A Canadian Perspective on the Anti-Spam Battle, forthcoming 3 University of Ottawa Law and Technology Journal (2005)

Computer and E-Mail Workplace Surveillance in Canada: The Shift From Reasonable Expectation of Privacy to Reasonable Surveillance, 82 Canadian Bar Review 151-89 (2003)

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Towards a General Agreement on the Regulation of Foreign Direct Investment, 26 Law and Policy in International Business 673 - 717(1995)

Foreign Direct Investment in Japan: A Guide to the Legal Framework, 9 Banking and Finance Law Review 305 – 57 (1994)

IV. Ongoing Publications

Columnist, Law Bytes, Toronto Star, 2003 – present

Columnist, Cyberlaw, Ottawa Citizen, 2005 - present

Columnist, Cyberlaw, Globe and Mail, 1999-2002

Creator, Developer, and Consulting Editor, BNA's Internet Law News, 1999–present

Creator & Author, Canadian Internet Law Resource Page, September 1998 – present (<http://www.cilrp.org>)

Creator & Author, UDRPInfo.com, August 2001 – present (<http://www.udrpinfo.com>)

Creator & Author, ccTLD Governance Project, November 2002 – present (<http://www.cctldinfo.com>)

Creator & Author, Privacyinfo.ca, November 2002 – present (<http://www.privacyinfo.ca>)

V. Editorial Appointments

Editor-in-Chief, Canadian Privacy Law Review (Butterworths), 2003 - present

Editor-in-Chief, Internet and E-commerce Law in Canada (Butterworths), 2000 - present

Technology Law Editor, Canadian Business Law Journal, 2001 - present

Editorial Board Member, E-Commerce and Law Report (BNA), 2000 - present

Editorial Board Member, Journal of Internet Law (Aspen), 2000 - present

Editorial Board Member, Internet Law and Business (Computer Law Reporter), 2000 - present

Editorial Board Member, Cyberspazio e Diritto - Cyberspace and Law (Italy), 2000 – present

Contributing Editor, Canadian Journal of International Business Law and Policy, 1996-98

Foreign Law Editor, Columbia Journal of Asian Law, 1996-97

VI. Conference Proceedings

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Canada Rejects One-Sided Approach to Copyright Reform(March 28/05)

New Accountability Needed for Net Service Providers (March 21/05)

Keeping An Eye on a Canadian Prize (March 14/05)

What Do You Want the Internet To Be? (March 7/05)

Let Towns, Cities Provide Cheap, Everywhere Broadband (February 28/05)

Music Industry Doesn't Need More Government Protection (February 21/05)

Revise Privacy Law to Protect Public, Not Offenders (February 14/05)

No Good Reason to Bow to U.S. Pharma's Lobbying (February 7/05)

TPMs – A Perfect Storm for Consumers (January 31/05)

Why Ottawa Should Stand On Guard in RIM Case (January 24/05)

Fairness Calls for Fairer Rules (January 17/05)

National Web Library Do-able, Affordable, Visionary (January 10/05)

Banner Year for Digital Decisions (December 20/04)

CIBC Breach Spotlights Hole in Privacy Law (December 13/04)

Time Music Industry Focused on Product (December 6/04)

Numbers Don't Crunch Against Downloading (November 29/04)

Dot-ca Privacy Plan a Canadian Compromise (November 22/04)

Internet-Age Aid For Canadian Culture (November 15/04)

Advancing Technology Threatens Cultural Policy (November 8/04)

Who Should Own Your Wedding Pictures? (November 1/04)

Revise Privacy Law to Expose Offenders, Block Snoops (October 25/04)

Privacy Law Perversely Protects Those Who Break It (October 18/04)

Court Decision Foreshadows Policy Debate (October 11/04)

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No Need for Dickensian Approach to Voice Via Web (September 20/04)

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Music Industry Abruptly Changes Tune on Ringtones (August 23/04)

A Blueprint for Better, and Fairer, Copyright Law (August 9/04)

U.S. Laws Put Canadian Privacy at Risk (July 26/04)

Bridging the Digital Divide (July 19/04)

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Copyright Reform Needs Balanced Approach (June 14/04)

Will Copyright Reform Chill Use of the Web? (May 31/04)

West Urged To Share Internet Governance (May 17/04)

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World Resists One-Size-Fits-All Web Laws (April 5/04)

Low Tech Case Has High Tech Impact (March 22/04)

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Web Decision Extends Long Arm of Ontario Law (February 16/04)

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Have-Not World More Plugged-In Than We Think (April 21/03)

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Fairness Says It's Time to Tax Goods Sold Online (March 24/03)

Governments Hold Reins in Those National Domains (March 10/03)

In Web Disputes, U.S. Law Rules the World (February 24/03)

Legalese Proved No Defence in E-Trading Case (February 10/03)

Privacy Popular, But Eyes Dropped the Ball (February 3/03)

Courts Poised to Decide Internet 'Borders' (January 13/03)

ii. Globe And Mail Cyberlaw Columns
Internet Turf War Playing Out (November 7/02)

Net Copyright Reform: Its Deep in Policy Agenda (October 17/02)

Federal Proposal Tells Only Part of Cybercrime Story (October 3/02)

Net Contract Fights Should Avoid Courts (September 19/02)

E-commerce Tax Policy Penalizes Canadian Business (September 5/02)

Moves Afoot to Give Consumers E-commerce Legal Certainty (August 22/02)

Internet Overseer Takes Wrong Path on Accountability (August 8/02)

Domain Name Policy Absurd When it Comes to Trademarks (July 25/02)

Internet 'Choke Points' Put the Squeeze on Content (July 11/02)

Shift to Workplace Privacy Protection (June 28/02)

New Net Laws Reach Beyond Borders (June 27/02)

Public's Role in Net Governance Threatened (June 13/02)

Time to Hit Delete Key on Weak Spam Policy (May 30/02)

Appeal Court Ruling the Latest Word on On-line Music (May 16/02)

Web Lottery Case Misses Legal Jackpot (May 2/02)

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Music Fans Face Raw Copyright Deal (March 21/02)

Domain Dispute Bias Goes From Bad to Worse (March 7/02)

Quebec Firm's Language Law Challenge Tests E-jurisdiction (February 21/02)

Brands, Free Speech Clash Over Domains (February 7/02)

Canada's Online Tax Policy Lags Leaders (January 24/02)

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The Story of Cyberlaw in 2001 (December 20/01)

Copyright Debate Turns One-Sided (December 6/01)

Canada's Laissez-Faire Stance on Microsoft Stifles Innovation (November 8/01)

Anti-terrorism Bill Could Limit E-Speech (October 25/01)

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Microsoft Likely to Get More Experience in Court (September 7/01)

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Net at Stake Despite Ruling, (June 29/01)

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B.C. Court Shores Up Protection for Anticorporate Protest Sites, (February 15/01)

Like it or Not, Napster and its Kind are Here to Stay, (February 14/01)

U.S. Blazes Trail in Clash of Trademarks, Domain Names, (February 1/01)

Everybody Wants to Rule the Web, (January 18/01)

Privacy Tops Internet Hot Spots for 2001, (January 4/01)

Cyberlaw: An A to Z Review, (December 21/00)

A Troubling Snapshot of E-Privacy in Canada, (December 7/00)

E-content Rules Must Shield Election, not Web Sites, (November 26/00)

Privacy Compliance is the New Priority, (November 10/00)

Watch Out for the Partitioned Web, (November 2/00)

New Dot-ca World Needs an Election, (October 26/00)

E-mail Traces Raises Legal Issues, (October 19/00)

Dot-ca Dispute Rules Open for Public Debate, (October 5/00)

What's In a Name? Domain Reform Holds the Answer, (September 26/00)

High-Speed Net Clash Moves Into High Gear, (September 21/00)

Trademark Confusion Creeps Into Web Site Content, (September 7/00)

WIPO Wipes Out Domain Name Rights, (August 24/00)

Copyright Holders May Rule the Day, (August 10/00)

Napster North of the 49th Parallel, (July 27/00)

When Technology is at Odds with the Law, (July 13/00)

Legally, I am Canadian, (June 29/00)

Firms Play 'Whack a Mole' Game in Trying to Stop E-competition, (June 15/00)

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