

COMMENTS OF .ORG THE PUBLIC INTEREST REGISTRY  
ON THE REPORT  
“REVISITING VERTICAL SEPARATION OF REGISTRIES AND REGISTRARS”

.ORG The Public Interest Registry (PIR) presents its comments on the report “Revisiting Vertical Separation of Registries and Registrars” (the “CRAI Report” or “Report”):  
<http://www.icann.org/en/topics/new-gtld-crai-report-24oct08-en.pdf>

PIR believes that fostering innovation and competition in the DNS is in the best interests of users of the Internet. However, the CRAI Report does not explicitly promote these goals. According to the Report, “This report describes CRA research, performed on behalf of ICANN, on the economic relationship between the registry and registrar functions.” The Report does not directly address goals such as increasing innovation or competition, although it recognizes that “ICANN’s founding is deeply connected to this policy goal of fostering competition in the registry and registrar functions.”

PIR believes that the CRAI Report has four major shortcomings:

1. Fundamentally, the Report fails to take full account of the history of the creation of a competitive registrar system to replace the monopoly, prior to the creation of ICANN, that acted as registry and registrar for the then-available top level domains. The separation of functions performed by registries and registrars is clearly a matter of global public interest. The so-called “White Paper”<sup>1</sup> issued by the U.S. Department of Commerce in June 1998 called for creation of a “new corporation” (which became ICANN) and reached this conclusion regarding competition:  
“The Internet succeeds in great measure because it is a decentralized system that encourages innovation and maximizes individual freedom. Where possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction.”<sup>2</sup>

The White Paper made no explicit reference to separation of registry and registrar functions but appears to have assumed it. The Memorandum of Understanding with the Department of Commerce requires ICANN to:

“Collaborate on the design, development, and testing of a plan for introduction of competition in domain name registration services, including:

...

- b. Development of an accreditation procedure for registrars and procedures that subject registrars to consistent requirements designed to promote a stable and robustly competitive DNS, as set forth in the [White Paper]....”<sup>3</sup>

Current ICANN agreements with the unsponsored gTLD registries restrict ownership of registrars, such as this provision in the .ORG Registry Agreement:

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<sup>1</sup> *Management of Internet Domain Names and Addresses* (the “White Paper”), 63 Fed.Reg. 31741 (1998), available at: [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm).

<sup>2</sup> *id.*, at 31749.

<sup>3</sup> *Memorandum of Understanding between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers* (“DoC MoU”), available at: <http://icann.org/general/icann-mou-25nov98.htm>. at §V(C)(3).

“7.1(c) Registry Operator shall not acquire, directly or indirectly, control of, or a greater than fifteen percent ownership interest in, any ICANN-accredited registrar.”<sup>4</sup>

The rules provide no corresponding prohibition on the ownership of registries by registrars. This seems inconsistent – the danger to competition posed by discrimination arises symmetrically from reintegration of the registry and registrar functions, not from who owns whom. There is a huge economic temptation for a registrar to favor a registry that it owns, at the expense of existing registries. This reality is unchanging. It is a major obstacle to principles of fair competition, and the CRAI Report’s arguments do not address it.

For the above reasons, PIR believes that the public interest in supporting competition does not favor a breakdown of the current separation of registry and registrar ownership. Even more so, the (limited) separation in the current rules, as reflected in the contracts so far, should be made symmetric. Rules should be put in place to reflect economic reality by restricting cross-ownership of registries and registrars or instituting additional safeguards against discrimination.

2. The Report proposes to continue the separation of ownership for existing unsponsored registries, which operate under a price cap for domain name registration. With respect to the new gTLD registries not subject to a price cap, the Report suggests some modest experiments that might help determine whether continued separation of registry/ registrar ownership is in the public interest. ICANN’S Draft Applicant Guidebook for new Generic Top-level Domains (gTLDs) (the “Guidebook”) includes a draft base agreement for new gTLDs that contains neither price caps nor ownership restrictions between registries and registrars.

PIR believes that the conclusions of the CRAI Report do not give ICANN a basis for an implicit policy to remove all cross ownership restrictions on new gTLDs. PIR further believes that any policy ultimately adopted should be applicable equally to registries and registrars and to existing and new gTLDs. Given the assumed economics behind new gTLDs, there is a real risk that discrimination in favor of new gTLDs will encourage speculation at the expense of efficiency-enhancing innovation, and churn at the expense of effective competition.

3. The proposed experiments in the Report do take account of the risks of self-dealing by registrars that own registries. The Report attempts to deal with these by proposing to prohibit registrars from offering registrations in a registry that it owns. This would be totally ineffective; there are now almost 900 ICANN accredited registrars. The identities of the real parties with interests in most of them are not public information. It would be all too easy for (the owners of) registrars to create new shell registrars to evade this prohibition by monopolizing or restricting access to registrations in the registry owned by the original registrar. The end result would be a severe negative impact on competition among registries and among registrars.
4. The Report fails to deal with a related, and equally serious, problem that has arisen in the competitive registrar market created by ICANN pursuant to the White Paper. When the first generation of separated registrars was accredited by ICANN, no one foresaw the size and

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<sup>4</sup> .ORG Registry Agreement, available at:  
<http://www.icann.org/en/tlds/agreements/org/registry-agmt-16jul08.htm>

economic importance of the current secondary market in domain names. Also, no one foresaw the emergence of nearly 900 registrars, most of whom have no economic rationale other than gaining access to registry files for the purpose of participating in this secondary market. Since current registry agreements for unsponsored gTLDs require non-discriminatory and equivalent access for all registrars, the registries must deal with all of them.

This has at least two unanticipated and undesirable consequences. First, it imposes an economic burden on the unsponsored registries, which have to bear contract and accounting responsibilities far out of proportion to the real business (selling registrations) of the original registrars. Second, the proliferation of registrars and the virtual impossibility of tracking real ownership make it almost impossible for ICANN effectively to monitor compliance with the requirements of its Registrar Accreditation Agreement. The resulting failures of compliance have continuing adverse effects on competition and innovation because the opportunity to escape the rules encourages exactly the most damaging forms of speculative behavior and undercuts the very real progress made during the early growth of the market under the ICANN rules.

Further, consolidation is already happening in the Registrar market. Economic power is now concentrated at the very top echelon. (See <http://www.webhosting.info/registrars/top-registrars/global/> for current data.) Blurring lines of registry/registrar ownership would strengthen incentives for the economically strongest registrars to engage in the anti-competitive practices outlined above. In addition, it would likely encourage further consolidation and mergers among registrars that wish to apply for new gTLDs, or other behavior such as predation (killing off the competition through use of market power), thus extending concentration in the registrar layer and encouraging far more damaging predatory or collusive practices. Also, registrars limiting themselves to traditional registrar functions will be less likely to support new gTLDs owned by their competitors. Encouraging registry/registrar cross ownership will actually stifle rather than promote competition.

## CONCLUSION

For all the foregoing reasons, ICANN should adopt a general policy limiting or prohibiting cross ownership between registries and registrars. Although there are some advantages of scale, scope and coordination to internalizing external costs between registries and registrars, the overall danger to competition and innovation and the potential of effective competition between the layers to drive efficiency within the layers suggests that the costs of a blanket prohibition on cross-ownership would be modest, especially as this form of structural separation is easier to monitor and enforce than a merely quantitative restriction. In the alternative, ICANN should make any new ownership policy equally applicable to registries and registrars