

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

POOL.com INC.

Plaintiff

- and -

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Defendant

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**MOTION RECORD OF THE MOVING PARTY,  
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS**

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Solicitors for the Moving Party,  
Internet Corporation for Assigned Names and  
Numbers

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

POOL.com INC.

Plaintiff

- and -

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Defendant

**NOTICE OF MOTION**  
(Returnable March 16, 2004)

The Defendant, Internet Corporation for Assigned Names and Numbers ("ICANN"), will make a motion to a Judge on March 16, 2004, at 10:00 a.m. or as soon after that time as the motion can be heard, at 161 Elgin Street, Ottawa, Ontario.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

THE MOTION IS FOR:

1. an Order staying or dismissing this Action;
2. the Defendant's costs on the motion on a substantial indemnity scale; and
3. such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

- (a) this Court lacks jurisdiction over ICANN because, among other things, ICANN is a United States corporation, is not resident in Ontario, does not conduct business in Ontario and has no assets in Ontario;
- (b) this Court lacks jurisdiction over the subject matter of this Action, which has no real and substantial connection to Ontario because, among other things, all of the events relevant to the Action as set out in the Statement of Claim arise in California, not Ontario;
- (c) in the alternative, California, and not Ontario, is the convenient forum for the trial of this Action because, among other things, virtually all, if not all, of the evidence and witnesses relevant to the Action are in California and the issue of whether ICANN acted improperly must be determined by a consideration of several agreements, all of which must, by their terms, be considered by the Courts of California;
- (d) Rules 17.06 and 21.01(3)(a) of the *Rules of Civil Procedure*; and
- (e) such other and further relief as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (i) the Affidavit of Daniel E. Halloran, sworn September 8, 2003; and
- (ii) the Supplementary Affidavit of Daniel E. Halloran, sworn September 23, 2003;

- (iii) the Second Supplementary Affidavit of Daniel E. Halloran, sworn January 21, 2004; and
- (iv) such further and other material as counsel may advise and this Honourable Court may permit.

Date: January 23, 2004

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Solicitors for the Plaintiff

POOL.com INC.

and

INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS  
Defendant

Plaintiff

Court File No: 03-CV-24621

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Ottawa

**NOTICE OF MOTION**

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

POOL.com INC.

Plaintiff

- and -

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Defendant

**AFFIDAVIT OF DANIEL E. HALLORAN  
(sworn September 5, 2003)**

I, DANIEL E. HALLORAN, of the City of Los Angeles, in the State of California, in the United States of America, MAKE OATH AND SAY:

1. I am an attorney admitted to the State Bar of California, and am the Chief Registrar Liaison and Acting Secretary of the Defendant, Internet Corporation for Assigned Names and Numbers ("ICANN"). I have been an employee of ICANN since 2000. As such, I have knowledge of the matters to which I hereinafter depose, except where I have stated such matters to be based on information and belief, in which case, I verily believe such information to be true.

2. I am swearing this Affidavit in support of ICANN's motion for an Order staying or dismissing this action on jurisdictional grounds. As is set out in detail below:

(a) this Court lacks jurisdiction over ICANN because, among other things, ICANN is a corporation incorporated under the laws of the State of

California within the United States, has no presence in Ontario, does not conduct business in Ontario and has no assets in Ontario;

- (b) this Court lacks jurisdiction over the subject-matter of this Action, which has no real and substantial connection to Ontario because, among other things, all of the events relevant to the Action as set out in the Statement of Claim arise in California, in the United States, not Ontario; and
- (c) California, and not Ontario, is the convenient forum for the trial of this Action because, among other things, virtually all, if not all, of the evidence and witnesses relevant to the Action are in California and the issue of whether ICANN acted improperly must be determined by a consideration of several agreements, all of which are, by their terms, governed by the laws of the State of California, and require that actions brought under such agreements be brought in the courts of the State of California.

**ICANN Does Not Reside or Carry On Business in Ontario**

3. ICANN is a not-for-profit corporation that was organized under the laws of the State of California in 1998. As is explained below, pursuant to delegation from the United States Department of Commerce, ICANN is responsible for administering certain aspects of the Internet's domain name system (the "DNS").

4. ICANN's principal place of business is in Marina Del Rey, which is in Los Angeles County, California in the United States. ICANN has no offices or facilities other than those in Marina Del Rey.

5. ICANN does not engage in any acts or activities in Ontario, provided that ICANN has accredited five registrars resident in the Province of Ontario.

6. ICANN has no assets or real estate in the Province of Ontario or at all in Canada. It is not registered to do business in Ontario (or any other Canadian province). It does not solicit any business in Ontario (or any Canadian province), it does not sell any goods or services in Ontario (or Canada). (In fact, ICANN actually does not sell anything at all.) ICANN does not have a bank account in Ontario (or Canada), and it does not have any employees in Ontario (or Canada).

7. ICANN maintains several websites that provide information regarding its Internet-coordination activities, including the websites at <http://www.icann.org>, <http://www.iana.org> and <http://www.internic.net>. All of these websites are operated from web servers physically located in Los Angeles County, California. The websites contain a wealth of information about ICANN, about ICANN constituent groups and about the projects that ICANN has undertaken in connection with the Internet. The websites also contain links to other information that is related to ICANN's activities. As explained above, ICANN does not offer anything for sale on any of its websites.

**The Subject-matter of the Action has No Substantial Connection to Ontario**

8. In order to understand the subject-matter in this Action, one must have an understanding of (i) how the Internet and, specifically, the Internet's DNS operates, and (ii) ICANN and its authority and responsibilities with respect to the Internet's DNS.



**(a) The Internet and DNS**

9. The Internet is a network of computers and computer networks that allows computers around the world to communicate with each other quickly and efficiently over a variety of physical links. For the Internet to function effectively, each computer connected to the Internet must have a unique identifier, or address, so as to allow the computers to communicate with each other.

10. These addresses are, in fact, lengthy numerical codes known as Internet Protocol ("IP") numbers or addresses. For example, an IP number might be 192.234.223.142, which is the address for the City of Ottawa's website.

11. Because IP numbers are long and difficult to remember, the IP address system has been overlaid by a more "user-friendly" system of "domain names". The system associates a "domain name" (a string of characters) with the IP number. For example, the domain name for the City of Ottawa's website host computer is "city.ottawa.on.ca".

12. In accordance with the Internet's DNS, Internet domain names consist of a string of "domains" separated by periods. The "top-level" domains, or "TLDs" are found to the right of the last period and include, among others, ".com", ".gov" and ".net", which are also known as generic TLDs, or "gTLDs".

13. There are approximately 250 different TLDs which are administered and operated by different entities around the world. Some TLDs are country code specific, such as ".uk" for the United Kingdom and ".ca" for Canada. The country specific domains are known as "ccTLDs".

14. The domain names for each TLD are maintained, monitored and controlled by a company, each called a "registry" or "registry operator". There is one registry for each TLD. A registry operates like a phone book, keeping a comprehensive listing of each registered domain name within the relevant TLD and its corresponding IP address.

15. Individuals seeking to register domain names do not deal with ICANN or registry operators but, instead, deal with third-party "registrars". It is the "registrars" that, in turn, deal with the appropriate registry on these individuals' behalf to register the domain names. Registrars are companies that register domain names on behalf of the public and co-ordinate the registration of the domain names in the DNS with the appropriate registry. Currently, approximately 170 registrars worldwide are engaged in dealing with customers and, in turn, requesting that various registry operators make registrations of domain names in the TLDs they operate.

**(b) ICANN's Role in the DNS**

16. Historically, much of the Internet's DNS was overseen by United States government agencies or by third-parties pursuant to agreements with U.S. government agencies. In 1997, the President of the United States directed the United States Secretary of Commerce to privatize the DNS.

17. In response to the government's direction, a broad coalition of the Internet's business, technical, academic and user communities formed ICANN in November 1998. At that time, ICANN signed a memorandum of understanding ("MOU") with the U.S. Department of Commerce to transition the administration of the Internet

from government to the private sphere. Pursuant to the MOU, the U.S. Department of Commerce retains responsibility for general oversight of ICANN's activities. A copy of the MOU, as amended to date, is attached hereto as Exhibit "A".

18. Thus, ICANN has been recognized by the U.S. and other governments, as well as by technical standards development bodies and other private sector entities involved in the Internet's operation, as the global consensus development entity to coordinate technical management of the DNS.

19. In accordance with its authority under the MOU, ICANN has entered into agreements (generally, a "Registry Agreement") with operators for most of the 14 gTLDs (a few gTLDs such as .gov and .mil operate under legacy arrangements under the direct auspices of the U.S. government.) Pursuant to a Registry Agreement, the basic obligations of a registry operator of a gTLD are to maintain a database of domain names within the particular TLD (such as .com or .net) it operates and respond to millions of queries from computers seeking to translate those domain names to IP numbers.

20. Whereas ICANN has a significant role in developing and implementing registration policies with respect to the gTLDs, ICANN's role in the coordination of the country specific TLDs, the ccTLDs, is limited to the delegation of responsibility for operation of ccTLDs to responsible trustees for the respective local Internet community, and ensuring global interoperability. Each ccTLD is operated on behalf of the local Internet community with the manager and/or supporting organization having a direct

responsibility to the local Internet community, and to the global Internet community through ICANN.

21. The internationally recognized delegee of the Canadian ccTLD, the .ca registry, is the Canadian Internet Registration Authority ("CIRA") located in Ottawa, Ontario. CIRA is a not-for-profit Canadian corporation.

22. In order to become a gTLD registrar, a company must be accredited by ICANN. ICANN accredits registrars by entering into a form agreement with each of them (each, a "Registrar Accreditation Agreement"). The current form of Registrar Accreditation Agreement is posted on the ICANN website at <http://www.icann.org/registrars/ra-agreement-17may01.htm>. An example of a Registrar Accreditation Agreement is attached hereto as Exhibit "B". Under a Registrar Accreditation Agreement, a corporation is granted permission to register domain names for the public in specifically named TLDs.

23. Each Registrar Accreditation Agreement contains a provision which states that the Registrar Accreditation Agreement is deemed to have been entered into in California and also contains a provision that any litigation which arises between the registrar and ICANN must be conducted in California. Specifically, clause 5.6 of the Registrar Accreditation Agreement states:

"In all litigation involving ICANN concerning this Agreement (whether in a case where arbitration has not been elected or to enforce an arbitration award), jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California, USA; however the parties shall also have the right to enforce a judgment of such a court in any court of competent jurisdiction."

24. Each Registrar Accreditation Agreement also contains an express exclusion of obligations to non-parties to the agreement. Specifically, clause 5.10 of the Registrar Accreditation Agreement states:

"No Third-Party Beneficiaries. This Agreement shall not be construed to create any obligation by either ICANN or Registrar to any non-party to this Agreement, including any Registered Name Holder."

25. ICANN has entered into Registrar Accreditation Agreements with five Ontario-based companies on terms identical to those ICANN has entered into with all other registrars.

26. In summary, when an individual or company wishes to register or attempt to register a specific domain name in a gTLD, it may contact an ICANN-accredited registrar. It advises the registrar of the domain name that it wishes to register. Upon receiving the information, the registrar contacts the appropriate registry to inquire as to whether the domain name is available or is currently registered by someone else. If the domain name is not currently registered by someone else, the registrar will be able to register the domain name on behalf of its customer. If the domain name is currently registered by someone else, the registrar will not be able to register that domain name on behalf of its customer.

**(c) Pool.com**

27. In the Statement of Claim, the plaintiff, Pool.com Inc. ("Pool.com"), alleges that it is an Ontario corporation engaged in the business of operating a "backorder" service for registered and soon-to-be-deleted domain names in the ".com" and ".net" gTLDs of the Internet's DNS.

28. Pool.com is not an ICANN-accredited registrar but, on information and belief, operates through a network of ICANN-accredited registrars in competing to acquire, for its customers, domain names that have not yet been renewed by their owners within the time required for renewal and have therefore been dropped or deleted out of the relevant TLD. Pool.com has no relationship or business dealings whatsoever with ICANN.

29. Based on my review of Pool.com's website, I understand that if the right to register a domain name is successfully acquired for a single customer, Pool.com charges the customer a (US) \$60.00 fee. However, if two or more of its customers have back-ordered a particular domain name, Pool.com requires the customers to hold a three-day auction to compete for the domain name. After three days, the domain name registration is awarded to the highest bidder who must pay the amount of its winning bid to Pool.com.

30. Although Pool.com was incorporated in Ontario, it appears that Pool.com conducts its business entirely in U.S. dollars. On its website, Pool.com explicitly states: "[A]ll prices, fees, and bids are in U.S. dollars". Copies of web-pages from Pool.com's website are attached hereto as Exhibit "C".

**(d) The Wait List System ("WLS")**

31. Notwithstanding the fact that Pool.com has not entered into any agreement with ICANN, and has no relationship or dealings whatsoever with ICANN, it appears to base its entire claim on the allegation (that is factually incorrect) that ICANN breached its contractual obligations to registrars under the Registrar Accreditation

Agreements (none entered into with Pool.com, but with ICANN-accredited registrars) by authorizing the registry operator of the ".com" and ".net" gTLDs to implement a "wait list" system for the registration of newly-deleted domain names. The "wait list" system which is at the heart of Pool.com's claim is explained below.

32. Domain names are registered for a limited period of time. If that period expires without renewal of the domain name, the registration may be deleted and following certain automatic renewal and grace periods, the domain name again becomes available for registration by the first person who requests registration. Currently, several registrars offer services to the public that attempt to register expired domain names almost immediately after they become available for re-registration.

33. I understand that in the .com and .net gTLDs alone, more than 800,000 domain names are deleted each month and become available for registration by registrants through the approximately 170 ICANN-accredited registrars. Those registrars seeking to register a recently deleted domain name on a customers' behalf do so by programming their systems to transmit continuous automated "add" domain name commands to the registry for a particular deleted domain name in an effort to be the first registrar to request registration of the domain name following its deletion. This tactic is utilized simultaneously by multiple registrars seeking multiple domain names, and often the same domain names, in excess of 100 million "add" commands being submitted to the .com registry per day.

34. Consumers who want to register a deleted or soon-to-be-deleted domain name under the current system need to sign up and, in many cases, pay for multiple

registrars in advance to try and register the newly deleted domain name on their behalf. Under this system, a consumer can never be certain that it will obtain the rights to a particular domain name if the domain name is deleted from the registry, even if the consumer signs up with multiple registrars currently offering this type of service.

35. Beginning in 2001, VeriSign, Inc. ("VeriSign") (the registry operator of the .com and .net gTLDs) proposed to offer a wait-list service (the "WLS") at the registry level with respect to domain names within the .com and .net gTLDs. The WLS would operate by permitting ICANN-accredited registrars, acting on behalf of customers, to place reservations for currently registered domain names in the .com and the .net gTLDs. The WLS would only permit one wait-list reservation to be accepted for each registered domain name. Each reservation would be for a one-year period and reservations would be accepted on a first come, first served basis, with the opportunity for renewal. VeriSign would charge the registrar a fee, which would be no higher than \$24.00 for a one-year reservation. The registrar's fee to the customer would be established by the registrar, not VeriSign. In the event that a registered domain name is not renewed and is deleted from the registry, VeriSign would check to determine whether a reservation for the domain is in effect and register the deleted domain name to the customer with the reservation or, if there is no reservation, VeriSign would delete the name from the registry so that the name is returned to the pool of names equally available for re-registration through all registrars on a first come, first served basis.

36. VeriSign has proposed to implement the WLS for a twelve-month trial beginning no sooner than October, 2003. At the end of the trial, ICANN and VeriSign would evaluate whether the service should be continued.



37. Unlike the current system, under the WLS, a consumer would simply have to sign up with any one registrar to be placed on the waiting list for the .com or .net TLD, which would guarantee the consumer the right to be next in line to register the domain name, should it be deleted.

38. VeriSign's proposed WLS has been the subject of review and discussion within the ICANN community for almost two years. On August 23, 2002, the ICANN Board of Directors determined that the WLS "promotes consumer choice" and that the "option of subscribing to a guaranteed 'wait-list' service is a beneficial option for consumers". Therefore, the Board of Directors approved a resolution authorizing the President and General Counsel of ICANN to negotiate appropriate revisions to VeriSign's registry agreements to allow for the offering of the WLS.

39. On March 10, 2002, a group of ICANN's accredited registrars issued a position paper opposing the WLS and urging ICANN to prevent its implementation. On September 12, 2002, after the Board resolved to authorize VeriSign to offer the WLS, certain registrars filed a request for reconsideration of the Board's decision. On May 20, 2003, ICANN's Reconsideration Committee determined that the registrars' request lacked merit and recommended that the Board take no action on it. After further consideration, the ICANN Board confirmed its decision of August 23, 2002.

40. Prior to the implementation of the WLS, several events must occur. First, VeriSign must reach an agreement with ICANN to modify the .com and .net registry agreements between VeriSign and ICANN. This has not yet occurred. Second, in accordance with the MOU, the U.S. Department of Commerce must approve any

modification to the agreements governing VeriSign's registry services with respect to .com and .net. This also has not yet occurred. Third, if and when the U.S. Department of Commerce's approval is obtained, VeriSign would still have to undertake the significant technical and operational tasks of implementing the WLS. Based on statements made by VeriSign, I understand that the earliest the WLS service could be launched is October 27, 2003.

**(e) The California Action**

41. There is a proceeding already underway in California with respect to the WLS which raises, in essence, the identical issues raised by Pool.com in this Action (as described below).

42. On July 16, 2003, three registrars accredited by ICANN filed a Complaint for injunctive and other relief against ICANN in the United States District Court, Central District of California, Civil Action No. CV-03-5045JFW (MANx) (the "California Action") regarding the WLS. A true copy of the Complaint in the California Action is attached hereto as Exhibit "D". The plaintiffs in the California Action have alleged that ICANN's authorization of VeriSign to go forward with offering the WLS constituted a breach of ICANN's obligations under the Registrar Accreditation Agreements entered into with each of the plaintiff registrars.

43. On July 16, 2003, the plaintiffs in the California Action filed a motion for a temporary restraining order and an order to show cause for a preliminary injunction preventing the implementation of the WLS.

44. In response to the plaintiffs' motion, ICANN filed an opposition and affidavits that make clear why the proposed WLS does not breach the Registrar Accreditation Agreements entered into with the plaintiffs and why the request for injunctive relief was without merit.

45. By Order dated July 18, 2003, the Honorable John F. Walter, United States District Judge of the United States District Court, Central District of California denied the plaintiffs' request for a temporary restraining order and preliminary injunction. A copy of the Order is attached hereto as Exhibit "E".

46. On August 6, 2003, ICANN filed its answer to the Complaint in the California Action. A copy of ICANN's answer is attached hereto as Exhibit "F".

47. The plaintiffs in the California Action have advised ICANN's attorneys that they intend to file a motion for a preliminary injunction on September 8, 2003 and intend to seek to schedule the hearing of the motion on October 6, 2003. A Scheduling Conference in the California Action has been set for October 27, 2003.

48. The California Action involves an analysis and interpretation of the Registrar Accreditation Agreement and the appropriateness of ICANN's actions under the Registrar Accreditation Agreement as they relate to the WLS. The plaintiffs in the California Action are Washington and Arizona corporations that have recognized that the appropriate jurisdiction for their action is California, as is required by the Registrar Accreditation Agreement.

**(f) The Present Action**

49. Pool.com has commenced the present action for, among other things, an interim and permanent injunction preventing the implementation of the WLS, a declaration that the authorization of the WLS is invalid, a declaration that the conduct of ICANN with respect to the WLS is an "intentional and wrongful interference with the trade and commercial prospects" of Pool.com and requesting general, special, punitive and exemplary damages.

50. The "wrongful interference" complained of in this case includes an alleged breach by ICANN of its obligations under the Registrar Accreditation Agreements (to which Pool.com, lacking accreditation by ICANN, is *not* a party) by, among other things, failing to establish a "consensus" for the WLS, and failing to seek review by an Independent Review Panel (provided for in ICANN's by-laws) to determine whether a consensus has been achieved.

51. In essence, Pool.com's claim is based upon the issue of whether ICANN breached its Registrar Accreditation Agreements and policies thereunder by virtue of authorizing VeriSign to offer the WLS. This question will be determined by the Courts of California in the California Action. The question of whether ICANN properly authorized VeriSign to offer the WLS has absolutely no connection whatsoever with Ontario and is an issue that deals entirely with ICANN's rights and obligations under its various agreements with various parties, agreements that properly will be interpreted by the Courts of California and by their own terms require them to be interpreted by the Courts of California. Respectfully, whether ICANN acted in accordance with its grant of delegated powers from the United States Department of Commerce in accordance with

the MOU, and in accordance with the various Registry Agreements and Registrar Accreditation Agreements is not a question for the Courts of Ontario, but is a question for the Courts of California.

52. ICANN's counsel obtained a copy of the Corporation Profile Report for Pool.com. This document confirms that Pool.com was incorporated on May 12, 2003, more than 2 years *after* VeriSign first proposed the WLS and approximately 9 months *after* the ICANN Board of Directors approved a resolution authorizing VeriSign to implement the WLS. It is noteworthy that not only is Pool.com not an ICANN-accredited registrar and not party to any agreement or relationship with ICANN, but its claims are founded upon actions taken by ICANN well in advance of Pool.com's incorporation and the commencement of its business. A copy of the Corporation Profile Report for Pool.com is attached as Exhibit "G".

**Ontario is not the Convenient Forum**

53. It would be highly inconvenient for ICANN to defend this Action in Ontario for the following reasons:

- (a) based upon my review of the Statement of Claim, I anticipate that while Pool.com may have one or two Ontario resident witnesses, the key witnesses will be the current and former staff and management of ICANN who would speak to ICANN's obligations under the Registrar Accreditation Agreements and to ICANN's role and responsibilities in connection with the Internet's DNS, all of whom are resident in California;
- (b) virtually all, if not all of the relevant documents and evidence are located in California;

- (c) ICANN is a California-based not-for-profit corporation that has limited resources and no business activities in Canada; and
- (d) Pool.com's action is predicated on a question governed by California law, namely whether or not ICANN has breached the Registrar Accreditation Agreements. Litigating a question governed by California law in the Ontario Courts will render this case unduly expensive and burdensome for ICANN, requiring, amongst other things the filing of expert evidence going to this question.

### **Summary**

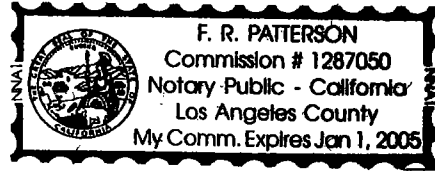
54. Given the following things, amongst others, I believe that the Superior Court of Justice of the Province of Ontario does not have jurisdiction over ICANN or over the subject-matter of this action:

- (i) ICANN is headquartered in California and only carries on business there;
- (ii) ICANN has no assets or employees in Ontario and does not carry on business in Ontario;
- (iii) ICANN has no connections to Ontario other than having accredited five registrars located in Ontario, under agreements governed by California law which contain a clause providing that the Courts of California have exclusive jurisdiction with respect to any disputes arising under the agreements;

- (iv) ICANN has no relationship with the plaintiff resident in Ontario, contractual or otherwise, and
- (v) there is a parallel proceeding in California where the key issue raised in this Action, which is a matter governed by California law, will be determined by the California Courts.

55. In the alternative, I believe that Ontario is not a convenient forum to adjudicate the dispute between Pool.com and ICANN and that California is clearly the more appropriate and convenient forum.

State of California, County of LOS ANGELES } ss.  
 Subscribed and sworn to before me on September 8, 2003



F. R. Patterson  
 (Name of Notary)  
 F. R. Patterson

Daniel E. Halloran  
 DANIEL E. HALLORAN

POOL.com INC.  
Plaintiff

and

INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS  
Defendant

Court File No: 03-CV-24621

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Ottawa

**AFFIDAVIT OF DANIEL E. HALLORAN  
(sworn September 5, 2003)**

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Solicitors for the Defendant



24

MEMORANDUM OF UNDERSTANDING BETWEEN  
THE U.S. DEPARTMENT OF COMMERCE  
AND  
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

I. PARTIES

This document constitutes an agreement between the U.S. Department of Commerce (DOC or USG) and the Internet Corporation for Assigned Names and Numbers (ICANN), a not-for-profit corporation.

II. PURPOSE

A. Background

On July 1, 1997, as part of the Administration's Framework for Global Electronic Commerce, the President directed the Secretary of Commerce to privatize the management of the domain name system (DNS) in a manner that increases competition and facilitates international participation in its management.

On June 5, 1998, the DOC published its Statement of Policy, *Management of Internet Names and Addresses*, 63 Fed. Reg. 31741(1998) (Statement of Policy). The Statement of Policy addressed the privatization of the technical management of the DNS in a manner that allows for the development of robust competition in the management of Internet names and addresses. In the Statement of Policy, the DOC stated its intent to enter an agreement with a not-for-profit entity to establish a process to transition current U.S. Government management of the DNS to such an entity based on the principles of stability, competition, bottom-up coordination, and representation.

B. Purpose

Before making a transition to private sector DNS management, the DOC requires assurances that the private sector has the capability and resources to assume the important responsibilities related to the technical management of the DNS. To secure these assurances, the Parties will collaborate on this DNS Project (DNS Project). In the DNS Project, the Parties will jointly design, develop, and test the mechanisms, methods, and procedures that should be in place and the steps necessary to transition management responsibility for DNS functions now performed by, or on behalf of, the U.S. Government to a private-sector not-for-profit entity. Once testing is successfully completed, it is contemplated that management of the DNS will be transitioned to the mechanisms, methods, and procedures designed and developed in the DNS Project.

In the DNS Project, the parties will jointly design, develop, and test the mechanisms, methods, and procedures to carry out the following DNS management functions:

- a. Establishment of policy for and direction of the allocation of IP number blocks;
- b. Oversight of the operation of the authoritative root server system;
- c. Oversight of the policy for determining the circumstances under which new top level domains would be added to the root system;
- d. Coordination of the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet; and

e. Other activities necessary to coordinate the specified DNS management functions, as agreed by the Parties.

The Parties will jointly design, develop, and test the mechanisms, methods, and procedures that will achieve the transition without disrupting the functional operation of the Internet. The Parties will also prepare a joint DNS Project Report that documents the conclusions of the design, development, and testing.

ICANN has determined that this project can be done most effectively with the participation of ICANN. ICANN has a stated purpose to perform the described coordinating functions for Internet names and addresses and is the organization that best demonstrated that it can accommodate the broad and diverse interest groups that make up the Internet community.

### C. The Principles

The Parties will abide by the following principles:

#### 1. Stability

This Agreement promotes the stability of the Internet and allows the Parties to plan for a deliberate move from the existing structure to a private-sector structure without disruption to the functioning of the DNS. The Agreement calls for the design, development, and testing of a new management system that will not harm current functional operations.

#### 2. Competition

This Agreement promotes the management of the DNS in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the DNS. This competition will lower costs, promote innovation, and enhance user choice and satisfaction.

#### 3. Private, Bottom-Up Coordination

This Agreement is intended to result in the design, development, and testing of a private coordinating process that is flexible and able to move rapidly enough to meet the changing needs of the Internet and of Internet users. This Agreement is intended to foster the development of a private sector management system that, as far as possible, reflects a system of bottom-up management.

#### 4. Representation.

This Agreement promotes the technical management of the DNS in a manner that reflects the global and functional diversity of Internet users and their needs. This Agreement is intended to promote the design, development, and testing of mechanisms to solicit public input, both domestic and international, into a private-sector decision making process. These mechanisms will promote the flexibility needed to adapt to changes in the composition of the Internet user community and their needs.

### III. AUTHORITIES

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A. DOC has authority to participate in the DNS Project with ICANN under the following authorities:

- (1) 15 U.S.C. § 1525, the DOC's Joint Project Authority, which provides that the DOC may enter into joint projects with nonprofit, research, or public organizations on matters of mutual interest, the cost of which is equitably apportioned;
- (2) 15 U.S.C. § 1512, the DOC's authority to foster, promote, and develop foreign and domestic commerce;
- (3) 47 U.S.C. § 902, which specifically authorizes the National Telecommunications and Information Administration (NTIA) to coordinate the telecommunications activities of the Executive Branch and assist in the formulation of policies and standards for those activities including, but not limited to, considerations of interoperability, privacy, security, spectrum use, and emergency readiness;
- (4) Presidential Memorandum on Electronic Commerce, 33 Weekly Comp. Presidential Documents 1006 (July 1, 1997), which directs the Secretary of Commerce to transition DNS management to the private sector; and
- (5) Statement of Policy, *Management of Internet Names and Addresses*, (63 Fed. Reg. 31741(1998) (Attachment A), which describes the manner in which the Department of Commerce will transition DNS management to the private sector.

B. ICANN has the authority to participate in the DNS Project, as evidenced in its Articles of Incorporation (Attachment B) and Bylaws (Attachment C). Specifically, ICANN has stated that its business purpose is to:

- (i) coordinate the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet;
- (ii) perform and oversee functions related to the coordination of the Internet Protocol (IP) address space;
- (iii) perform and oversee functions related to the coordination of the Internet domain name system, including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system;
- (iv) oversee operation of the authoritative Internet DNS root server system; and
- (v) engage in any other related lawful activity in furtherance of Items (i) through (iv).

#### IV. MUTUAL INTEREST OF THE PARTIES

Both DOC and ICANN have a mutual interest in a transition that ensures that future technical management of the DNS adheres to the principles of stability, competition, coordination, and representation as published in the Statement of Policy. ICANN has declared its commitment to these principles in its Bylaws. This Agreement is essential for the DOC to ensure continuity and stability in the performance of technical management of the DNS now performed by, or on behalf of, the U.S. Government. Together, the Parties will collaborate on the DNS Project to achieve the transition without disruption.

#### V. RESPONSIBILITIES OF THE PARTIES

##### A. General.

