

1 Jeffrey A. LeVee (State Bar No. 125863)
jlevee@JonesDay.com
2 Eric P. Enson (State Bar No. 204447)
epenson@JonesDay.com
3 Kathleen P Wallace (State Bar No. 234949)
kwallace@JonesDay.com
4 JONES DAY
5 555 South Flower Street
6 Fiftieth Floor
7 Los Angeles, CA 90071.2300
8 Telephone: +1.213.489.3939
9 Facsimile: +1.213.243.2539

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13
14 NAME.SPACE, INC.,

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
18 ASSIGNED NAMES AND
NUMBERS,

19 Defendant.

Case No. CV 12-8676-PA

Assigned for all purposes to
Honorable Percy Anderson

**DECLARATION OF JEFFREY
A. LEVEE IN SUPPORT OF
ICANN'S MOTION FOR
SUMMARY JUDGMENT**

[ICANN's Reply Memorandum in
Support of ICANN's Motion for
Summary Judgment; Declaration of
Louis Touton; ICANN's
Memorandum in Opposition to
Name.space's Rule 56(d)
Application; and ICANN's
Objections to the Declaration of
Paul Garrin Filed And Served
Concurrently Herewith]

Hearing Date: Feb. 25, 2013
Hearing Time: 1:30 pm
Hearing Location: 312 N. Spring St.

DECLARATION OF JEFFREY A. LEVEE

I, Jeffrey A. LeVee, declare:

1. I am a partner with the law firm Jones Day, counsel for defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) in this action. I am admitted to practice before this Court, and submit this declaration in support of ICANN’s motion for summary judgment. I have personal knowledge of the facts set forth herein and am competent to testify thereto if called as a witness.

2. Attached hereto as **Exhibit A** is a true and correct copy of Judge Pregerson’s February 7, 2013 Order Granting ICANN’s Motion to Dismiss the complaint in the matter of *Image Online Design, Inc. v. ICANN*, Case No. CV 12-08968 DDP (JCx).

3. Attached hereto as **Exhibit B** is a true and correct copy of the relevant excerpts of the Second Amended Complaint in the matter of *PGA Media, Inc. (d/b/a Name.space) v. Network Solutions, Inc. and the National Science Foundation*, Case No. 97 Civ. 1946 (RPP), filed in the United States District Court for the Southern District of New York on or about September 18, 1997.

4. Attached hereto as **Exhibit C** is a true and correct copy of Paul Garrin’s September 27, 2000 email posted in an ICANN Internet forum entitled “ICANN’s \$50,000.00 Question”, available at <http://www.fitug.de/icann-euorpe/0010/msg00015.html> (last visited February 11, 2013).

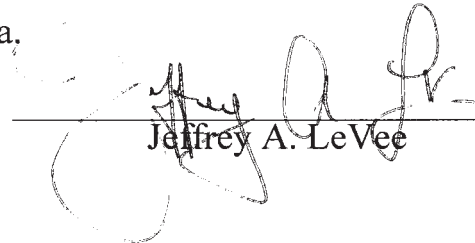
5. Attached hereto as **Exhibit D** is a true and correct copy of a February 24, 2012 letter I received from name.space’s counsel, Michael Miller, wherein Mr. Miller stated that name.space “seeks the following action on ICANN’s part: (1) ICANN grant name.space’s outstanding application from ICANN’s 2000 TLD Application Round and delegate the 118 gTLDs set forth in that application.”

6. Attached hereto as **Exhibit E** is a true and correct copy of the March 16, 2012 letter I received from name.space’s counsel, Michael Miller, wherein Mr. Miller stated that “[a]t a minimum, the 118 gTLDs submitted in

1 name.space's 2000 application should be considered as part of the 2012 Application
2 Round without requiring name.space to pay additional application fees.”

3 7. Attached hereto as **Exhibit F** is a true and correct copy of the TLD
4 Application Process FAQs Page from the 2000 Application Round, *available at*
5 <http://archive.icann.org/en/tlds/tld-faqs.htm> (last visited February 11, 2013).

6 I declare under penalty of perjury under the laws of the United States of
7 America that the foregoing is true and correct. This declaration was signed on
8 February 11, 2013 at Los Angeles, California.

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10 _____
11 Jeffrey A. LeVee

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EXHIBIT A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IMAGE ONLINE DESIGN, INC.,)	Case No. CV 12-08968 DDP (JCx)
)	
Plaintiff,)	ORDER GRANTING MOTION TO DISMISS
)	
v.)	[Dkt. No. 13]
)	
INTERNET CORPORATION FOR)	
ASSIGNED NAMES AND NUMBERS,)	
)	
Defendant.)	
)	

Presently before the court is Defendant Internet Corporation for Assigned Names and Numbers (ICANN)'s Motion to Dismiss Complaint. Having considered the parties' submissions and heard oral argument, the court adopts the following order.

I. BACKGROUND

Defendant ICANN is a California public benefit corporation that has been authorized by the United States government to administer the Internet's primary domain name system ("DNS"). (Compl. ¶ 23.) Each computer connected to the Internet has a unique identity established by its Internet Protocol address ("IP address"). (Id. ¶ 9.) The DNS converts numeric IP addresses, which are difficult to remember, into an alphanumeric hostname that

1 is easier to remember, such as myhost.cnn.com. (Id. ¶¶ 10-11.)
2 The field to the right of the last period, the “.com” in the
3 example above, is known as a top level domain (“TLD”), and the
4 field to the left of the TLD, “cnn” in the example, is the second
5 level domain (“SLD”). (Id. ¶ 17.) The field to the left of the
6 SLD, if any, is called a third level domain. (Id. ¶ 18.)

7 In the early years of the Internet, the United States
8 government operated the DNS through contractual arrangements with
9 third parties. (Id. ¶ 24.) ICANN was created in 1998 by the
10 United States Department of Commerce to administer the DNS, as part
11 of an initiative to privatize management of the DNS. (Id. ¶¶ 23,
12 25.) ICANN has overall authority to manage the DNS and the
13 Department of Commerce retains no regulatory oversight or statutory
14 authority. (Id. ¶¶ 26-27.) ICANN determines what new TLDs to
15 approve and selects and contracts with registries to operate the
16 TLDs. (Id. ¶ 26.)

17 Plaintiff Image Online Design (“IOD”) is a California
18 Corporation with its principal place of business in San Luis
19 Obispo, California. (Id. ¶ 4.) Since 1996, IOD has been and
20 currently is engaged in providing telecommunications services,
21 namely, Internet registry services using the service mark .WEB.
22 (Id. ¶ 29.) IOD has made its .WEB registry services available
23 through an alternate DNS root system to consumers who choose to
24 modify their web browsers to resolve domain names ending in .WEB.
25 (Id. ¶ 30.) IOD has registered over 20,000 .WEB domain names.
26 (Id.)

27 In 2000, ICANN issued a call for proposals by those seeking to
28 sponsor or operate one or more new TLDs, and issued a New TLD

1 Registry Application Form, instructions for filling out the
2 application, and a statement of criteria for the eventual decision.
3 (Id. ¶¶ 42, 68.) On October 1, 2000, IOD submitted an application
4 for the TLD .WEB, for which IOD was to act as the registry
5 operator, and paid the application fee of \$50,000. (Id. ¶ 45.) On
6 November 16, 2000, ICANN's Board of Directors issued its decision
7 on new TLDs, identifying seven selected for the "proof of concept
8 phase." (Id. ¶ 46.) The TLD .WEB was not selected. (Id.) At
9 some time during the deliberations in 2000, the then Chairman of
10 the Board of Directors Dr. Vincent Cerf stated, "I'm still
11 interested in IOD. They've worked with .WEB for some time. To
12 assign that to someone else given that they're actually functioning
13 makes me uneasy." (Id. ¶ 47.)

14 On December 15, 2000, IOD filed with ICANN a request for
15 reconsideration of IOD's .WEB TLD application. (Id. ¶ 48.) ICANN's
16 Reconsideration Committee responded on March 16, 2001, stating, "it
17 should be clear that **no applications were rejected**; the object was
18 not to pick winners and losers, but to select a limited number of
19 appropriate proposals for a proof of concept. **All of the proposals**
20 **not selected remain pending, and those submitting them will**
21 **certainly have the option to have them considered if and when**
22 **additional TLD selections are made."** (Id. ¶ 49, emphasis in
23 Complaint.) ICANN's Board adopted this recommendation and its
24 reasoning on May 7, 2001. (Id. at ¶ 50.)

25 ICANN issued a guidebook for applications for new TLDs in June
26 2011 (revised in June 2012), and the application window was opened
27 on January 12, 2012, and closed on May 30, 2012. (Id. ¶¶ 54-55.)
28 The guidebook stated that IOD could have received an \$86,000 credit

1 toward the \$185,000 new application fee on the condition that it
2 would agree that it "has no legal claims arising from the 2000
3 proof-of-concept process." (Id. ¶ 57.) IOD did not submit a new
4 application because, the Complaint alleges, IOD's .WEB TLD
5 application was still pending before ICANN. (Id. ¶ 56.) Seven
6 applications to operate a .WEB TLD were submitted. (Id. ¶ 58.)
7 ICANN did not identify IOD as an applicant to operate the .WEB TLD.
8 (Id. ¶ 62.) ICANN has stated in its guidebook, press releases, and
9 website postings that it intends to permit one or more applicants
10 to operate the .WEB registry in the DNS root system controlled by
11 ICANN. (Id. ¶ 96.)

12 IOD asserts contract, trademark, and tortious interference
13 claims against ICANN. ICANN moves to dismiss on the grounds that
14 (1) IOD executed a release of ICANN in its 2000 Application,
15 forever discharging ICANN from "any and all" claims relating to
16 ICANN's "action or inaction" in connection with IOD's application,
17 (2) IOD has not alleged facts plausibly suggesting that ICANN
18 breached any terms of the 2000 Application, (3) IOD has not alleged
19 facts plausibly suggesting that ICANN has engaged in trademark
20 infringement, and (4) IOD has not alleged facts plausibly
21 suggesting that ICANN intentionally interfered with IOD's business
22 interests.

23 **II. LEGAL STANDARD**

24 Under Federal Rule of Civil Procedure 12(b)(6), a complaint is
25 subject to dismissal when the plaintiff's allegations fail to state
26 a claim upon which relief can be granted. "When determining
27 whether a complaint states a claim, a court must accept as true all
28 allegations of material fact and must construe those facts in the

1 light most favorable to the plaintiff.” Resnick v. Hayes, 213 F.3d
2 443, 447 (9th Cir. 2000).

3 In Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009), the Supreme
4 Court explained that a court considering a 12(b)(6) motion should
5 first “identify[] pleadings that, because they are no more than
6 conclusions, are not entitled to the assumption of truth.” Id.
7 Next, the court should identify the complaint’s “well-pleaded
8 factual allegations, . . . assume their veracity and then determine
9 whether they plausibly give rise to an entitlement to relief.”
10 Id.; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th
11 Cir. 2009) (“In sum, for a complaint to survive a motion to
12 dismiss, the non-conclusory factual content, and reasonable
13 inferences from that content, must be plausibly suggestive of a
14 claim entitling the plaintiff to relief.”) (internal quotation
15 marks omitted).

16 **III. DISCUSSION**

17 **A. Contract Claims**

18 **1. Breach of Contract**

19 IOD alleges that ICANN breached its contract by “accepting
20 applications from other entities seeking a .WEB TLD and running a
21 .WEB registry before considering, approving or rejecting IOD’s .WEB
22 TLD application.” (Compl. ¶ 78.) ICANN disputes that this is a
23 breach of contract and argues that IOD has not identified a
24 specific contract provision that ICANN has allegedly breached.

25 IOD cites a number of statements by ICANN in support of its
26 breach of contract claim. It points, first, to Reconsideration
27 Request 00-13, Recommendation of the Committee, March 16, 2001
28 (“Reconsideration Recommendation”). The Reconsideration

1 Recommendation was a response to IOD's request for reconsideration
2 of ICANN's decision not to select .WEB as a new TLD. (Compl. ¶¶
3 46-48.) It provided specific responses to IOD's reasons why their
4 request should be reconsidered, and also made general comments on
5 the selection and reconsideration process. It stated, "All of the
6 proposals not selected remain pending, and those submitting them
7 will certainly have the option to have them considered if any when
8 additional TLD selections are made." (Compl. ¶ 49; RJN Exh. H,
9 emphasis omitted.)

10 IOD also alleges that during ICANN's deliberations, the
11 Chairman of ICANN's Board of Directors stated: "I'm still
12 interested in IOD. They've worked with .WEB for some time. To
13 assign that to someone else given that they're actually functioning
14 makes me uneasy." (Compl. ¶ 47.) Finally, IOD alleges that the
15 Chairman testified before Congress and stated that "one of the
16 things that allowed [ICANN] to I think achieve consensus [on the
17 seven TLDs selected on November 16, 2000] was the belief that any
18 of the qualifying TLD applications would, in fact, be considered
19 later." (Id. ¶ 51.)

20 When reviewing breach of contract claims, courts "must
21 determine whether the alleged agreement is 'reasonably susceptible'
22 to the meaning ascribed to it in the complaint." Klein v. Chevron
23 U.S.A., Inc., 202 Cal. App. 4th 1342, 1384 (2012). "A secondary
24 document becomes part of a contract as though recited verbatim when
25 it is incorporated into the contract by reference provided that the
26 terms of the incorporated document are readily available to the
27 other party." Republic Bank v. Marine Nat. Bank, 45 Cal.App.4th
28 919, 923 (1996) (internal citations and quotation marks omitted).

1 Here, the contract appears to consist of the Unsponsored TLD
2 Application Transmittal Form (the "Application"), signed by John S.
3 Frangie, Chief Executive Officer, Image Online Design, Inc.¹ (RJN
4 Exh. C.) The Application specifically incorporates a number of
5 other documents. In it, Mr. Frangie certified that "all documents
6 linked directly or indirectly from 'TLD Application Process:
7 Information for Applicants' . . . have been thoroughly reviewed on
8 behalf of applicant. In particular, the following documents have
9 been reviewed: B3.1. New TLD Application Process Overview . . .
10 B3.2 New TLD Application Instructions . . . B3.3 Criteria for
11 Assessing TLD Proposals" (Id.)

12 IOD does not specifically claim that the statements in the
13 Reconsideration Recommendation or made by the Chairman, discussed
14 above, were part of the Agreement. Indeed, the Agreement would not
15 be "reasonably susceptible" to such an interpretation. IOD provides
16 no reason why statements beyond the Agreement, made after the
17 contract was entered into, should be considered to be part of the
18 contract.

19 Moreover, the explicit terms of the Agreement contradict the
20 notion that ICANN had an obligation to do anything beyond
21 considering IOD's application. The Agreement includes the
22 following language:

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25 ¹"[A] district court ruling on a motion to dismiss may
26 consider a document the authenticity of which is not contested, and
27 upon which the plaintiff's complaint necessarily relies." Parrino
28 v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998), superceded by
statute on other grounds. IOD's Complaint necessarily relies on
the Application insofar as both of its causes of action allege
breach of the terms of the Application.

1 B6. The applicant understands and agrees that this \$50,000 is
2 only an application fee to obtain consideration of this
3 application; that the fee will not be refunded or returned in
4 any circumstances . . . that there is no understanding,
5 assurance, or agreement that this application will be selected
6 for negotiations toward entry of an agreement with a registry
7 operator; or that, if this application is selected, the
8 negotiations will lead to entry of such an agreement or
9 establishment of a TLD as sought in this application.

10

11 B12. The applicant hereby agrees, acknowledges, and
12 represents that it has no legally enforceable right to
13 acceptance or any other treatment of this application or to
14 the delegation in any particular manner of any top-level
15 domain that may be established in the authoritative DNS root.
16 It further agrees, acknowledges, and represents that it has no
17 legally enforceable rights in, to, or in connection with any
18 top-level domain by virtue of its preparation or submission of
19 this application or by virtue of ICANN's receipt of this
20 application, ICANN's acceptance of the application fee,
21 ICANN's consideration or other handling of this application,
22 or statements made in connection with this or other
23 applications ICANN receives."

24

25 B14.2. [T]he applicant hereby releases and forever
26 discharges ICANN and each of its officers, directors,
27 employees, consultants, attorneys, and agents from any and all
28 claims and liabilities relating in any way to (a) any action

1 or inaction by or on behalf of ICANN in connection with this
2 application or (b) the establishment or failure to establish a
3 new TLD.”

4 (RJN Exh. C.) These provisions give ICANN no responsibilities with
5 respect to IOD’s Application beyond its initial consideration of
6 the Application. Since IOD has pointed to no contract terms that
7 ICANN has breached, the court finds that IOD has failed to state a
8 claim for breach of contract.²

9 The court finds that IOD has not stated a claim for breach of
10 contract.

11 **2. Release of Liability**

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15 ²ICANN points to more specific language demonstrating its lack
16 of breach in the FAQ for the 2000 Application.

17 FAQ #54: If our TLD application is not accepted, what becomes
18 of our application? I understand that the \$50,000 is non-
19 refundable, but does the application remain active for the
20 second round of TLD applications?

21 As stated in FAQ #28, plans for any subsequent rounds of
22 TLD introduction will not be made until evaluation of the
23 present proof of concept round. It is likely that, if there
24 are subsequent rounds, there will be revisions in the program
25 based on experience in the first round. This will likely
26 require submission of new application materials. As to the
27 non-refundable application fee, please note that it “is only
28 an application fee to obtain consideration of this
application.”

(RJN, Exh. G.) The court is not convinced that this should be
considered to be part of the contract. The Application includes an
acknowledgment on the part of IOD that “[a]ll documents linked
directly or indirectly from ‘TLD Application Process: Information
for Applicants,’” which includes the FAQ page. However, the FAQ
page appears not to have been a stable document, as it contains a
statement at the top saying, “We add/revise material on this page
frequently. If you have visited here before, please reload/refresh
this page.” (RJN Exh. G.) Because this document is only generally
referenced, and because it is difficult to know its content at any
given time, the court declines to consider it a part of the
contract.

1 Because the court finds no claim stated for breach of
2 contract, it need not consider whether the release of liability is
3 valid.

4 **B. Trademark Claims**

5 **1. Ripeness of Trademark Infringement**

6 “To prevail on its Lanham Act trademark claim, a plaintiff
7 must prove: (1) that it has a protectible ownership interest in the
8 mark; and (2) that the defendant's use of the mark is likely to
9 cause consumer confusion.” Rearden LLC v. Rearden Commerce, Inc.,
10 683 F.3d 1190, 1202-03 (9th Cir. 2012) (internal citations and
11 quotation marks omitted). ICANN argues that Plaintiff’s trademark
12 claims are not ripe for adjudication because, assuming that
13 Plaintiff’s claim to the mark is valid with respect to TLDs,
14 Plaintiff has not alleged that ICANN has used the mark.

15 The Complaint alleges that “ICANN has stated, through its
16 guidebook, press releases regarding the addition of new TLDs
17 including the .WEB TLD, and postings on its website, that it
18 intends to permit one or more of the new applicants to operate the
19 .WEB registry in the Internet’s primary DNS root system controlled
20 by ICANN.” (Compl. ¶ 96.) It alleges that ICANN has accepted seven
21 non-refundable deposits of \$185,000 to operate the .WEB registry.
22 (Id. ¶ 95.) Plaintiff contends in the Complaint that the
23 acceptance of the deposits combined with its affirmations of intent
24 to operate the .WEB registry together “constitute a use in commerce
25 of IOD’s federally registered trademark and service mark which is
26 likely to cause confusion, mistake, or to deceive.” (Id. ¶ 97.)

27 ICANN argues that these facts do not amount to an infringing
28 use. Under the Lanham Act, “a mark shall be deemed to be in use in

1 commerce . . . when it is used or displayed in the sale or
2 advertising of services and the services are rendered in commerce.”
3 15 U.S.C. § 1127. Here, argues ICANN, since the TLD has not been
4 approved and no registry applicant has been selected, the mark is
5 not being used by ICANN or any TLD registry service.

6 IOD contends that even if there has been no use, threats of
7 infringement are actionable before trademark infringement has in
8 fact occurred, citing a case in which the court enjoined the sale
9 of wine bearing a label that featured Marilyn Monroe’s likeness
10 although the product had not yet been sold. Nova Wines, Inc. v.
11 Adler Fels Winery LLC, 467 F.Supp.2d 965 (C.D. Cal. 2006). That
12 case is consistent with the Ninth Circuit’s holding that “specific
13 acts of alleged infringement or an immediate capability and intent
14 to produce an allegedly infringing item” constitute infringement.
15 Sweedlow, Inc. v. Rohm & Haas Co., 455 F.2d 884, 886 (9th Cir.
16 2009). Here, IOD alleges that ICANN is in possession of a number
17 of applications to use the .WEB TLD and has stated that it intends
18 to use it. IOD asserts that “[s]ince ICANN has the power to
19 approve new TLDs and to choose registries to operate those new
20 TLDs, and ICANN has exercised that power in the past, and ICANN has
21 publicly stated its intent to permit one of the new applicants to
22 operate the .WEB registry, it is ‘plausible’ that ICANN’s intent
23 will be realized.” (Opp. at 13.)

24 The court finds that IOD has not alleged use of the trademark
25 or “immediate capability and intent” to infringe, and therefore the
26 trademark infringement claim is not ripe for adjudication.
27 Infringement is, at this stage, merely speculative. Without
28 knowing, for instance, which party might be chosen to operate a

1 potential .WEB TRD, IOD cannot know whether that party itself has a
2 plausible claim to trademark in .WEB, whether ICANN will change its
3 mind about using .WEB as a TLD, or whether there is confusion
4 between IOD's registered mark and ICANN's use of .WEB. Prior to
5 ICANN selecting an applicant, if any, to operate the TRD, the
6 parties will not be able to build a factual record that will allow
7 the court to answer any of these questions. No one has used the
8 mark or has the immediate capability and intent to use the mark.³
9 Therefore the issue is not ripe.

10 **2. Trademark Claim under 15 U.S.C. § 1114(1)**

11 To state a claim for trademark infringement, a plaintiff must
12 show that defendant is "using a mark confusingly similar to a
13 valid, protectable trademark" of plaintiff's. Brookfield
14 Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d
15 1036, 1046 (9th Cir. 1999).⁴

16 IOD has a valid trademark registration for the mark .WEB for
17 "computer accessories, namely, mouse pads, cd holders, . . . fanny
18 packs and backpacks, . . . thermal insulator containers for food or
19 beverages; cups; mugs; . . . can insulating sleeves . . . [and]

20

21

22 ³In oral argument, ICANN also suggested that even if it does
23 accept an application for .WEB and allows a registry service to
24 administer it, ICANN itself would not be using the term in
commerce.

25 ⁴Under 15 U.S.C. § 1114(1), "Any person who shall, without the
26 consent of the registrant- (a) use in commerce any reproduction,
27 counterfeit, copy, or colorable imitation of a registered mark in
28 connection with the sale, offering for sale, distribution, or
advertising of any goods or services on or in connection with which
such use is likely to cause confusion, or to cause mistake, or to
deceive; . . . shall be liable in a civil action by the registrant
for the remedies hereinafter provided."

1 online retail store services featuring computer accessories.”⁵
2 (RJN Exh. I.) ICANN contends that the services it provides, would
3 provide, or would allow to be provided using .WEB are not related
4 to the goods and services covered by IOD’s registration; ICANN
5 coordinates the Internet’s DNS, accepts applications for TLDs, and
6 would allow the use of .WEB as a TLD, whereas IOD’s registered mark
7 applies to mouse pads, backpacks, other accessories, and online
8 retail services. “If the goods are totally unrelated, there can be
9 no infringement because confusion is unlikely.” AMF Inc. v.
10 Sleekcraft Boats, 599 F.2d 341, 348 (9th Cir. 1979). Thus, ICANN
11 argues, there can be no infringement under this section.

12 IOD contends that ICANN does not perform the proper fact-
13 driven analysis to determine likelihood of confusion and that it is
14 not proper for the court to make such determinations at the motion
15 to dismiss stage. (Opp. at 17.) IOD contends that if such factual
16 analysis were to be conducted at this stage, “there is no
17 information in the record regarding whether the goods and services
18 offered under IOD’s .WEB trademark are complementary, or sold to
19 the same or similar class of purchasers. Further, there is no
20 information in the record regarding whether the products have a
21 similar use and function. And, in this case, it is not obvious
22 whether the goods are complementary, or sold to the same class of
23 purchasers, or similar in use and function.” (Opp. at 17.)

24 “In an infringement suit, the plaintiff bears the burden of
25 proving likelihood of confusion, which exists when consumers

27 ⁵IOD’s trademark registration certificate can be considered
28 because it is critical to IOD’s claims and is not subject to
reasonable dispute. See Parrino, 146 F.3d at 706 and note 1 above.

1 viewing the mark would probably assume that the product or service
2 it represents is associated with the source of a different product
3 or service identified by a similar mark.” Lindy Pen Co., Inc. v.
4 Bic Pen Corp., 725 F.2d 1240, 1243 (9th Cir. 1984) (internal
5 citations and quotation marks omitted). See also M2 Software, Inc.
6 v. Madacy Entertainment, 421 F.3d 1073, 1081 n.6 (9th Cir. 2005)
7 (“The burden of proving likelihood of confusion [that is,
8 infringement] remains on the party charging infringement even when
9 relying on an incontestable registration”) (internal citations,
10 quotation marks, and alterations omitted).

11 Here, IOD admits that it has presented no evidence of
12 likelihood of confusion. It simply asserts in its Third Cause of
13 Action that the use of .WEB for registry service would be “likely
14 to cause confusion” with IOD’s registered mark. (Compl. ¶ 97.)
15 Since its registered mark is for computer and beverage accessories
16 and online retail services, whereas ICANN would use or allow use of
17 .WEB for TLD internet services, even taking the complaint in the
18 light most favorable to the plaintiff, the court cannot infer a
19 likelihood of confusion between the subject matter of the
20 registered trademark (mouse pads and backpacks) and the products or
21 services offered by ICANN (Internet DNS and TLD application
22 services).⁶

23 _____
24 ⁶In oral argument, IOD indicated that confusion was likely
25 because other TLD registry services also sell products on their
26 website. IOD gave the specific example of VeriSign, the company
27 that operates the TLD .COM. At the website www.verisign.com,
28 VeriSign sells products including cyber security products. IOD
offered this as an example of the reason why a consumer would be
confused if another company operated the .WEB registry service
while IOD still holds the trademark for .WEB for certain products.
However, the VeriSign site (www.verisign.com) nowhere uses “.COM”
(continued...)

1 **3. Trademark Claims under 15 U.S.C. § 1125(a)**

2 Under 15 U.S.C. § 1125(a), a plaintiff can recover for
3 infringement of common law trademark.⁷ IOD asserts that it has a
4 common law trademark in the .WEB mark in connection with its
5 registry services. ICANN asserts that .WEB is a generic TLD that
6 is not entitled to trademark protection. IOD states that it has a
7 case before the Ninth Circuit,³ pending since 2000, which will
8 decide this issue, and that the court should stay the issue until
9 that decision has been made.

10
11 _____
12 ⁶(...continued)
13 as a trademark for the products and services it is selling; the
14 mark involved appears to be VERISIGN. This example therefore does
15 not help IOD demonstrate a likelihood of confusion; it tends more
16 to demonstrate the TLDs are generally not source indicators.

17 ⁷
18 “(1) Any person who, on or in connection with any
19 goods or services, or any container for goods, uses in
20 commerce any word, term, name, symbol, or device, or
21 any combination thereof, or any false designation of
22 origin, false or misleading description of fact, or
23 false or misleading representation of fact, which--
24 (A) is likely to cause confusion, or to
25 cause mistake, or to deceive as to the
26 affiliation, connection, or association of
27 such person with another person, or as to
28 the origin, sponsorship, or approval of his
or her goods, services, or commercial
activities by another person, or
(B) in commercial advertising or promotion,
misrepresents the nature, characteristics,
qualities, or geographic origin of his or
her or another person's goods, services, or
commercial activities,
shall be liable in a civil action by any person
who believes that he or she is or is likely to be
damaged by such act.”

15 U.S.C.A. § 1125.

27 ³Image Online Design, Inc. v. Core Association, 120 F.Supp. 2d
28 870 (C.D. Cal. 2000), appeal docketed, No. 00-56284 (9th Cir. July
2000). The case appears to be in mediation.

1 This court agrees with ICANN⁴ that the mark .WEB used in
2 relation to Internet registry services is generic and cannot enjoy
3 trademark protection. "Throughout the development of trademark
4 law, the purpose of trademarks remained constant and limited:
5 Identification of the manufacturer or sponsor of a good or the
6 provider of a service." New Kids on the Block v. News America
7 Pub., Inc., 971 F.2d 302, 305 (9th Cir. 1992). Many TLDs do not
8 have trademark significance since they do not serve as source
9 identifiers. "[T]he primary reason that a consumer is likely to
10 associate a domain name with a source is that the second-level
11 domain indicator (in this case the 'advertising' component of
12 'advertising.com') is distinctive." Advertise.com, Inc. AOL
13 Advertising, Inc., 616 F.3d 974, 981 (9th Cir. 2010). Thus, as the
14 Ninth Circuit has remarked that in the mark ADVERTISING.COM, "the
15 use of '.com' . . . only conveys the genus of the services offered
16 under AOL's mark," not the source of those services. Id. at 982.
17 To convey the "genus" of the services is to be by definition a
18 "generic" mark.

19 The proposition that TLDs are not generally source indicators
20 has been adopted by courts, legal scholars, and other authorities.
21 See e.g. Image Online Design, Inc., 120 F. Supp. 2d at 877 ("[A]
22 domain name ending in .web does not indicate source to a web site
23 customer. A consumer understands source as it relates to web sites
24 through the second-level domain name. Only second level domains
25 indicate source."); In re Oppedahl & Larson LLP, 373 F.3d 1171,

26 _____
27 ⁴And with Judge Kelleher in Image Online Design, Inc., 120
28 F.Supp. 2d. 870. The court recognizes that an appeal has been
pending since 2000 but finds the reasoning comprehensive and
persuasive.

1 1173 (Fed. Cir. 2004) ("the term '.com' is a top level domain
2 indicator (TLD) without any trademark significance" and "'.com' has
3 no source-identifying significance."); McCarthy on Trademarks §
4 7:17.50 ("[A] top level domain indicator has no source indicating
5 significance and cannot serve any trademark purpose. . . . [T]he
6 TLD '.com' functions in the world of cyberspace much like the
7 generic indicators 'Inc.,' 'Co.,' or 'Ltd.' placed after the name
8 of a company."); and Trademark Manual of Examining Procedure 5th
9 Ed. (2007) § 1215.02 ("Generally, when a trademark, service mark,
10 collective mark, or certification mark is composed, in whole or in
11 part, of a domain name, neither the beginning of the URL
12 ('http://www.') nor the TLD have any source-indicating
13 significance. Instead, those designations are merely devices that
14 every Internet site provider must use as part of its address.
15 Advertisements for all types of products and services routinely
16 include a URL for the web site of the advertiser, and the average
17 person familiar with the Internet recognizes the format for a
18 domain name and understands that 'http,' 'www,' and a TLD are a
19 part of every URL.").

20 IOD points out that the USPTO has recognized that "as the
21 number of available TLDs is increased by [ICANN], or if the nature
22 of new TLDs changes, the examining attorney must consider any
23 potential source-indicating function of the TLD and introduce
24 evidence as to the significance of the TLD." (Compl. ¶ 36.) It
25 asserts that "the function of TLDs as generally not being source
26 indicating is a relic of an essentially exclusive '.com.'" (Compl.
27 ¶ 37.) This may be the case. For instance, if ICANN were to
28 introduce the TLD .APPLE, the user would arguably expect that that

1 TLD is administered by Apple Inc. In such a case, the TLD might be
2 considered a source indicator. If Sony tried to administer the TLD
3 .APPLE, Apple Inc. would likely argue and possibly prevail on a
4 trademark infringement claim.

5 This said, it appears to the court that today only the most
6 famous of marks could have a source indicating function as a TLD.
7 Some marks, such as .WEB, might remain generic even if they were
8 famous, since .WEB in connection with registry services for the
9 World Wide Web appears to refer to the service offered, rather than
10 to only a particular producer's registry service. See
11 Advertise.com, Inc. v. AOL Advertising, Inc., 616 F.3d 974, 977
12 (9th Cir. 2010) (internal citations and quotation marks
13 omitted) ("Generic terms are those that refer to the genus of which
14 the particular product or service is a species, i.e., the name of
15 the product or service itself. To determine whether a term [is]
16 generic, we look to whether consumers understand the word to refer
17 only to a particular producer's goods or whether the consumer
18 understands the word to refer to the goods themselves.")

19 The court agrees with Judge Kelleher that the mark .WEB is not
20 protectable under traditional trademark analysis because it "seems
21 to represent a genus of a type of website" and thus answers the
22 question "What are you?" rather than "Who vouches for you?" Image
23 Online Design, Inc. v. Core Ass'n, 120 F.Supp.2d 870, 879-80
24 (C.D.Cal. 2000).⁵ Because the purported mark .WEB used as a TLD is
25

26 ⁵The court sees no reason to stay this decision pending the
27 resolution of Image Online Design, Inc., 120 F.Supp.2d 870, now
28 before the Ninth Circuit. That appeal has been pending since 2000,
and the court is persuaded by the reasoning and holding of the
district court opinion in that case.

1 generic, IOD cannot obtain common law trademark protection and
2 therefore cannot state a claim for infringement under this section.

3 **4. Contributory Infringement**

4 "To be liable for contributory trademark infringement, a
5 defendant must have (1) intentionally induced the primary infringer
6 to infringe, or (2) continued to supply an infringing product to an
7 infringer with knowledge that the infringer is mislabeling the
8 particular product supplied." Perfect 10, Inc. v. Visa Intern.
9 Service Ass'n, 494 F.3d 788, 807 (9th Cir. 2007) (internal quotation
10 marks and citation omitted). Because the court has found that IOD
11 has not alleged any actual infringement and that the mark .WEB for
12 registry services is generic, the contributory infringement claims
13 also fail.

14 **C. Intentional Interference Claims**

15 **1. Intentional Interference with Contract**

16 "Under California law, a claim for intentional interference
17 with contract requires: (1) a valid contract between plaintiff and
18 a third party; (2) defendant's knowledge of the contract; (3)
19 defendant's intentional acts designed to induce breach or
20 disruption of the contract; (4) actual breach or disruption; and
21 (5) resulting damage." Family Home & Fin. Ctr. v. Fed Home Loan
22 Mortg. Corp., 525 F.3d 822, 825 (9th Cir. 2008).

23 In its Sixth Cause of Action, IOD alleges the elements of
24 intentional interference with contract as follows: (1) "IOD
25 maintains contractual relationships with its customers, who
26 purchased IOD's .WEB services, including the ability to register a
27 domain name in IOD's .WEB registry"; (2) "ICANN knows that IOD has
28 contracts with its customers to provide and manage domain names

1 that resolve in IOD's .WEB registry"; (3) "ICANN has intentionally
2 and knowingly interfered with IOD's existing customer contracts by
3 permitting other entities to apply for and operate a .WEB registry
4 in the Internet's primary DNS root system controlled by ICANN. . .
5 . [T]he inclusion of .WEB in the Internet's primary DNS root system
6 by ICANN will cause computer users searching for IOD's customers'
7 computers, to reach other computers instead"; (4) "ICANN's
8 acceptance of the seven \$185,000 deposits, and ICANN's affirmations
9 that it intends to permit one or more of the new applicants to
10 operate the .WEB registry in the Internet's primary DNS root system
11 controlled by ICANN, has disrupted and interfered with, and will
12 continue to disrupt and interfere with, IOD's ability to fulfill
13 its contractual obligations to provide .WEB registry services to
14 its customers"; (5) "As a result of ICANN's intentional
15 interference with IOD's contractual relations, IOD has been damaged
16 in an amount to be determined at trial." (Compl. ¶¶ 136-40.)

17 The court finds that these allegations are conclusory. IOD
18 has not alleged any facts identifying the particular contracts, the
19 actual disruption of these contracts, or any actual damage to IOD.
20 IOD is alleging only that it has some contracts with customers for
21 its .WEB registry and that ICANN knows that it has some such
22 contracts. IOD cannot simply allege that ICANN has interfered with
23 its business model; for this tort, it must allege actual
24 interference with actual contracts, such that the result is a
25 specific breach, not merely general damage to the business. IOD
26 has pointed to no case law, nor has the court discovered any, that
27 allows for such claims of generalized disruption of contracts.

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**2. Intentional Interference with Prospective
Economic Advantage**

To state a claim for intentional interference with prospective economic advantage, IOD must allege "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." Pardi v. Kaiser Foundation Hospitals, 389 F.3d 840, 852 (9th Cir. 2004), quoting Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1153 (2003). "[T]he third element also requires a plaintiff to plead intentional wrongful acts on the part of the defendant designed to disrupt the relationship" Korea Supply Co., 29 Cal. 4th at 1154.

As discussed above, IOD has failed to allege facts to support the five elements of intentional interference with prospective economic advantage. Additionally, because the court has found that IOD has not stated a claim for trademark infringement, the court also finds that IOD has not pled any intentional wrongful acts on the part of ICANN.

1 The court therefore finds that IOD has failed to state a claim
2 for intentional interference with contract and with prospective
3 economic advantage.

4 **IV. CONCLUSION**

5 For the reasons stated above, the Motion to Dismiss Complaint
6 is GRANTED.

7 IT IS SO ORDERED.

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10 Dated: February 7, 2013


DEAN D. PREGERSON
United States District Judge

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EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Doc # 13

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 PGMEDIA, INC., D/B/A NAME.SPACE™,
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 Plaintiff,
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 v.
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 NETWORK SOLUTIONS, INC., and the
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 NATIONAL SCIENCE FOUNDATION,
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 Defendants.
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97 Civ. 1946 (RPP)

Second Amended Complaint

Jury Trial Demanded

FILED
DISTRICT COURT

Plaintiff PGMedia, Inc., d/b/a name.space™ ("PGM" or Plaintiff), by its attorney Michael J. Donovan, Esq., for its Second Amended Complaint against Defendant Network Solutions, Inc. ("NSI"), and Defendant National Science Foundation ("NSF"), which amendment and joinder of Defendant NSF is made pursuant to Rules 15(a), 19(a)(2) and 20(a) of the Federal Rules of Civil Procedure and this Court's Order, dated September 17, 1997, respectfully alleges:

Preliminary Statement

1. Plaintiff PGMedia, Inc. seeks herein to open access to the Internet's Domain Name Registration Market,¹ which has been controlled exclusively by Defendant NSI since 1993. NSI's exclusive control and manipulation of that market to maintain its monopoly in the registration of universally resolvable Domain Names on the Internet is not based on any technical requirement or justification arising from the architecture of the Internet, nor shielded by any congressional grant of immunity. On the contrary, the NSI monopoly is a continuation and exploitation of the arcane and arbitrarily limited Domain Name format developed at a time when the Internet was exclusively operated and controlled by military, governmental and educational research facilities. Now that the Internet has long since become a thriving commercial marketplace, essentially free of governmental regulation and control, all of the firms doing business in that market, including NSI, must be subject to applicable Federal and state law which forbids NSI's illegal, monopolistic conduct.

¹ Capitalized terms not otherwise defined herein are given the meaning set forth in the Glossary of Terms, annexed hereto as Exhibit A.

2. In this Second Amended Complaint, PGM seeks extremely limited and narrowly tailored injunctive relief to compel NSI to add reference in the Root Zone File on the NSI Root Nameservers to PGM's Nameservers so that PGM may compete with NSI in the Domain Name Registration Market for Domain Name registrations under shared Top Level Domain Names ("TLDs"). Unlike NSI, PGM does not claim any exclusivity with respect to the Top Level Domain Names under which it offers registration services -- indeed, there is no technical barrier to prevent NSI from also offering registration services under the PGM Shared TLDs in competition with PGM. However, because NSI controls and operates the Root Zone File which is the central (and essential) technical bottle-neck facility for the Domain Name Registration Market, NSI's refusal to allow PGM access to the Root Zone File is a clear violation of Federal and state antitrust laws, and the relief PGM seeks herein should be granted. In addition, after the initial commencement of this action and NSI's initial refusal to allow PGM the access it seeks herein, Defendant NSF notified NSI that NSF would not allow any amendment to the Root Zone File, and similarly rejected PGM's request that NSF acquiesce in such amendment. Defendant NSF's attempt to inject itself into this

dispute and prevent the relief PGM seeks is without authority and a violation of PGM and its clients' First Amendment rights.

The Parties

3. Plaintiff PGMedia, Inc., d/b/a name.space™, is a corporation duly organized under the laws of the State of New York, with its principal place of business at 11 East 4th Street New York, New York. In 1996, PGM launched its service name.space™ on the Internet in an effort to provide Global Internet Domain Name registration services in competition with Defendant NSI, which controls the central Root Zone File and NSI Root Nameservers on the Internet.

4. On information and belief, Defendant Network Solutions, Inc. ("NSI"), is a corporation duly organized under the laws of the State of Delaware, with its principal place of business at 505 Huntmar Park Drive, Herndon, Virginia. As noted above and described in more detail below, NSI exclusively controls the Root Zone File on the NSI Root Nameservers, and has refused PGM's request that reference to the PGM Nameservers (in the form annexed hereto as Exhibit C) be added to the Root Zone File on the NSI Root Nameservers so that PGM's Nameservers may also become "root" or universally resolvable on the Internet.

5. On information and belief, Defendant National Science Foundation ("NSF"), is an independent agency of the United States government, established by the National Science Foundation Act of 1950, as amended, and related legislation, 42 U.S.C. §§ 1861 et seq., and is joined herein pursuant to 5 U.S.C. § 703 (1997), Fed. R. Civ. P. 15(a), 19(a)(2) and 20(a), and this Court's Order, dated September 17, 1997. The principal offices of Defendant NSF are located at 4201 Wilson Boulevard, Arlington, Virginia 22230.

Non-Party Co-Conspirators

6. On information and belief, prior to the filing of the Complaint commencing this action, NSI conspired with the Internet Assigned Numbers Authority ("IANA") and its director, Mr. Jon Postel ("Postel"), to erect barriers to entry to that market in order to preclude any competition with NSI, and to control the creation of other discrete sub-market monopolies under an extremely limited set of new, exclusively-owned, Top Level Domains. On information and belief, such conspiracy ended prior to the filing of this Second Amended Complaint.

Relevant Market

7. The Relevant Market for purposes of this Complaint is the market for initial registration, publication and

subsequent servicing of commercial, non-governmental alphanumeric Domain Names corresponding to IP Numbers in accordance with the Domain Name System ("DNS") for use in enabling and facilitating communication between disparate Hosts on the Internet (the "Domain Name Registration Market"). The Domain Name Registration Market is international in scope extending to every Host on the Internet. At present, Defendant NSI holds a monopoly position in the Domain Name Registration Market and exercises monopoly power with respect thereto.

Jurisdiction and Venue

8. Jurisdiction is proper, as against Defendant NSI herein, in this District pursuant to, inter alia, 15 U.S.C. §§ 15, 26, and 28 U.S.C. §§ 1331, 1367. Jurisdiction is proper, as against Defendant NSF in this District pursuant to, inter alia, 5 U.S.C. §§ 702, 703, and 28 U.S.C. § 1331.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), because, among other things, the antitrust injury complained of herein was caused and is continuing to be caused to PGM's business within this District. In addition, venue is proper in this District against Defendant NSF pursuant to, inter alia, 28 U.S.C. § 1402(a)(1).

FACTUAL BACKGROUND

A Brief History of the Internet and its architecture - Pre-1992.

10. The Internet began as a network created in the 1960s by the Advanced Research Projects Agency ("ARPA"), of the United States Department of Defense ("DoD", the network established by ARPA is referred to herein as "ARPANET"). The original purpose of ARPANET was to create a communication network via computers which could, among other things, potentially survive a nuclear war. ARPANET was designed to be redundant, so that the destruction of any one computer or "node" on ARPANET would not prevent the other nodes from continuing operations.

11. Throughout the 1970s and into the 1980s, numerous additional networks were established at geographically diverse governmental, educational and research facilities. It soon became apparent that enabling communication between these various networks would facilitate collaboration among members of the many research and education communities and provide remote access to information and computing resources. Because these various networks were not all based on the same technology and protocols, a communication standard was developed and implemented to allow

the free flow of information and communication across the numerous and geographically dispersed networks.

12. In 1982, the Transmission Control Protocol ("TCP") was implemented by ARPANET and DoD's network, CSNET. This allowed a connection of and intercommunication between CSNET and ARPANET. As other networks implemented the TCP standard, the number of networks interconnected through the Internet grew rapidly. In order to allow the computers ("hosts") on each network to locate Hosts on other networks, each Host was assigned a numerical address (e.g., 205.160.45.115). Such numerical Host addresses are referred to herein as "IP Addresses".

13. For ease of reference and accessibility, each Host's IP Address was then assigned a unique alphanumeric name ("Domain Name"). Because of the requirement that each Domain Name be unique, a central group of redundant Root Nameservers was established to house the translation database which allows any individual Host to locate other Hosts by way of the alphanumeric Domain Names. The Domain Name entered by the requesting Host is translated into the appropriate IP Address, and the requesting Host may then communicate directly with the Host at the IP Address corresponding to the Domain Name originally entered.

14. At the same time, and well before the Internet became a commercially driven industry, a Domain Name System ("DNS") was developed in an attempt to imbue each alphanumeric Domain Name with information regarding the Host addressee. The Domain Name was divided into hierarchical fields, separated by periods (e.g., namespace.pgpmmedia.com). The field appearing farthest right in the Domain Name (the "Top Level Domain" or "TLD") was arbitrarily limited to six possible codes (i.e., .COM, .EDU, .GOV, .MIL, .ORG, and .NET²), each denoting the type of entity or organization located at the corresponding IP Address. It is important to stress that this arcane format and the original TLDs were created at a time when the Internet was not commercial in nature. In fact, commercialization of the Internet was not even contemplated. In addition, there exists no technical requirement or justification for the arbitrary limitation of TLDs in this way.

15. Indeed, as discussed in greater detail below, in recognition that additional TLDs are technically feasible and in an effort to protect the monopoly enjoyed by Defendant NSI, NSI joined with the Non-Party Co-Conspirators IANA and Postel in the

² The .NET and .ORG TLDs were added in 1994 in belated recognition that demand for new Domain Names flowed primarily from Commercial Internet users.

Domain Name Registry Market in an effort to protect and retain NSI's monopoly as to registration of Domain Names under the TLDs it services commercially and exclusively (i.e., .com, .net, .org, .gov and .edu; collectively, the "NSI TLDs"), while allowing the creation of additional monopolies with respect to a similarly restricted, exclusively owned and arbitrarily assigned group of new TLDs. Under the structure that NSI and the Non-Party Co-Conspirators were attempting to impose on the Internet prior to the filing of the Complaint, dated March 21, 1997, commencing this Action, each newly created Domain Name Registry was to have exclusive control of the TLD assigned to it and would not have been allowed to register names under any other TLD. There is no technical basis for such exclusivity, and PGM claims no such exclusivity with respect to the PGM Shared TLDs under which it registers domain names.

16. Because of the ever-present need for redundancy in the Internet's architecture, a total of nine Root Nameservers (NSI now controls thirteen Root Name Servers; collectively the "NSI Root Nameservers") were established on the Internet "backbone." On information and belief, from and after 1993, NSI has exclusively controlled the registry of Domain Names contained on the NSI Root Nameservers, and has exclusive control over the

Root Zone File on each such server. Each of the NSI Root Nameservers also holds the complete database of Second Level Domain Names registered under the NSI TLDs. NSI also controls the central Root Zone File on each of the NSI Root Nameservers in the UNIX language, commonly identified as "named.root," "root.zone," or "db.root," which serves as the directory of the NSI Root Nameservers, as well as the central directory of other country-specific TLDs, such as '.au' for Australia's root Nameservers. (A true and correct copy of the Root Zone File on the NSI Root Nameservers is annexed hereto as Exhibit B). Every request by way of alphanumeric Domain Name to locate a particular Host on the Internet must necessarily, by default, refer to the Root Zone File on the NSI Root Nameservers in order to be directed to the appropriate Nameserver containing the Second Level Domain Names registered under the particular TLD indicated in the Host's request. Accordingly, unless and until a Nameserver, whether it be a TLD's Root Nameserver or any second level name's Nameserver, is referred to in the Root Zone File, that Nameserver will not be globally recognized on the entire Internet and the names serviced thereby will not be universally resolvable.

17. If a requesting Host seeks the IP Address corresponding to a Domain Name under the ".com" TLD, the Host's request will first refer to the Root Zone File in NSI's exclusive control in order to be directed to the appropriate NSI Root Nameservers containing the Second Level Domain Names registered under the .com TLD. Similarly, if the Domain Name entered ends in a country-specific TLD, the Root Zone File refers the request to the root Nameserver(s) servicing the Domain Names registered under that specific country's TLD. Therefore, because of the redundant and centralized nature of the NSI Root Nameservers in the Internet's architecture, as well as the essential "directory of directories" role of the Root Zone File in the Internet's architecture, the Root Zone File is an Essential Facility which simply cannot be duplicated by PGM in its efforts to offer Domain Name Registration Services with universally resolvable Domain Names in competition with NSI in the Domain Name Registration Market. By its control of this Essential Facility, NSI has the power to eliminate competition in the Domain Name Registration Market which is "downstream" from the Root Zone File.

Network Solutions, Inc. takes control of the Root Nameservers and Root Zone File and exacts monopoly prices.

18. On information and belief, on or about January 1, 1993, pursuant to Cooperative Agreement No. NCR-9218742 (the "NSI/NSF Agreement") between Defendant NSF, on the one hand, and Defendant NSI, on the other, NSI was given exclusive control of the NSI Root Nameservers, the then-existing database of authoritative second level domain names under the TLDs .com, .org, .net, and .gov, and the Root Zone File therein. On information and belief, the Root Zone File at all relevant times herein was and continues to be under the exclusive control of NSI and is maintained exclusively by NSI. In the NSI/NSF Agreement, Defendant NSF did not reserve to itself or any other government agency any control or other authority with respect to changes in the "permitted" alphanumeric composition of the top level domain namespace. Even if it had, however, its exercise of such control must be limited by the First Amendment to the U.S. Constitution. As originally executed, the NSI/NSF Agreement was made on a Cost-Plus-Fixed-Fee basis. However, on or about September 13, 1995, the NSI/NSF Agreement was amended (the "Fee Amendment") to specifically allow NSI to own and operate the NSI Registry (as

well as the NSI Root Nameservers and Root Zone File) for profit and as an unregulated private commercial enterprise.

19. As amended, the NSI/NSF Agreement sets the prices to be charged by NSI for Domain Name Registration Services at \$100 per initial Domain Name registration and two years of use, and \$50 per year renewal thereafter (the "NSI Fee"). The Fee Amendment to the NSI/NSF Agreement fundamentally altered the relationship between NSF and NSI. The agreement is no longer on a cost-plus-fixed-fee basis, but rather, even the government now pays a reduced fee to NSI for the Domain Names it runs and registers under the ".gov" TLD. Furthermore, a portion of the fees collected by NSI purportedly are collected for governmental use, rendering the fee arrangement an illegal and unconstitutional tax.

20. The total disengagement by NSF, the extreme NSI Fee, NSI's monopoly control of the Root Zone File and NSI Root Nameservers, and the artificially limited supply of NSI TLDs has led to considerable dissatisfaction within the Internet Community over the lack of choice and competition in the Domain Name Registration Market. Not only does NSF no longer maintain any authority to prevent the changes to the Root Zone File which PGM herein seeks, but the NSI/NSF Agreement is, in essence, an

agreement fixing prices and in restraint of trade. Furthermore, NSF's actions to prevent PGM's access to the Root Zone File have denied PGM and its clients' First Amendment rights to freedom of speech.

**Dissatisfaction in the Internet Community over
NSI's monopoly and arbitrary limitation of
Domain Name content.**

21. With the explosive growth and commercialization of the Internet generally and the Domain Name Registration Market in particular has come ever-increasing demand for Domain Name Registration Services. For example, as of the end of 1996, NSI reported that it is registering over 80,000 Domain Names per month under its arbitrarily limited NSI TLDs, and charging each of those registrants \$100 per domain name for the first two years, and \$50 per annual renewal thereafter. Because NSI holds the monopoly position of being the only firm which offers universally resolvable commercial Domain Names (due to its exclusive control of the Root Zone File and the NSI Root Nameservers), the NSI-Registered Domain Names have been viewed as property by some speculative registrants independent of Trademark and Copyright laws and a 'land-grab' for Domain Names has ensued. There exists no technical requirement or justification for the

arbitrary limitation of the NSI TLDs, or for the exclusive position held by NSI with respect to registrations under the NSI TLDs and in the Domain Name Registration Market generally. Thus, not only does NSI possess monopoly power in its control of the Root Zone File on the NSI Root Nameservers, but, in arbitrarily and unnecessarily limiting the potential supply of Domain Names by its limited NSI TLDs, NSI has forced over 900,000 Domain Name registrants to pay monopoly prices for the artificially limited Domain Names offered by NSI. Indeed, PGM itself has been forced to pay monopoly prices for the Domain Names it has registered through NSI.

PGM develops and launches name.space™ in competition with NSI.

22. In January 1996, Paul Garrin, President and Chief Executive Officer of PGMedia, Inc., announced his intention to establish a network of Nameservers (the "PGM Nameservers") in five countries on two continents to provide a competing Domain Name Registry (the "PGM Registry") to that offered by NSI. PGM, doing business as name.space™, offers Domain Name Registration Services under virtually any TLD which the registrant may desire. At the same time, PGM does not claim any exclusivity to any TLD under which it registers Domain Names. On the contrary, there is

no technical justification to prevent other Domain Name Registries (including NSI) from registering Domain Names under the same TLDs PGM services.

23. By removing the arbitrary limitation and registration exclusivity of TLDs perpetuated by NSI, PGM's Shared TLDs will greatly increase consumer choice in the Domain Name Registration Market. This expansion of consumer choice will allow the market to develop product and service oriented TLDs which may greatly increase consumer accessibility of specific Internet sites, and will enable new and expanded modes of political speech. For example, under the PGM Shared TLD ".cameras", each manufacturer and/or retailer of cameras could merely register its site using its Trade or Servicemark followed by the product it sells. Thus, PGM's Registry offers Domain Name registrants the potential to create and use Domain Names which may convey complete thoughts, or may, among other things, serve an advertising function to the registrant. (For example, the name.space™ Host Domain Name in the NSI Registry is "namespace.pgmedia.net", while the Domain Name which is served and resolved by the PGM Nameservers is "name.space"; in this example, ".space" is the PGM Shared TLD). In addition, by no longer forcing Domain Names to bear the arbitrarily created and

limited NSI TLDs, PGM's name.space™ service will facilitate the propagation of Domain Names without the jargon of the Internet of old which can be intimidating and cumbersome to new end-users of the Internet. This opening of the Top Level Domain name space to free and unfettered expression also will allow far greater opportunities for meaningful expression of thoughts and ideas in Domain Names. Furthermore, by removing the exclusivity associated with registrations under the NSI TLDs, existing trademark and copyright laws may apply fully to Domain Names just as with other forms of published mass media.

24. The PGM Nameservers are in compliance with all extant industry standards and protocols. Unfortunately, the Domain Names under the PGM Shared TLDs listed and serviced by the PGM Nameservers cannot technically become 'root' and universally resolvable by disparate Hosts on the Internet unless and until reference (in the form annexed hereto as Exhibit C) to the PGM Nameservers corresponding to the PGM Shared TLDs is added to the Root Zone File on the NSI Root Nameservers. This is due to the fact that all Internet Service Providers ("ISPs") and other Hosts first look to the Root Zone File in the NSI Root Nameservers to be directed to the appropriate Root Nameservers which service the TLD on the Domain Name entered by the requesting user. The fact

that such amendment is technically feasible is confirmed by the fact that NSI routinely adds reference in the Root Zone File to the TLDs and registries of other countries. As discussed below, even the Non-Party Co-Conspirators have admitted to such feasibility.

25. At present, the PGM Shared TLDs are only resolvable when the requesting end-user has taken the additional, and often intimidating, step of reconfiguring and redirecting its Internet Connection to by-pass its ISP and look first to the PGM Nameservers. It is simply not feasible for PGM to create its own universally resolvable Domain Name Registry within the present Internet architecture due to the central bottle-neck position held by the Root Zone File on the NSI Root Nameservers.

26. Because PGM is unable to offer universally resolvable Domain Names under its Shared TLDs (a listing of the PGM Shared TLDs offered by name.space™ and serviced by the PGM Nameservers is annexed hereto as a Root Zone File Addendum annexed hereto as Exhibit C), PGM is unable to operate for profit in the Domain Name Registration Market absent the relief herein sought. Nevertheless, as evidence of the incredible demand for Domain Names under PGM's Shared TLDs, PGM is currently accepting registrations under the PGM Shared TLDs it now services, as well

as accepting reservations of additional TLDs to add to its list of Shared TLDs. However, because of the lack of universal resolvability of the PGM Shared TLDs, PGM is unable to charge anything more than a nominal amount for these reservations unless and until the relief requested herein is granted. The universal resolvability that PGM herein seeks is essential for PGM's name.space™ service to become a viable competitor in the Domain Name Registration Market.

27. Thus, until the relief requested herein is granted and the PGM Shared TLDs and the Domain Names PGM registers under those TLDs become universally resolvable, the value of those Domain Names to the registrants is necessarily limited if not eliminated by NSI's refusal to amend the Root Zone File under its control. Each day that NSI continues to refuse to amend the Root Zone File as sought herein, PGM is unable to charge an open and competitive market-based price for the Domain Name Registration Services it offers, and, accordingly, PGM has sustained and continues to sustain substantial damages to its business in the form of lost profits in an amount to be determined at trial as a direct and proximate result of NSI's refusal to amend the Root Zone File and its other illegal conduct described herein.

NSI, IANA and Postel conspire to protect NSI's monopoly while limiting and controlling the creation of additional TLD monopolies.

28. As noted above, demand for Domain Names (and increased choice in TLDs) has exploded in the last two years as a result of the rapid and thorough commercialization of the Internet. In their initial response to this increase in demand, Defendant NSI and the Non-Party Co-Conspirators IANA and Postel attempted to artificially control the creation and pricing of a limited number of new and exclusive TLDs.

29. On information and belief, Defendant NSI has acted in concert with non-party coconspirators IANA and Postel to prevent free market forces from operating in the Domain Name Registration Market. On information and belief, such conspiracy ended prior to the filing of this Second Amended Complaint. Neither IANA nor Postel was acting under any proper grant of authority with respect to the Domain Name Registration Market. For example, as detailed below, NSI refused to grant PGM access to the Root Zone File, citing NSI's "agreement with IANA." On information and belief, such agreement was merely a part of the conspiracy which operated to preclude competition in the Domain Name Registration Market, was in violation of Federal and state

antitrust laws, and PGM has been and continues to be injured by that conspiracy.

PGM requests access to the Essential Facilities controlled by NSI.

30. By letter dated March 11, 1997, PGM formally requested that NSI amend the Root Zone File in the NSI Registry to include reference to the PGM Shared TLDs and the PGM Nameservers. If PGM's narrowly tailored request were granted, the Domain Name Registration Market would open up to free market competition, greatly enhancing consumer choice in the Domain Name Registration Market through the creation and expansion of shared TLDs.

Access Denied.

31. On March 12, 1997, NSI informed PGM by telephone that NSI refused PGM's requested amendment to the Root Zone File. By letter to PGM dated March 17, 1997, NSI formally rejected PGM's request, stating NSI had an 'agreement' with IANA to defer all such requests to that entity. Because, among other things, IANA and Postel have no authority to determine whether and to what extent there should be competition in the Domain Name Registration Market, NSI's initial response to PGM's request amounted to a refusal of that request. As such, NSI's initial

response to PGM's request was in violation of both Federal and state antitrust laws, and PGM has been injured and continues to be injured thereby. Accordingly, the limited and narrowly tailored injunctive relief requested by PGM herein should be granted. In addition, PGM requests an award of damages (trebled) to its business as a direct and proximate result of NSI's illegal conduct, as well as an award of costs and attorney fees incurred in seeking this relief.

Defendant NSF injects itself into the Proceedings, claiming control of the Root Zone File.

32. On or about June 10, 1997, Defendant NSI requested that Defendant NSF acquiesce in NSI's proposal for opening the Domain Name Registration Market to allow competition. While certain terms of that proposal are unreasonable, the June 10, 1997 NSI proposal, if implemented, would allow for unlimited TLDs and would fully open the Top Level Domain name space such that PGM and others could fairly compete with NSI in the Domain Name Registration Market.

33. By letter dated June 25, 1997, Defendant NSF informed Defendant NSI that is:

unable to concur with your proposed plan and process at the present time and must reject [NSI's] request. The National Science Foundation also specifically requests that

NSI take NO action to create additional TLDs to the Internet root zone file until NSF, in consultation with other U.S. government agencies, has completed its deliberations in this area and is able to provide further guidance.

34. By letter dated July 10, 1997, Defendant NSI requested that NSF clarify the apparently non-mandatory terms of its June 25, 1997 letter.

35. By letter dated August 11, 1997, Defendant NSF responded to NSI's request for clarification, stating that the June 25 letter was "intended to be a directive under the [NSI/NSF Agreement]." The June 25 and August 11, 1997, letters from Defendant NSF to Defendant NSI are referred to collectively herein as the "NSF Letters."

36. By letter dated September 4, 1997, PGM requested that NSF retract its directive in the NSF Letters and acquiesce in the NSI Proposal. By letter dated September 12, 1997, Defendant NSF explicitly rejected PGM's request.

37. Thus, through the NSF Letters and NSF's response to PGM's request, Defendant NSF has asserted that it controls and is authorized to limit and restrict the alphanumeric composition of the Top Level Domain name space (implying that it, not NSI, owns and controls the NSI database and registry), and has acted

to prevent PGM from obtaining the reasonable relief to which it is entitled. There is simply no justification for such claim of authority and control by NSF. Furthermore, PGM specifically contests NSF's contention in the NSF Letters that NSF is empowered and authorized to decide what changes, if any, are to be made to the Top Level Domain name space. The NSF Letters and NSF's response to PGM's request explicitly purport to preclude PGM's access to the Root Zone File and the Domain Name Registration Market. Even if NSF is correct that it has retained such exclusive control of and authority with respect to the Root Zone File, the NSF's actions and statements to preclude PGM's entry into the market for publishing Internet Domain Names have had and continue to have the effect of denying PGM's and its clients' rights to freedom of speech, in violation of the First Amendment of the U.S. Constitution.

COUNT I

**Violation of Section 1 of the Sherman Act
Against Defendant NSI**

38. Plaintiff PGM repeats and realleges paragraphs 1 through 37 above as if fully set forth below.

39. As set forth in greater detail above, NSI, prior to the filing of this Second Amended Complaint, conspired with IANA and Postel to preclude competition in the Domain Name Registration Market. On information and belief, such conspiracy ended prior to the filing of this Second Amended Complaint. Such conspiracy directly and proximately injured PGM's business. The sole intent and effect of this conspiracy was to erect barriers to entry, enforced by NSI, to protect and perpetuate NSI's monopoly power and position in the Domain Name Registration Market. Thus, this conspiracy was an unlawful combination in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and had an effect on Interstate Commerce.

40. Accordingly, PGM requests that it be awarded damages (to be trebled), including lost profits, which it sustained as a direct and proximate result of NSI's illegal conspiracy in restraint of trade with the Non-Party Co-Conspirators in an amount to be determined at trial, but not less than \$1,000,000. In addition, pursuant to 15 U.S.C. § 15, NSI should be ordered to pay PGM's reasonable attorney's fees and costs in seeking the relief herein sought.

COUNT II

**Violation of Section 2 of the Sherman Act
Against Defendant NSI**

41. Plaintiff PGM repeats and realleges paragraphs 1 through 40 above as if fully set forth below.

42. As alleged above, NSI holds monopoly power in the Domain Name Registration Market, and exclusively controls the Root Zone File which is an Essential Facility to that market, to the exclusion of any possible competition. NSI's denial of PGM's request that NSI add reference to the PGM Shared TLDs and PGM Nameservers in the Root Zone File, which is an Essential Facility under NSI's exclusive control, is without justification, and in restraint of trade. Such refusal violates Section 2 of the Sherman Act, 15 U.S.C. § 2, has had and continues to have an effect on Interstate Commerce, and PGM has been injured and continues to be injured thereby.

43. Accordingly, PGM requests that NSI be ordered, pursuant to 15 U.S.C. § 26, to amend the Root Zone File on the NSI Root Nameservers to add reference, in the form annexed hereto as Exhibit C, to the PGM Shared TLDs and the PGM Nameservers, and that PGM be awarded damages (to be trebled), including lost profits, which it sustained and continues to sustain as a direct

and proximate result of NSI's illegal conduct described above in an amount to be determined at trial, but not less than \$1,000,000. In addition, pursuant to 15 U.S.C. § 15, NSI should be ordered to pay PGM's reasonable attorney's fees and costs in seeking the relief herein sought.

COUNT III

**Violation of The Donnelly Act
Against Defendant NSI**

44. Plaintiff PGM repeats and realleges paragraphs 1 through 43 above as if fully set forth below.

45. As alleged above, the effect and result of NSI's conduct complained of herein, including the conspiracy with the Non-Party Co-Conspirators, has been to erect illegal barriers to entry in order to eliminate and preclude any competition in the Domain Name Registration Market, to artificially limit supply of TLDs to consumers within the State of New York, and elsewhere, to artificially limit consumer choice, and to effectively preclude innovation in the Domain Name Registration Market. Such conduct is in violation of The Donnelly Act, New York Gen. Bus. Law §§ 340 et seq. As a direct and proximate result of NSI's illegal conduct complained of herein, PGM has sustained and continues to

sustain damages, including lost profits, in an amount to be determined at trial, but not less than \$1,000,000 and trebled according to law.

46. Accordingly, PGM requests that NSI be ordered, pursuant to 15 U.S.C. § 26 and principles of New York common law, to amend the Root Zone File on the NSI Root Nameservers to add reference, in the form annexed hereto as Exhibit C, to the PGM Shared TLDs and the PGM Nameservers, and that PGM be awarded damages (to be trebled), including lost profits, which it sustained and continues to sustain as a direct and proximate result of NSI's illegal conduct described above in an amount to be determined at trial, but not less than \$1,000,000. In addition, pursuant to N.Y. Gen. Bus. Law § 340(5), NSI should be ordered to pay PGM's reasonable attorney's fees and costs in seeking the relief herein sought.

COUNT IV

Violation of Section 2 of the Sherman Act Against Defendant NSI

47. Plaintiff PGM repeats and realleges paragraphs 1 through 46 above as if fully set forth below.

48. As set forth in detail above, the conspiracy by and between NSI and the Non-Party Co-Conspirators was with the specific intent to protect the NSI monopoly with respect to the NSI TLDs, and to limit the creation of additional TLDs to be serviced by new submarket monopolies. On information and belief, such conspiracy ended prior to the filing of this Second Amended Complaint. This illegal attempted monopolization was in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, had an effect on Interstate Commerce, and PGM has been injured thereby.

49. Accordingly, PGM requests that it be awarded damages (to be trebled), including lost profits, which it sustained and continues to sustain as a direct and proximate result of the attempted monopolization by NSI and the Non-Party Co-Conspirators in an amount to be determined at trial, but not less than \$1,000,000, and trebled according to law. In addition, pursuant to 15 U.S.C. § 15, NSI should be ordered to pay PGM's reasonable attorney's fees and costs in seeking the relief herein sought.

COUNT V
Preliminary Injunction
Against Defendant NSI

50. Plaintiff PGM repeats and realleges paragraphs 1 through 49 above as if fully set forth below.

51. As set forth in Counts One through Four above, NSI's refusal to allow PGM access to the Root Zone File on the NSI Root Nameservers is in violation of Sections 1 and 2 of the Sherman Act, and The Donnelly Act, New York Gen. Bus. Law §§ 340, et seq. PGM has sustained and continues to sustain irreparable harm as a result of NSI's illegal conduct. Because of the difficulty in measuring with precision the damages, including lost profits, which PGM has sustained and continues to sustain as a result of NSI's illegal conduct, PGM has no adequate remedy at law. In addition, the injunctive relief requested herein is also in the public interest in that such relief will greatly increase consumer choice and competitive pricing in the Domain Name Registration Market! Accordingly, PGM respectfully requests that NSI be ordered, pursuant to 15 U.S.C. § 26 and principles of New York Common Law, by preliminary injunction to amend the Root Zone File as requested by PGM herein.

Count VI
Declaratory Judgment Against
Defendants NSI and NSF

52. Plaintiff PGM repeats and realleges paragraphs 1 through 51 above as if fully set forth below.

53. As alleged above, on or about June 10, 1997, Defendant NSI requested that NSF acquiesce in its proposal, which, among other things, would allow the amendment of the Root Zone File which PGM seeks herein. Notwithstanding certain unreasonable terms of that proposal, the June 10, 1997 NSI Proposal would allow open, free and unlimited use of the Top Level Domain name space, and would allow unrestricted competition in the Domain Name Registration Market. In response, as alleged more fully above, Defendant NSF purported to direct Defendant NSI, by letters dated June 25, and August 11, 1997 (the "NSF Letters"), that Defendant NSI "specifically take NO action to create additional TLDs or to add any other new TLDs to the Internet root zone file" Subsequently, by letter dated September 12, 1997, NSF rejected PGM's request that NSF retract the NSF Letters and acquiesce in NSI's Proposal. Thus, by way of the NSF Letters and NSF's response to PGM's request, Defendant NSF has attempted to prevent Plaintiff PGM from obtaining the relief it seeks herein. Furthermore, because Defendant NSI has

refused to grant that relief absent NSF approval (the need for which approval PGM expressly contests) based on the substance of the NSF Letters, Defendant NSI has also, once again, improperly refused PGM's reasonable request for access to the essential facility under NSI's control, namely the Root Zone File, thereby precluding PGM from entering the market for provision of Domain Name Registration Services.

54. Furthermore, even if Defendant NSF were found to have retained authority and exclusive control over the Root Zone File as it contends in the NSF Letters and its response to PGM's request, the substance of the NSF Letters has had and continues to have the effect of denying Plaintiff PGM and its clients' First Amendment rights to freedom of speech. By acting to prevent free and unfettered utilization of the Top Level Domain Name Space, NSF has attempted to prevent free speech in that space, in violation of PGM and its clients' First Amendment rights. Plaintiff PGM has been and continues to be irreparably harmed by NSI's refusal to grant PGM reasonable access to the essential facility under NSI's control. In addition, PGM has been and continues to be irreparably harmed by the statements of Defendant NSF because they have further prevented PGM's access to the Domain Name Registration market.

55. The Administrative Procedures Act, 5 U.S.C. §§ 702, provides in relevant part: " A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . , is entitled to judicial review thereof."

(Id.) Furthermore, 28 U.S.C. § 2201 provides in relevant part:

(a) In a case of actual controversy within its jurisdiction, . . . upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201 (1997). The NSF Letters and NSF's response to PGM's request constitute agency action. The NSF Letters and NSF's response to PGM's request have raised the issue as to whether Defendant NSF retained exclusive control over the Root Zone File. Even if NSF were correct, NSF's actions unconstitutionally limit and preclude free speech in Internet Domain Names by preventing unlimited utilization of the top level domain name space. In either event, the NSF Letters and NSF's response to PGM's request have clearly created an actual controversy between Plaintiff PGM, Defendant NSI and Defendant NSF, which entitles PGM to the declaratory relief it seeks herein.

WHEREFORE, Plaintiff PGMedia, Inc., d/b/a name.space™, respectfully requests judgment:

1. Ordering Defendant NSI to amend the Root Zone File on the NSI Root Nameservers to add reference, in the form annexed hereto as Exhibit C, to the PGM Shared TLDs and the PGM Nameservers;

2. Awarding PGM damages against Defendant NSI, including lost profits, which PGM has sustained and continues to sustain as a direct and proximate result of NSI's illegal conduct described above in an amount to be determined at trial but not less than \$1,000,000 and trebled according to law;

3. Awarding PGM its reasonable attorneys fees and costs against NSI in seeking the relief herein sought;

4. Declaring that Defendant NSF does not possess any authority sufficient to prevent or otherwise preclude the relief sought herein by Plaintiff PGMedia, Inc., or, in the alternative, even if NSF possesses any such authority, such authority as exercised in the NSF Letters and in NSF's response to PGM's request has violated PGM and its clients' rights under the First Amendment to the U.S. Constitution, and further declaring that Defendant NSI is in sole and exclusive control of the Root Zone File; and,

5. Granting such other and further relief as is just and proper.

Dated: New York, New York
September 17, 1997



Michael J. Donovan (MD-5955)
Attorney at Law
431 Broome Street
New York, New York 10013
(212) 219-1415

Attorney for Plaintiff PGMedia,
Inc. d/b/a name.space™

EXHIBIT A

GLOSSARY OF TERMS

Root Zone File

The file, most commonly in the UNIX language, commonly identified as "named.root," "db.root," or "root.zone," residing on the NSI Root Nameservers organized by TLD which serves as the central "root" directory of Nameservers of all TLDs listed on the Internet. The Root Zone File is the master directory of directories. In order for a TLD to be globally recognized on the Internet, it must be listed in the Root Zone File. As alleged in the Complaint, the Root Zone File is an Essential Facility to the Domain Name Registration Market.

Domain Name

The unique alphanumeric name, separated into hierarchical fields by dots ((".")), which corresponds to the IP Address of an Internet Host.

Domain Name Registration Market

The market for initial registration and subsequent servicing of commercial, non-governmental alphanumeric Domain Names corresponding to IP Numbers in accordance with the Domain Name System ("DNS") for use in enabling and facilitating communication between disparate Hosts on the Internet. The Domain Name Registration Market is international in scope being limited only by the geographic boundaries of the Internet. At present, Defendant NSI holds a monopoly position in the Domain Name Registration Market and exercises monopoly power with respect thereto.

Domain Name Registration Services

The services involved in maintaining Nameservers containing Domain Names organized hierarchically, and facilitating the "publication" or listing of Domain Names registered by Internet Hosts.

Domain Name System ("DNS")

A distributed database, in the UNIX language, which enables the use of alphanumeric addresses to locate and communicate with disparate Internet Hosts by way of translation into IP addresses.

Internet

For purposes of this Complaint, the Internet is the vast interconnected network of networks which enables intercommunication of networks and Hosts at geographically dispersed locations.

Internet Host

Computer or computers located at specific IP Addresses and their corresponding Domain Names.

IP Address

The Internet Protocol address. A unique set of numbers, currently ranging from 0.0.0.0. to 255.255.255.255., which are assigned in blocks to networks on the Internet in order to locate any individual computer or Host thereon from anywhere on the Internet. Each number in the range can only be assigned to one Host or computer on the Internet.

Root Nameserver

A Nameserver which is referred to in the Root Zone File is a "root" Nameserver, meaning that the Domain Names serviced by the Nameserver are universally resolvable into IP Numbers by disparate Hosts on the Internet.

Second Level Domain Name

The field in the Domain Name appearing immediately to the left of the Top Level Domain. The Second Level Domain is under the administration of a given network or Internet Service Provider, but listed in the

database of the Root Nameserver which contains the Root Zone File.

Top Level Domain

The highest hierarchical field in the Domain Name, appearing farthest right in the name. The Top Level Domain Name (TLD) may be likened to the area code which precedes a telephone number, in that a TLD, in conjunction with its reference on the Root Zone File, will enable location of the Nameserver which contains the Second Level Domain Names registered under the TLD.

Universal Resolvability

The quality given to a Domain Name when reference is added to the Nameserver(s) servicing that Domain Name in the Root Zone File on the NSI Root Nameservers. That is, a universally resolvable Domain Name may be used by any end-user on the Internet to locate the named Host or computer, and the Domain Name requested will be "resolved" by way of the Root Zone File and the Root Nameservers listed for the TLD corresponding to the Domain Name requested. Only TLDs referred to in the Root Zone File are universally resolvable.

EXHIBIT C

[\[Date Prev\]](#)[\[Date Next\]](#)[\[Thread Prev\]](#)[\[Thread Next\]](#)[\[Date Index\]](#)[\[Thread Index\]](#)

[ICANN-EU] fwd: ICANN's \$50,000.00 Question

- *To:* icann-europe@fitug.de
- *Subject:* [ICANN-EU] fwd: ICANN's \$50,000.00 Question
- *From:* Andy Mueller-Maguhn <andy@ccc.de>
- *Date:* Sun, 1 Oct 2000 23:14:44 +0200
- *Comment:* This message comes from the icann-europe mailing list.
- *Sender:* owner-icann-europe@fitug.de

```
>From: Paul Garrin <pg@namespace.org>
>Subject: ICANN's $50,000.00 Question
>Date: Wed, 27 Sep 2000 17:08:45 -0400
>
>     Is the ICANN $50,000.00
>     TLD Application Fee a Scam?
>
>
>The Internet Corporation For Assigned Names and
>Numbers (ICANN) is accpeting proposals from
>sponsors and organizations for new Generic Top
>Level Domains (gTLDs) for possible addition to the
>Global Domain Root so users worldwide can register
>and access internet sites worldwide with domain
>names such as "new.world" or "bargain.shop" and
>others, in the same way that they can access
>"shopping.com" or any other ".com" address.
>
>
>The application fee for sponsors of a new gTLD is
>non-refundable $50,000, payable to ICANN. The
>deadline for all applications is October 2, 2000.
>
>
>In November, 2000 ICANN will select the "winning"
>proposals and recommend to the US Department of
>Commerce NTIA to activate the new gTLDs by
>adding them to the Global Domain Root, physically
>under the control of Network Solutions, Inc.
>
>
>Many have expressed concerns over the amount and
>the validity of the non-refundable fee, especially
>non-profit groups and small entrepreneurs who feel
>that the fee is excessive and raises the barrier of entry
>for becoming a TLD operator beyond their means
>while unfairly favoring large corporations with little
>or no interest in protecting the values of free speech
>and civil society.
>
```

>
>To add to the controversy, such an application
>process and fee has never been imposed before for
>new TLD registries, including in the cases of new
>"country code" TLDs now marketed for commercial
>purposes such as ".cc" ".nu" ".ws" ".tv" and others.
>Rights to those and other so-called "ccTLDs" were
>granted to private corporations free of charge and
>absent due diligence review of their capabilities and
>business plans. In most cases, the granting of ccTLDs
>in 1997 and 1998 were the result of "insider"
>connections to the IANA (Internet Assigned
>Numbers Agency) by the late Dr. Jon Postel, the
>predecessor of ICANN, without any open solicitation,
>review or competitive bid. Since Dr. Postel's untimely
>death in October, 1998 at the moment ICANN was
>called before the House Commerce Committee for
>review, ICANN has assumed the functions formerly
>carried out by the IANA under Dr. Postel. ICANN
>has been widely criticised for operating in secret with
>no public oversight or review of their decisions and
>policies, which in the end affect all internet users
>worldwide.
>
>
>Legitimacy and precedence aside, critics of ICANN
>are likely to question the chances that ICANN, whose
>board is dominated by corporate interests such as
>IBM, MCI-Worldcom, ATT, AOL, Network
>Solutions, British Telecom, and various intellectual
>property and trademark interests, will select any new
>TLDs at all from the paid applications. In any event,
>the possibility that a majority of the applications will
>be rejected by ICANN causing most applicants to
>each lose \$50,000.00. If ICANN receives a large
>number of applications but only activates 1 or 2 new
>gTLDs most of the applicants will lose their money
>and be kept out of the registry business.
>
>
>This is not the first time that ICANN has tried to
>extract fees from domain companies. In 1999 ICANN
>attempted to impose a \$1.00 per domain per year
>"tax" on every ".com" ".org" and ".net" domain
>registered. After review and hearings before the US
>House Committee on Commerce, ICANN was forced
>by Congress to withdraw the "dollar-per-domain tax".
>A source inside the House Commerce Committee
>(who asked not to be named) commented that if the
>issue of the \$50,000.00 non-refundable fee is brought
>before the Commerce Committee it is likely that, just
>as in the "dollar-per-domain tax", the fee would be
>overturned. The majority of members on the House
>Commerce Committee are opposed to any form of
>regulation or taxation of the internet.
>
>
>How much will ICANN get away with is a big
>question. It's probably no coincidence that the
>solicitation of applications and fees was timed when

>the Congress went on break in August. Although
>Congress is back in session, many members are up
>for re-election and are spending most of their
>energies on their campaigns and not on legislation.
>Whether or not there will be hearings or review
>before the elections is unknown, as is the possibility
>that Congress will order ICANN to refund the fees
>after the fact.
>
>
>It is not yet known how many companies will apply
>for gTLD registry status and pay the non-refundable
>fee. It is also important to note that the ultimate order
>to add new gTLDs to the Global Domain Root
>comes not from ICANN, but from the NTIA, as a
>written directive pursuant to "Amendment 11" of the
>cooperative agreement between the NTIA and NSI.
>Such a written directive would then give Network
>Solutions the green light to make the necessary
>additions to the "root.zone" file that runs on
>"root-server A" that would activate the new gTLDs
>to the entire internet. One letter and a simple text edit
>will change the world.

- **Follow-Ups:**

- [Re: \[ICANN-EU\] fwd: ICANN's \\$50,000.00 Question](#)
 - *From:* Jefsey Morfin <jefsey@wanadoo.fr>
- Prev by Date: [\[ICANN-EU\] Re-opening the funding debate](#)
- Next by Date: [\[ICANN-EU\] Re: Re-opening the funding debate](#)
- Prev by thread: [Re: \[ICANN-EU\] Re-opening the funding debate](#)
- Next by thread: [Re: \[ICANN-EU\] fwd: ICANN's \\$50,000.00 Question](#)
- Index(es):
 - [Date](#)
 - [Thread](#)

EXHIBIT D

MORRISON | FOERSTER

1290 AVENUE OF THE AMERICAS
NEW YORK, NY 10104-0050

TELEPHONE: 212.468.8000
FACSIMILE: 212.468.7900

WWW.MOFO.COM

MORRISON & FOERSTER LLP

NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SACRAMENTO, SAN DIEGO,
DENVER, NORTHERN VIRGINIA,
WASHINGTON, D.C.

TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

February 24, 2012

Writer's Direct Contact
212.468.8009
MBMiller@mofo.com

Via E-Mail (jlevee@jonesday.com)

Jeffrey A. LeVee, Esq.
Jones Day
555 South Flower Street, Fiftieth Floor
Los Angeles, California 90071

Re: **name.space**

Dear Mr. LeVee:

Thank you for your February 18, 2012 letter. To respond to your question, **name.space** seeks the following action on ICANN's part:

- (1) ICANN grant **name.space**'s outstanding application from ICANN's 2000 TLD Application Round and delegate the 118 gTLDs set forth in that application; and
- (2) ICANN recognize in connection with the 2012 Application Round **name.space**'s priority and proprietary rights in the other 364 gTLDs that **name.space** originated and has been using in commerce continuously since 1996, and make provision for the consideration of such rights as part of the 2012 Application Round.

For your convenience, attached is a list of the 118 gTLDs from **name.space**'s 2000 application and **name.space**'s other 364 gTLDs at issue.

Sincerely,



Michael B. Miller

name.space's 118 gTLDs from 2000 ICANN gTLD Application

.ads	.fashion	.men	.society
.agency	.festival	.monitor	.software
.aids	.fiction	.movie	.solutions
.air	.film	.music	.sound
.antiques	.films	.news	.soup
.art	.foundation	.now	.space
.artists	.free	.nyc	.sports
.auction	.fun	.one	.star
.audio	.fund	.online	.studios
.bbs	.funds	.opera	.sucks
.books	.gallery	.page	.systems
.cafe	.games	.partners	.tech
.cam	.gay	.people	.temple
.card	.graphics	.planet	.theater
.cars	.group	.politics	.time
.center	.guide	.power	.times
.channel	.help	.productions	.toys
.church	.history	.projects	.trade
.city	.hotel	.properties	.travel
.club	.index	.radio	.voice
.commerce	.insurance	.records	.war
.computers	.jazz	.school	.watch
.consulting	.jobs	.security	.weather
.culture	.lab	.service	.women
.design	.mad	.sex	.world
.digital	.mag	.shareware	.writer
.direct	.magic	.shoes	.zine
.dtv	.mail	.shop	.zone
.dvd	.market	.show	
.factory	.media	.site	

364 Other gTLDs Originated by **name.space**

.academy	.estate	.lotto	.review
.access	.etc	.loud	.ride
.africa	.exchange	.love	.right
.age	.express	.lover	.rights
.airlines	.facts	.lp	.road
.alley	.fair	.ltd	.rock
.almanac	.family	.magazine	.roots
.amor	.faq	.magnetics	.rough
.anarchy	.farm	.mall	.run
.aps	.fax	.man	.said
.arch	.fellowship	.manifesto	.sale
.arts	.filter	.map	.sands
.associates	.finance	.mars	.sauna
.band	.firm	.materials	.say
.bank	.fish	.matrix	.scan
.bar	.flow	.mayor	.scape
.beat	.flux	.med	.scifi
.beer	.folks	.medical	.secret
.bicycle	.food	.medium	.secure
.bicycles	.form	.memorabilia	.senate
.big	.forum	.metal	.sense
.bird	.fringe	.mind	.services
.black	.fuck	.minds	.settings
.blog	.funk	.mission	.sidewalk
.blue	.game	.model	.skate
.body	.garden	.models	.ski
.book	.gate	.monde	.small
.box	.geek	.money	.socks
.boys	.general	.moon	.soft
.brain	.girl	.motors	.south
.brand	.girls	.movies	.spa
.broker	.global	.multimedia	.speech
.bros	.golf	.mutual	.spider
.brown	.governor	.nation	.spot
.budapest	.green	.network	.square
.bug	.grey	.networks	.state
.business	.growth	.next	.store
.buy	.guard	.ngo	.story
.cable	.guitar	.night	.street
.camera	.guitars	.noise	.student
.camp	.hack	.north	.studio
.canada	.hacker	.nostalgia	.suite
.capital	.hair	.not	.surf

.care	.handbook	.noticias	.symphony
.casino	.hard	.null	.sync
.central	.hat	.nuts	.system
.centre	.hell	.objects	.talk
.chaos	.hole	.ocean	.tape
.chapel	.home	.oil	.taxi
.chat	.hope	.open	.text
.cigarettes	.host	.ops	.texte
.cigars	.hot	.orange	.theatre
.circle	.hotline	.out	.thing
.code	.hour	.outside	.things
.coffee	.house	.paper	.think
.collectables	.icon	.partner	.thumb
.college	.illusions	.peace	.tiger
.comics	.illustrated	.perfect	.tolerance
.comix	.image	.photo	.trend
.computer	.impact	.pictures	.tribe
.computing	.inc	.place	.tribune
.congress	.indeed	.play	.truth
.connection	.indigo	.plaza	.tube
.construction	.inn	.pleasures	.txt
.cool	.inside	.poets	.underground
.corp	.institute	.pool	.union
.country	.internet	.pop	.unit
.creations	.irc	.porno	.unix
.cult	.islands	.port	.unlimited
.cyber	.jam	.post	.up
.daily	.jet	.presence	.usa
.data	.jewelry	.president	.video
.day	.journal	.press	.view
.dictionary	.kids	.privacy	.views
.digit	.label	.private	.violet
.dimension	.labs	.products	.vision
.dir	.lava	.pub	.vlog
.disc	.law	.public	.vox
.dish	.left	.publicadvocate	.way
.dog	.library	.publications	.west
.down	.lie	.punk	.white
.east	.limited	.radikal	.wifi
.easy	.link	.reality	.wine
.electric	.list	.realty	.wire
.elite	.lit	.record	.wise
.email	.lives	.red	.works
.enterprises	.llc	.reflector	.workshop
.entertainment	.llp	.report	.worldwide

.ephemera	.logic	.reporter	.writers
.erotic	.logo	.republic	.yellow
.erotica	.loop	.resources	.zero

EXHIBIT E

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1290 AVENUE OF THE AMERICAS
NEW YORK, NY 10104-0050

TELEPHONE: 212.468.8000
FACSIMILE: 212.468.7900

WWW.MOFO.COM

MORRISON & FOERSTER LLP

NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SACRAMENTO, SAN DIEGO,
DENVER, NORTHERN VIRGINIA,
WASHINGTON, D.C.

TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

March 16, 2012

Writer's Direct Contact
212.468.8009
MBMiller@mofocom

Via E-Mail (jlevec@jonesday.com)

Jeffrey A. LeVee, Esq.
Jones Day
555 South Flower Street, Fiftieth Floor
Los Angeles, California 90071

Re: **name.space**

Dear Mr. LeVee:

I am writing in response to your letter dated March 2, 2012. This letter is without waiver of any of **name.space**'s rights.

name.space is the originator and creator of the 482 gTLDs that were identified in the attachment to my February 24, 2012 letter, and a participant in the 2000 Application Round.

First, with respect to the 2000 Application Round, **name.space** submitted an application for delegation of 118 gTLD strings, along with its \$50,000 application fee, in accordance with ICANN's rules permitting an unlimited number of strings in a single application provided they conform to a single business model. Once this application was lodged, it remained under consideration until it was resolved. **name.space** has never, to this day, been told that the status of its application has been resolved, and the 2012 Application Round materials appear to reserve on this issue.

The status of **name.space**'s 2000 application is of particular importance to **name.space** given its business model that incorporates the simultaneous operation of a significant number of gTLDs—a feature that drives not only **name.space**'s revenue model but also its competitive appeal to other rights holders. The 2012 Application Process appears to have been designed intentionally to preclude or at least impede such a business model, by requiring application fees for each gTLD for which an application has been submitted. Indeed, **name.space** appears to be uniquely situated in this regard as its application contains 118 gTLDs already in service that predate the ICANN process and for which **name.space** has already sought recognition by proceeding through the ICANN process in good faith, beginning even before the formation of ICANN itself. At a minimum, the 118 gTLDs

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Jeffrey A. LeVee, Esq.

March 16, 2012

Page Two

submitted in **name.space**'s 2000 application should be considered as part of the 2012 Application Round without requiring **name.space** to pay additional application fees.

Second, with respect to **name.space**'s priority and/or proprietary rights in the 482 gTLDs at issue, **name.space** has originated and used those gTLDs in commerce continuously since 1996 by making them available for registration and resolution, among other services, to those users who choose to operate on **name.space**'s network. Those users, as a result, identify and associate those gTLDs with **name.space** and its services, and **name.space** has common law trademark rights in those gTLDs as well as potential federal trademark rights. As ICANN is undoubtedly aware, while the U.S. Patent and Trademark Office ("USPTO") regards TLDs as generally serving no source-indicating function, the USPTO has recognized that "[a]s the number of available TLDs is increased by the Internet Corporation for Assigned Names and Numbers ("ICANN"), or if the nature of new TLDs changes, the examining attorney must consider any potential source-indicating function of the TLD and introduce evidence as to the significance of the TLD." TMEP § 1209.03(m) (8th ed. Oct. 2011). The USPTO has explicitly recognized that TLDs could, in fact, serve source-indicating functions. *See id.*; TMEP § 1215.08(a).¹

Accordingly, **name.space**'s gTLDs—such as .NOW, .POWER, .SPACE and .SUCKS, to name a few—would be infringed by competing gTLDs delegated under the same name. **name.space** has begun the process of registering its trademarks in Europe for select gTLDs, and intends to do the same in the U.S.

Moreover, **name.space** currently provides services to websites and various network services in operation on the Internet that use domains under its gTLDs. Any delegation by ICANN of those gTLDs to others will therefore cause disruption to **name.space**'s existing services and to the content on its network, not to mention confusion as to where each gTLD in conflict resolves. Given **name.space**'s priority in first establishing those gTLDs and providing services thereto, any conflicting delegation by ICANN would amount to interference with **name.space**'s services as well as infringement and unfair competition by the delegated party, and possibly by ICANN.

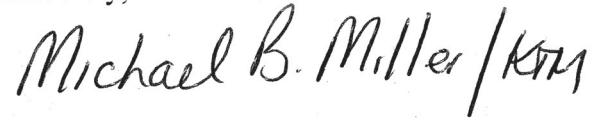
¹ **name.space** is aware that the USPTO currently takes the position that "a mark [that] is composed solely of a TLD for 'domain name registry services'" is not entitled to registration, but **name.space** provides services beyond mere domain name registry services, such as searching, hosting and content delivery services. Moreover, this limitation only applies to U.S. federally registered trademarks, and is not applicable to common law trademarks or foreign registered trademarks.

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Jeffrey A. LeVee, Esq.
March 16, 2012
Page Three

In sum, given **name.space**'s unique position, we need to discuss these issues with you as a matter of urgency.

Sincerely,



Michael B. Miller

EXHIBIT F



TLD Application Process FAQs

We add/revise material on this page frequently. If you have visited here before, please reload/refresh this page.

(Please note that in some cases the questions in the following FAQs have been edited to generalize them or otherwise to provide information of greater general interest.)

FAQ #1: What is the process for obtaining information about how to apply to sponsor or operate a new TLD?

ICANN will make various information for applicants available on its web site. The information can be accessed through the web page at <http://www.icann.org/tlds/tld-application-process.htm>. This information will include various explanatory materials as well as application forms.

If you have a question before 3 October 2000 about the TLD application process that, after carefully reviewing the posted materials, you feel has not yet been answered, you may submit that question by e-mail to tld-applications@icann.org. To help provide all applicants with equitable access to information about the process as they prepare their applications, it is ICANN's practice to respond to questions about applications during the application period **only** when they are submitted **in writing**. Please do not attempt to get additional information by calling or visiting our offices.

We will periodically review the questions submitted and, if a response is appropriate, we will post the question (or an edited version of it, if we feel that would be more informative) along with our responses on this web page. Please watch this web page to see any response to your question. We will not be replying separately to e-mail inquiries.

We may also create and publish other FAQs on this page as we become aware of points that should be clarified.

Please note that any question that you submit to tld-applications@icann.org is subject to being published verbatim on this web page. If you do not wish to

publish an idea you have to the world, you should not include it in your question.

IMPORTANT NOTE: Those seeking information about the possibility of registering domain names within an existing or to-be-created TLD should direct their questions to icann@icann.org. **Questions of this character should not be sent to the tld-applications mailbox.**

FAQ #2: My TLD concept is complicated, and I feel I need to meet with ICANN to explain it. How do I do that?

After the close of the application period on 2 October 2000, ICANN staff will be evaluating all of the applications received. This process will involve not only reviewing what has been submitted, but also consulting with technical, financial, business, and legal experts and gathering additional information that may be pertinent to the application.

As needed, after the application period is concluded the ICANN staff may gather additional information by sending applicants e-mails asking for the information, by conducting telephone or in-person interviews with applicants, by attending (possibly with ICANN-retained experts) presentations by applicants or their experts, or by other means. These inquiries will be initiated by the ICANN staff; if you feel a presentation to ICANN is necessary to properly present your proposal you should suggest that in your written application.

FAQ #3:

(A) I represent a fairly large ISP & newly forming open source registrars' group that is also interested in possibly creating a new TLD. How do I know what TLD is being spoken for? The US\$ 50,000 application fee is not a problem, but I don't want to waste it on a TLD that already has been dealt with or is being processed.

(B) Recently I'm drawing an Chinese DNS standard and require information about DNS, especially TLDs. As I know, ICANN issued new TLDs recently during the meeting in Yokohama, and I want to know what are these new TLDs.

In Yokohama, the ICANN Board adopted a policy that will allow the introduction of new TLDs, which will probably become operational next year. However, **no particular TLDs were approved in Yokohama**. The TLDs that are presently in effect are described in the "[Present Structure of the Domain-Name System](#)" section of the "[Introduction of New Top-Level Domains](#)" document published in advance of the Yokohama meeting.

FAQ #4: Will the date I submit my application matter if multiple candidates apply for the same name(s)? Do applicants who submit their applications earlier get priority with everything else equal?

You must submit your complete application to ICANN by the 2 October 2000

deadline. If you do so, the date on which you submit your application will not affect the selection process. In other words, the date you apply makes no difference (as long as you get your application in on time).

FAQ #5: Is it correct to assume that new TLDs to be considered by ICANN may utilize non-ASCII characters in both the name of the TLD and in name components ("labels") hierarchically below it?

No. Domain names are used as identifiers in a variety of protocols and applications that conform to them. These protocols expect the identifiers they use to conform to a very narrow definition, which has been established in the Internet for over 25 years. Use of names that do not conform to the narrowest of the rules and conventions is known to cause operability and interoperability problems. The format is described in several places, most importantly section 3 of [RFC 1034](#) and section 2.1 of [RFC 1123](#) (both full Internet Standards).

Specifically, applications expect domain names that are composed only of the letters A to Z (interpreted in a case-independent fashion), digits, hyphens, and the period, all coded according to the rules of the "ASCII" character set (the "basic version" character coding specified in ISO 646). The period is used only to separate name components (called "labels" in the DNS). Labels may not start or end with a hyphen or be more than 63 characters in length; top-level domain names (i.e. the rightmost label in a name) may not start with a digit.

At this time, ICANN will only establish top-level domains having names that comply with the above format. Registries will be expected similarly to follow that format for the names they register.

The [Internationalized Domain Name \(IDN\) Working Group](#) of the [Internet Engineering Task Force \(IETF\)](#) is charged with specifying the requirements for internationalized access to domain names and a standards track protocol and encodings, based on those requirements, which will adequately respond to applications restrictions. When IDN's work is complete, the above name-formation requirements might be modified.

See [FAQ #9](#) and [FAQ #36](#) for related information.

FAQ #6: Will applications submitted after 2 October 2000 (around December or early next year) be considered?

The current activity (in calling for proposals to sponsor or operate new TLDs) is part of a "proof of concept" program in which various ideas for new TLDs will be tested in actual practice. The plan is to introduce a limited number of new TLDs in a measured and responsible manner and then to evaluate how the introduction fared.

To be included in this proof-of-concept program, applications must be received by 2 October 2000. Based on evaluation of how things proceed, next steps will be decided, and later applications might then be accepted.

FAQ #7: How can I arrange for ICANN to send me a hard copy of the application form?

You can't. Applications will consist primarily of comprehensive technical, business, and policy proposals prepared by or for the applicant. There will also be various forms to be submitted, which are scheduled to be available on the ICANN web site on 15 August 2000. Once these are available, you should print them, fill them out, and submit them as part of your overall application.

FAQ #8: In some jurisdictions, it is a long process to authorise a not-for-profit corporation. Will ICANN accept an application for which the temporary applicant is an ordinary corporation with the intent to convert it to a not-for-profit corp? Such an authorisation may be conditional upon the conversion prior to fully implementing the registry.

The appropriate course in this situation depends on whether the to-be-formed not-for-profit corporation is proposed to be a sponsoring organization (the usual case), the registry operator, or both.

A proposed sponsoring organization need not actually be formed at the time that the application is made. The application for a sponsored TLD can be made by those proposing to form the sponsoring organization. Of course, formation must be complete before the organization enters a TLD sponsorship agreement with ICANN. Ordinarily, ICANN's decision to delegate to a sponsoring organization will be made based partly on the characteristics of the proposed organization, and that organization should be the one that will serve as the sponsoring organization throughout the period of the requested delegation.

In contrast, the registry operator's proposal should be submitted by an existing organization. As with sponsoring organizations, ICANN's decision to delegate to a registry operator will be made based partly on the characteristics of the operator. The proposed operator should be the one that is proposed for the entire period of the requested delegation.

See [FAQ #12](#) for related information.

FAQ #9: If a restricted TLD were to be the subject of an application, would ICANN accept a TLD name in ASCII letters which are conversions from another symbolic system to Roman letters?

A TLD name must conform to format requirements summarized in [FAQ #5](#). Provided it does, it can be a transliteration having meaning in another symbolic system. For example, .san (transliterated from Japanese) would be acceptable as the name of a TLD for personal-use domain names.

FAQ #10: Will there at any time be the opportunity to secure an extended window to lodge an application or the possibility of securing some sort of option over the right to lodge an application? The very short time frame within which to lodge applications is short.

The current application process is part of a "proof of concept" program that is intended to involve introduction of only a limited number of new TLDs. In recognition of the limited recent experience in introducing new TLDs, the program is meant to allow the Internet community to evaluate possible additions and enhancements to the DNS and possible methods of implementing them. After these initial introductions, decisions can be made about evolution of the DNS (including new TLDs) based on the experience gained. While it would not be appropriate to prejudge those decisions, they may involve seeking additional applications in the future.

FAQ #11: One might think that all applicants must be not-for-profit organizations. Is this understanding correct?

No. Depending on the type of TLD being proposed (sponsored or unsponsored), the applicant will be either a sponsoring organization or a registry operator. For discussions of the role of each, see the [Sponsored and Unsponsored TLDs section of the New TLD Application Process Overview](#) document and [criteria 7 in the Criteria for Assessing TLD Proposals](#) document. Each organization should have characteristics (not-for-profit, for-profit, etc.) appropriate to its role within the overall context of the proposal.

FAQ #12: Can multiple organizations make an application to sponsor a TLD?

Yes, in the situation where the sponsoring organization is not yet formed. See, for example, [item A1 on the Sponsored TLD Application Transmittal Form](#) and [Instruction I9.2](#). In all other situations, there should be only a single applicant. For related information, see [FAQ #8](#).

FAQ #13: I have the question about paying the US\$50,000 fee. If the application is not granted, is ICANN giving the US\$50,000 back?

No. The fee is only an [application](#) fee, in exchange for which ICANN will review your application. ICANN will keep your fee even if it does not grant your application.

There is only one situation in which your application fee might be returned. If you claim your application contains confidential information and ICANN disagrees, ICANN will delete the information before reviewing your application on the merits. In this situation, you will be offered the opportunity to withdraw the application and obtain a refund of the US\$50,000 application fee. See [section I of the Statement of Requested Confidential Treatment of Materials Submitted](#) for details.

FAQ #14: If the application is granted by ICANN, is ICANN keeping the fee?

Yes. Applications will be granted only after review and evaluation by ICANN. The fee is designed to defray ICANN's costs associated with processing and evaluating the applications, and follow-up.

Please note that ICANN recovers its costs of operation from domain-name

and IP-address registries and registrars. Those preparing Registry Operator Proposals should [factor their share \(if the application is accepted\) of ICANN's cost-recovery needs into their business model](#).

FAQ #15: Why is the application fee so high? Aren't you going to prevent non-profit TLD registry proposals by requiring such a steep application fee?

As a small non-profit organization, ICANN must conduct its activities so they are essentially self-funding, on the principle of cost-recovery. For example, the accreditation process for .com, .net, and .org registrars is funded through application and accreditation fees paid by those registrars. Likewise, the new-TLD-application process must be self-funding. This process will include very intensive review and analysis of applications on many levels (including technical, financial, legal, etc.). The application fee was set at a level intended to cover all of ICANN's costs related to the process. It would not be justifiable to require existing registries and registrars to subsidize the process.

In establishing the fee, ICANN's Board was concerned that the application fee might discourage some applications for special-purpose restricted TLDs. However, a multi-tiered fee structure would mean that some applicants would subsidize the application-review costs of others. This would be particularly unfair because of difficulties in distinguishing between for-profit and non-profit proposals in the global context. Accordingly, a single, cost-recovery-based application fee has been adopted for this year's new-TLD-application process.

FAQ #16: ICANN states clearly its intention to create competition among gTLD registries as it did with registrars. Will ICANN grant an application for a new registry for an existing gTLD like .com, .net, or .org?

No. The current program involves the evaluation of applications to sponsor or operate "[new TLDs](#)," not existing ones. As stated in the [New TLD Application Process Overview](#) document, "The adopted policy calls for submission of proposals to sponsor or operate new TLDs by interested persons and organizations." There is no intent to upset arrangements for existing TLDs through this program.

FAQ #17: My group is dissatisfied with the operation of the two-letter ccTLD that has been assigned to our country. We would like to apply to operate a registry for that ccTLD. Should we submit an application under the New TLD program?

No. The [New TLD Application Process](#) involves establishing new TLDs, not changing the delegation of existing ones. Applications in the New TLD program should not seek TLD strings that match [alpha-2 codes on the ISO 3166-1 list](#).

See [FAQ #21](#) and [FAQ #24](#) for related information.

FAQ #18: If we go through all the effort to apply for a top level domain, who owns it? What could potentially happen to change ownership?

Top-level domains are established for the benefit of the Internet community. Their operation is delegated to particular organizations based on a showing that doing so is in the best interests of the Internet community. An operator does not "own" a top-level domain. As noted in [RFC 1591](#) (written by Jon Postel in 1994 and entitled "Domain Name System Structure and Delegation"): "Concerns about 'rights' and 'ownership' of domains are inappropriate. It is appropriate to be concerned about 'responsibilities' and 'service' to the community."

It is anticipated that TLD registry agreements will provide that, if a registry operator fails to meet its service obligations, the agreement may be terminated. In their proposals, sponsoring organizations and registry operators should state the term they are suggesting and explain why they believe that term would best serve the interest of the Internet community. See, for example, [item D13.2.10 of the Registry Operator's Proposal](#).

See [FAQ #39](#) for similar information concerning sponsored TLDs.

FAQ #19: Is the non-refundable US\$ 50,000 application fee per TLD or per idea? In other words, if I apply for multiple TLD strings is that one or many applications?

It is US\$ 50,000 *per application*. [Section VIII of the New TLD Application Instructions](#) discusses the circumstances in which a single application can propose multiple TLD strings.

FAQ #20: I am planning to submit an application to ICANN for a new TLD. I would like to submit my application in writing. What address should I send my application to?

This information is provided in [item I22 of the New TLD Application Instructions](#). Persons considering submitting an application are urged to carefully review that document as well as the instructions stated in the applications. Failure to follow all of the instructions can lead to denial of your application.

FAQ #21: Will an application which accidentally proposes a TLD that is an alpha-3 code on the ISO-3166-1 list fail?

As stated in [FAQ #17](#), applications in the New TLD program should not seek TLD strings that match [alpha-2 codes on the ISO 3166-1 list](#). There is no similar, automatic disqualification on alpha-3 codes on the ISO 3166-1 list.

See [FAQ #24](#) for a follow-up question.

FAQ #22: What is the procedure in the event of duplicate submission of a domain name by different parties? Which party would get preference? Would the fee be non-refundable for the party that is not selected?

Applications to sponsor or operate a TLD will be evaluated according to the [Criteria for Assessing TLD Proposals](#), under which all aspects of the proposal

(operational, financial, technical, etc.) will be considered. The particular TLD string requested is only one of many factors in the evaluation. Clearly, the same TLD cannot be established for both proposals; differences between the applications would be considered according to the criteria. The fee paid by a non-selected applicant would not be refundable.

FAQ #23: Will two (or more) parties that apply for a TLD in related fields or that propose identical plans be asked to negotiate to present a joint proposal?

Although it is possible that negotiations toward a joint proposal would be urged depending on the circumstances, applicants should not assume that ICANN will request or require such negotiations. Applicants should consider discussing their proposals with other interested members of the community before submitting them.

FAQ #24: [FAQ #21](#) states that there is no "automatic disqualification" of applications proposing TLD labels that are alpha-3 codes on ISO 3166-1 list. Is this the correct even if a [ccTLD has been established for the corresponding alpha-2 code on the ISO 3166-1 list](#)?

Yes, it is correct that there is no automatic disqualification. Please take note, however, of [consideration 4\(b\) in the Criteria for Assessing TLD Proposals](#), which states:

b. Is the proposed TLD semantically "far" from existing TLDs, so that confusion is avoided? (For example, TLD labels suggesting similar meanings might be more easily confused.) Is it phonetically distinct from existing TLDs? Meanings and pronunciations in different languages may be relevant to these inquiries.

In this context, "existing TLDs" includes ccTLDs that have been established.

FAQ #25: We are an established not-for-profit institute that wishes to sponsor a chartered TLD. However, we feel that the eventual formation of an international sponsoring organization would be best for this chartered TLD. We would therefore like to propose our institute as the sponsoring organization pro tem, with a well-defined schedule for the establishment of the international sponsoring organization (as negotiated with ICANN). Would such a proposal be acceptable to ICANN?

Assuming that a proposal qualifies in other respects, the fact that the proposed sponsoring organization has not yet been formed should not disqualify the proposal. As noted in [section 1\(c\)\(i\) of the New TLD Application Process Overview](#), "Where the proposed sponsoring organization has not yet been formed, the submission may be made by the organizers of that organization." Thus, it would be appropriate to have a proposal under which your not-for-profit institute would propose to establish the international sponsoring organization. If you wish your proposal to be evaluated based on the appropriateness of the to-be-formed international organization (rather than the institute) as sponsor, we recommend that your proposal include plans to

form the organization before completion of any contract negotiations with ICANN. The proposed organization could be affiliated initially with your institute, with a spin-off scheduled for a later time.

In submitting your application, you should check the box in [item A1 of the Sponsored TLD Application Transmittal Form](#) next to "Organization(s) or person(s) proposing to form the sponsoring organization (check this item only if the sponsoring organization has not yet been formed)." [Section I of the Sponsoring Organization's Proposal](#) should be completed to give the information for the sponsoring organization that is proposed (i.e. the one to be formed).

FAQ #26: Will existing ICANN-accredited registrars for .com, .net, and .org be able to act as registrars in the new TLDs?

The type of channels used for registrations in a TLD is only one of many factors that will be considered in determining whether to select a proposal for negotiations toward possible establishment of a TLD. For a discussion of some relevant factors that may pertain to the considerations raised by your question, see [Criteria for Assessing TLD Proposals](#), and particularly "[the enhancement of competition for registration services](#)" (factor 3).

See [FAQ #38](#) for related information.

FAQ #27: Can the floppy diskette requirement be expanded to allow softcopy submission on CD?

Yes, it can. Thanks for the great suggestion! We have already changed the documents to make this change.

See [FAQ #40](#) for related information.

FAQ #28: Can you provide any estimate on the timing for the "proof of concept" phase for new TLDs, and when the next opportunity to propose TLDs after this initial phase will be?

There is not yet any date that has been scheduled for a "next round," and at present we have no predictions as to the schedule. In the current round of applications, applicants are [requested to describe the value of their proposals as proofs of concept](#). [Item E30 of the Description of TLD Policies](#) requests suggestions for how the results of the introduction being proposed should be evaluated. Once a decision is made on the evaluation procedure to be used for TLDs introduced in the current round, the timing of future steps should become clearer.

See [FAQ #54](#) for related information.

FAQ #29: We would like to provide an Executive Summary of our TLD proposal (perhaps 1 to 3 pages in length) that describes the motivation and overall goals of the TLD. Where should such a summary be placed in the application? Perhaps as a

cover letter?

We suggest that you attach it to your [Description of TLD Policies](#). Before item E1 on your description, you should type in a statement such as "An Executive Summary of this proposal is attached."

Materials that you wish ICANN to consider in support of your application should be included in the body of your application materials (i.e. your transmittal form, the Sponsoring Organization's Proposal, the Registry Operator's Proposal, the Description of TLD Policies, the fitness disclosures, or the Statement of Requested Confidential Treatment) or as a referenced attachment, not in an unreferenced, separate cover letter.

FAQ #30: [Item \(c\) under factor 8 of the Criteria for Assessing TLD Proposals](#) states that when evaluating proposals ICANN will examine: "c. Has the proponent considered intellectual property interests or otherwise designed protections for third-party interests?" What types of intellectual-property protections should be included?

Applicants should propose measures they believe are appropriate to protect intellectual property and other third-party interests. The types of protections that are appropriate will depend, to some extent, on the nature of the TLD and other circumstances. Applicants should anticipate that one of the topics of [public comments on their proposals](#) will be the appropriateness of the protections they propose.

In preparing their proposals, applicants may wish to consult the materials prepared by the ICANN DNSO Intellectual Property Constituency (IPC) and [posted on the IPC website](#). These are the views of the IPC only.

FAQ #31: What TLDs are already established?

Presently, there are seven traditional "generic" TLDs (.com, .edu, .gov, .int, .mil, .net, and .org), nearly 250 [two-character "country-code" TLDs](#), and one infrastructure TLD (.arpa).

For a more detailed description of the present TLDs, see the [detailed topic paper on TLDs](#) prepared in advance of the ICANN Yokohama meeting.

FAQ #32: I'm investigating the possibility of two companies (parent companies) with complimentary capabilities forming a jointly held company (joint venture) to operate a new non-sponsored TLD registry. The joint venture would not have any operational experience and history. Am I correct in assuming that the Registry Operator's Proposal should describe the data and history for the two parent companies? Also, will ICANN consider the application if the joint venture is not yet established when the application is sent?

A [Registry Operator's Proposal](#) must be submitted by a proposed registry operator that is in existence (i.e. has already been formed) at the time the proposal is signed and submitted. Note that the proposed registry operator

should be an organization, such as a corporation, having the ability to enter legally binding contracts.

The Registry Operator's Proposal should describe the capabilities of the entity proposed actually to serve as registry operator. In the circumstances you describe, that could be done by describing the data and history of the parent companies and by providing documentation that the parent companies are firmly committed to transferring their relevant operational units to the newly formed entity.

FAQ #33: How do I pay the application fee?

When they were first posted, the instructions required that the non-refundable application fee be paid by check. That is still the payment method we prefer that you use. However, for the convenience of those that may have difficulty in obtaining a check drawn on a United States bank, we have decided to permit payment by wire transfer. In either case, because your application will only be considered once we are satisfied you have fully paid the application fee, it is vital that you follow the payment instructions **exactly**:

- If you choose to pay by check, with your application you must send a check, drawn on a United States bank and **payable to the Internet Corporation for Assigned Names and Numbers (ICANN)**, in the amount of 50,000 United States dollars.
- If you choose to pay by wire transfer, you must arrange for the wire transfer to be sent to ICANN at the following account:

Internet Corporation for Assigned Names and Numbers
Account number 09141-04900
Routing indicator 121000358
Bank of America Branch 0914
4754 Admiralty Way
Marina del Rey, CA 90292 USA
Telephone +1/310/247-2080

We must receive wire transfers **at least five business days before we receive your application and you must include a wire transfer receipt or other document identifying the wire transfer with your application.**

See [FAQ #57](#) for related information.

FAQ #34: Where can I obtain a list of the parties that previously submitted a letter of interest and brief proposal to operate/sponsor a new gTLD?

For a list of expressions of interest received in the period leading up to the ICANN meeting in Yokohama, [click here](#).

See [FAQ #49](#) for related information.

FAQ #35: Can I propose to act as both the registry operator also a registrar?

Applicants should describe the marketing channels they are proposing. See [item D13.2.4 of the Registry Operator's Proposal](#). A proposal to act as both registry operator and registrar is not forbidden, though that feature may affect how your proposal is evaluated. In formulating recommendations for the ICANN Board, the ICANN staff currently intends to consider at least the factors stated in the [Criteria for Assessing TLD Proposals](#), including [factor 3](#): "The enhancement of competition for registration services."

FAQ #36: In your response to [FAQ #5](#), regarding the use of non-ASCII characters in a TLD string, you stated, "top-level domain names... may not start with a digit." Having conducted research into this specific area, we have proven (just by the adoption of simple policies that can be applied at the registry level) that it is possible to operate a TLD with a digit as the first character while maintaining the stable operation of the DNS, and we believe that a proposal of this sort "[might increase the utility of the DNS](#)." Can the no-beginning-digit statement of [FAQ #5](#) be relaxed?

Not at this time. It is important to Internet stability that DNS names conform to the relatively narrow format rules and conventions stated in the RFCs because, among other things, application developers have relied on those format rules and conventions in designing, implementing, and testing software that handles DNS names. Although the statements in [RFC 1034](#) and section 2.1 of [RFC 1123](#) (cited in the response to [FAQ #5](#)) might, standing alone, be subject to differing interpretations, subsequent RFCs have interpreted those RFCs to prohibit TLD labels starting with digits. See [RFC 2396](#), pages 13-14 (August 1998); [RFC 1738](#), page 6 (December 1994). At least one of these RFCs has been available to software developers for over five years.

If the no-first-digit requirement for TLD labels is to be relaxed, it should be done through the IETF, which developed the documents articulating the requirement.

FAQ #37: It has been rumored that there is a financial backing requirement of \$10,000,000. Can you please clarify these details? If not \$10,000,000, what is the specific requirement?

There is no specific, fixed amount of firmly committed capital required. The level of capital will depend on the nature of the overall proposal. The Registry Operator's Proposal submitted with the application should contain a detailed analysis of capital requirements and demonstrate firm commitments for that capital. See Items [D13.2.5](#), [D13.2.13](#), and [D13.4.4](#). As noted under [factor 9 of the Criteria for Assessing TLD Proposals](#):

The ICANN staff intends to place significant emphasis on the completeness of the proposals and the extent to which they demonstrate that the applicant has a thorough understanding of what is involved, has carefully thought through all relevant issues, has realistically assessed the business, financial, technical,

operational, and marketing requirements for implementing the proposal, has procured firm commitments for all necessary resources, and has formulated sound business and technical plans for executing the proposal.

FAQ #38: Is ICANN planning on establishing a general registrar accreditation process for all the new TLDs?

As noted in [Item E4 of the Description of TLD Policies](#), an applicant for the operation or sponsorship of a new TLD should propose policies for selection of, and competition among, registrars concerning the TLD. That policy can include use of ICANN's accreditation program for the .com, .net, and .org or some alternative mechanism. Please refer to [FAQ #26](#) for a discussion of the effect the proposed policies may have on evaluation of the application.

FAQ #39: In the case of a sponsored and restricted TLD where policy formulation is granted by ICANN, under which conditions may this delegation be revoked? Are there precedents? What appeal mechanisms exist?

The conditions for revocation of the delegation of policy-formulation responsibility for a sponsored and restricted TLD would be set forth in an agreement between ICANN and the sponsoring organization (likely including a charter for the TLD). In general, violations by the sponsoring organization of the agreed conditions for the delegation, or a determination that the charter is no longer appropriate to the needs of the Internet community and should be revised or rescinded, could lead to revocation of the delegation. The terms of agreements will be discussed in negotiations after initial selections are made in November.

As [noted in the Detailed Topic Paper prepared for the Yokohama meeting](#), in many respects the sponsorship paradigm is a generalization of the concepts underlying appointment of managers for ccTLDs under existing ccTLD delegation policy. The current policies in that regard are set forth in [ICP-1](#).

ICANN decisions are subject to review by the ICANN Board under [ICANN's reconsideration policy](#). One topic of the negotiations will be other "appeal" mechanisms.

FAQ #40: Assuming that the required HTML-format electronic copy of the specified parts of the application is for posting on the web site for public review, are other formats acceptable as long as they fulfill the same purpose of being publicly readable? Would you allow for PDF as an alternative/supplement to be posted on the site?

Applicants must provide electronic copies of the specified portions of their applications in both HTML format and a common word-processing format. See [Items 17 and 10](#) of the New TLD Application Instructions. Applicants may, if they choose, also submit those portions of their applications in PDF format. ICANN staff will decide whether to post the PDF format in addition to the HTML format once all the applications are received.

See [FAQ #60](#) and [FAQ #73](#) for related information.

FAQ #41: How many hard (i.e. paper) copies of the application should be submitted?

A single copy is sufficient.

FAQ #42: We are planning to propose a sponsored, restricted TLD. We propose that the sponsoring organization be responsible for making policies, assessing individual applications, informing the registry operator which applications meet the TLD's requirements and should be registered, providing customer support, and carrying out marketing. The sponsoring organization will be the profit center and the registry operator will be paid fees by the sponsor and receive an equity interest in the sponsor. Does this structure meet the structural requirements for running a TLD or do we have to place the marketing, advertising, and other operational functions in the hands of the registry operator?

The configuration of the proposed structure is up to the applicant. Please note, however, that sponsoring organizations are intended to allow participation of the affected segments of the relevant communities. As [stated in the New TLD Application Process Overview](#):

The extent to which certain policy-formulation responsibilities are appropriately delegated to a sponsoring organization will depend upon the characteristics of the organization that may make such delegation appropriate. These characteristics may include the mechanisms the organization proposes to use to formulate policies, its mission, who will be permitted to participate and in what way, and the degree and type of accountability to the community it will serve (to the extent these are necessary and appropriate). The Sponsoring Organization's Proposal provides an opportunity to provide information on these characteristics.

FAQ #43: What period should the pro-forma financials included in the registry operator's business plan cover?

The registry operator's business plan required by [Item D13.2 of the Registry Operator's Proposal](#), as well as the pro-form financial projections required by [Item D13.3](#), should cover the entire term of registry agreement being proposed (see [Item D13.2.10](#)), but in any event need not be presented for more than four years. As noted in [Item D13.3](#), the pro-forma projections should be broken down into periods no longer than quarterly.

FAQ #44: In [Item D13.2.5 of the Registry Operator's Proposal](#) you ask for projections of demand for registry services in the proposed new TLD "for at least 10%, 50%, and 90% confidence levels." What does this mean?

Proposed registry operators are requested to provide at least three estimates of the demand for registry services. One estimate (the 50% confidence estimate) should express the projection of demand that the registry operator

concludes is equally likely to be exceeded as to be not met. The other two estimates (the 90% and 10% confidence estimates) should be nine times as likely to be exceeded as to be not met, and vice versa.

FAQ #45: The application transmittal forms (e.g., Items [A13-A15](#) and [B12-B14](#)) limit ICANN's liabilities to the applicant unless and until the application is selected for negotiations, those negotiations are successfully concluded, and formal, written agreements are entered. What about the applicant's liabilities to ICANN? For example, the persons proposing to form a sponsoring organization may fail to successfully organize the sponsoring organization (broad based, etc.) even though they may have started negotiations with ICANN. Would they be liable to ICANN (other than for the US\$50,000 non-refundable application fee)?

The applicants must abide by the various obligations and certifications (concerning, as one example, truthful and complete disclosure) stated in the application materials. Assuming they do so, neither a sponsoring organization, its organizers, nor a registry operator incurs any monetary liability to ICANN by submitting the application, beyond the US\$50,000 non-refundable application fee. In particular, submitting an application does not subject the applicants to liability for failing to properly form a sponsoring organization even though negotiations are commenced.

In the event that, after negotiations, formal written agreements are reached, those agreements will specify the obligations of the selected sponsoring organizations and registry operators to ICANN. Sponsoring organizations must be formed before agreements with them will be entered.

FAQ #46: Regarding the the Registry-Registrar Protocol (RRP) used in the .com, .net, and .org TLDs and described in [RFC2832](#):

(A) Will new registries have open, unrestricted access to the RRP for use and future modification, without the requirement of a license from Network Solutions, Inc.?

(B) If a license will be required, will such license require a license fee and allow the future modification of the RRP, including the creation of derivative works?

(C) Does Network Solutions Registry claim intellectual property rights in the RRP as described in RFC 2832, or any other basic functionality necessary for the efficient interface between registries and registrars utilizing the RRP?

(D) Will Network Solutions cooperate with a formal IETF process to create a permanent open and peer reviewed standard?

Questions (A), (B), and (C) involve legal issues, about which you should consult your lawyer. Please note the following two items in that connection:

- a. The RRP is described in [RFC 2832](#), which contains the following statement:

"Copyright (C) The Internet Society (2000). All Rights Reserved.

"This document and translations of it may be copied and furnished to others, and derivative works that comment on or otherwise explain it or assist in its implementation may be prepared, copied, published and distributed, in whole or in part, without restriction of any kind, provided that the above copyright notice and this paragraph are included on all such copies and derivative works. However, this document itself may not be modified in any way, such as by removing the copyright notice or references to the Internet Society or other Internet organizations, except as needed for the purpose of developing Internet standards in which case the procedures for copyrights defined in the Internet Standards process must be followed, or as required to translate it into languages other than English.

"The limited permissions granted above are perpetual and will not be revoked by the Internet Society or its successors or assigns."

b. NSI Registry is [offering its RRP software development kits as open source software](#) under the terms of the [GNU Lesser General Public License](#).

On Question (D), please note that Scott Hollenbeck of NSI Registry has submitted an [Internet Draft on "Generic Registry-Registrar Protocol Requirements"](#) (**New: Now in version 5**). Members of the Internet community wishing to contribute in this area should [contact Mr. Hollenbeck](#).

FAQ #47: What are the acceptable lengths (number of characters) for TLD labels?

Ordinarily, TLD labels (e.g., "com") that are proposed for the new TLD program should be between three and sixty-three characters long, inclusive.

Two-letter codes must be available for establishing ccTLDs according to the policy set forth in [ICP-1](#). Under that policy, ccTLDs are established with two-letter codes that appear on the [ISO 3166-1 list](#). To avoid the possibility of future name collision, proposals for two-letter TLDs will not be accepted in the new TLD program unless the [ISO 3166 Maintenance Agency](#) has indicated that the proposed two-letter code will not be placed on the ISO 3166-1 list in a way that would be incompatible with the proposal. Compatibility could be demonstrated, for example, for a proposed TLD not meeting the alpha-2 code format used in the ISO 3166-1 list (e.g., "a1") or where the Maintenance Agency has reserved the proposed code, in a manner compatible for the proposed usage under the new TLD program, for stated "particular applications" including Internet TLD usage (this includes reservations for all usages).

Under current practice of the Internet Assigned Numbers Authority, one-letter codes are reserved from assignment to allow for future DNS extensibility.

See [FAQ #56](#) for related information.

FAQ #48: Will ICANN require that current second-level-domain-name holders in .com, .net, and .org be given an opportunity to register their names before the general public?

Applicants should propose mechanisms to deal with start-up issues for the proposed TLD in a way that takes account of the rights and expectations of existing domain-name holders, trademark owners, and others. [See Item E15 in the Description of TLD Policies](#). At this stage of the new TLD program, there is no fixed set of required mechanisms in this regard, such as giving a preferential opportunity for registration in the proposed TLD to domain-name holders in the existing TLDs. [One factor that will be considered in evaluating proposals](#) is the adequacy of the proposed mechanisms for allocation of names during the start-up phase of the proposed TLD.

FAQ #49: Where can a sponsoring organization obtain a list of registry operators?

We are not aware of any comprehensive list of organizations seeking to become registry operators. However, you might review the [expressions of interest that ICANN received before its Yokohama meeting in July 2000](#).

FAQ #50: How many unrestricted TLDs and how many restricted TLDs will ICANN be approving?

At its 16 July 2000 meeting in Yokohama, the ICANN Board [adopted a recommendation](#), which was made by ICANN's Domain Name Supporting Organization, to introduce new TLDs in the next several months in a measured and responsible manner. The exact number of TLDs that will be introduced will depend on the character of the proposals received. The mix of restricted and unrestricted TLDs will also depend on the character of the proposals.

FAQ #51: What is the current amount that NSI Registry pays for each domain name in the registry? Will the fee structure be the same for new TLDs?

ICANN's operating costs are supported by the name registries and registrars and the address registries according to formulas established through a budget process that includes discussions among those entities. For the 2000-2001 fiscal year, .com, .net, and .org registrars are contributing US\$2,140,000 and NSI Registry is contributing US\$250,000. The exact arrangements for new TLDs are not yet established, but they will be expected to contribute a fair share of ICANN's cost-recovery needs.

FAQ #52: What guidance can you provide on independent but related registry submissions that seek to solve a common problem, specifically where there is a cross subsidy from one registry to the other?

If there are multiple registries, multiple applications (with multiple application fees) should be submitted. See [Instruction I30](#). The applications should note their relationship to each other, and should take account of the subsidy (for example, in the [pro forma financial projections](#)).

FAQ #53: [Item D13.2.15 of the Registry Operator's Proposal](#) asks for a detailed description of plans for dealing with the possibility of registry failure. Does this refer to system failure, business failure, or both?

It refers to all types of failures from any cause, including business failures, system failures, natural disasters, and sabotage.

FAQ #54: If our TLD application is not accepted, what becomes of our application? I understand that the \$50,000 is non-refundable, but does the application remain active for the second round of TLD applications?

As stated in [FAQ #28](#), plans for any subsequent rounds of TLD introductions will not be made until evaluation of the present "proof of concept" round. It is likely that, if there are subsequent rounds, there will be revisions in the program based on experience in the first round. This will likely require submission of new application materials. As to the non-refundable application fee, please note that it "is only an application fee to obtain consideration of *this* application." See Items [A7](#) and [B6](#) of the transmittal forms.

FAQ #55: The [Registry Operator's Proposal](#) asks for the Dun & Bradstreet D-U-N-S Numbers (if any) of the operator and certain subcontractors. What is a D-U-N-S Number?

Information about D-U-N-S Numbers is [available on the Dun & Bradstreet web site](#). Although any existing D-U-N-S number(s) should be given in the application, you need not obtain a D-U-N-S Number to apply.

FAQ #56: According to [FAQ #47](#), two-character TLDs must be available for ccTLDs. However, it is not clear as to whether or not a two-character TLD can be proposed if it in fact has not been assigned a country. Can a two-character TLD can be established if it is not currently on the ISO 3166-1 list?

Generally, no. A two-character code will be considered only if (a) it is not presently on the [ISO 3166-1 list](#) and (b) the [ISO 3166 Maintenance Agency](#) has indicated that the code will not be added to the list in the future for any purpose that is incompatible with the use you propose for the code.

FAQ #57: Please confirm my understanding that if payment of the non-refundable application fee is made by check, payment is timely if it is received by ICANN on 2 October. I.e. that the five-day requirement applies solely to wire transactions.

If you pay by check drawn on a United States bank and payable to the Internet Corporation for Assigned Names and Numbers (ICANN) in the amount of 50,000 United States dollars (see [Item I8.1 of the Instructions](#)), then your payment will be timely if the check is received at ICANN's offices by

2 October. If you choose to pay by wire transfer, your wire transfer must be received at least five business days before we receive your application and you must include a wire transfer receipt or other document identifying the wire transfer with your application (which must be received by 2 October).

FAQ #58: [Item C18.2 of the Sponsoring Organization's Proposal](#) indicates that ICANN will accept an application for a sponsored TLD where there is not yet a finalized contract between the sponsor and the registry operator, if the sponsoring organization submits proposed terms for a contract (i.e. at least a detailed term sheet) with the registry operator for provision of registry services, proof of commitment from the registry operator for provision of services under those proposed terms, and a notation of the estimated date of entry into the contract. What do you mean by "proof of commitment from the registry operator"? Isn't the signed copy of the Registry Operator's Proposal sufficient proof?

An example of sufficient proof of commitment by the registry operator would be a signed letter of intent stating the proposed terms for the contract. The signed Registry Operator's Proposal is not necessarily sufficient because it may not indicate the registry operator's willingness to enter into a contract on the proposed terms.

FAQ #59: I am confused as to the meaning of a sponsored vs. unsponsored TLD. Please describe the difference between the two and what ICANN's involvement in the policy making process would be in each case.

For a description of the differences between sponsored and unsponsored TLDs, please see [section 1\(b\) of the New TLD Application Process Overview](#).

FAQ #60: [Item C1 of the Sponsoring Organization's Proposal](#) states that the following documents should be attached to the proposal: articles of incorporation, association, etc.; bylaws or any similar organizational document; list of persons presently on the supervising Board of the organization (or to be initially on the Board); and their resumes. Because we were established long ago, we do not have these in electronic form. Is it acceptable to attach hard copy documents instead, with a brief summary in the electronic version?

Because we expect to post these materials for public review and comment, they should be submitted in electronic form.

See [FAQ #40](#) and [FAQ #73](#) for related information.

FAQ #61: [Item D15.2.4 of the Registry Operator's Proposal](#) asks about interface and user authentication in the zone generation process. If the zone file generation process is automated and user intervention is not required, what interface and user authentication is referred to?

If your registry systems design does not contemplate user intervention in any circumstances please note this and explain how operations ordinarily done with user intervention (e.g., emergency updates) are accomplished.

FAQ #62: [Item D15.2.3 of the Registry Operator's Proposal](#) asks about the reporting capabilities of the registry database. Are you looking for the native reporting capabilities of the proposed database? Or are you looking for reporting capabilities that can be added on top of the database? What types of reports? Financial, technical? Please be more specific.

Item D15.2.3's reference to database reporting capabilities is directed to the reporting capabilities of the registry database system as it will be implemented. Please explain what reporting capabilities will be implemented in the overall system you employ. This includes financial, technical, operational, and any other type of report you anticipate will be available. Your response should be as specific as possible.

FAQ #63: Do you anticipate granting any extensions of the time to submit applications beyond 2 October?

No, we do not.

FAQ #64: Our sponsoring organisation and the registry operator are based in different countries. We plan to send the two parts of the proposal separately to ICANN, although the proposals will be clearly labelled as being component parts of the same proposal. Is this acceptable to ICANN?

Yes. Please be sure each proposal clearly designates the connection to the other proposal.

FAQ #65: At what time on October 2, 2000 does the application process conclude? Since this is a Monday does this mean that all applications need to be received by the previous Friday, September 29, 2000? At what time do your offices close?

[Item I24 of the Instructions](#) states:

I24. The complete application, including all forms, attachments, and accompanying materials, along with the check for the non-refundable application fee (or wire-transfer documentation), must be received by ICANN at its office in Marina del Rey during the period beginning 5 September and ending 2 October 2000. All materials must be received before 5:00 pm, California time, on 2 October 2000.

Lately we have been receiving many questions that are answered in the instructions, the application forms, these FAQs, and the other materials we have posted. This indicates that some persons are considering applying without carefully reading all the materials. Failure to **fully understand** and **follow exactly** all the instructions in all the materials may result in your application being denied.

FAQ #66: [Item E7 in the Description of TLD Policies](#) talks about policies on data privacy, escrow and Whois service. What is "escrow" service?

For background on escrow requirements, please see [Section II.I of the .com, .net, and .org Registrar Accreditation Agreement](#) and [Section 7 of the ICANN-Network Solutions Registry Agreement](#).

FAQ #67: In completing [Item E9 of the Description of TLD Policies](#), regarding "Services and Pricing", is it obligatory to specify how much would be charged, or will a description of the guiding principles behind a tariff structure be sufficient?

There are no absolute requirements on this, but the ICANN staff has indicated that specificity and completeness will be positive factors in the evaluation process. See [Factor 9 of the Criteria for Assessing TLD Proposals](#). Please note that pricing levels will ordinarily be important to formulate your [Business Capabilities and Plan](#) and [pro-forma financial projections](#). See [Item D13.2.12 of the Registry Operator's Proposal](#). If your pricing formula is not pegged to a specific value (such as a system in which overall registry costs are divided equally among all registrants), please describe exactly the formula and in connection with your pro-forma financial projections give projections of the resulting pricing.

FAQ #68: Is it appropriate to include references to pricing in [Item C18.2 of the Sponsoring Organization's Proposal](#), which refers to "proposed terms for a contract with the registry operator", or is this area reserved for direct discussion between ICANN and the Registry Operator?

Ordinarily, the proposed terms for a contract between the sponsoring organization and the registry operator should cover the services the registry operator will provide and the terms on which they will be provided.

FAQ #69: [Item A3 in the Sponsored TLD Application Transmittal From](#) asks for "copies of documents demonstrating the authority (of the person signing the application)". What type of documents are you expecting? Is an officer or employee of the sponsoring organization sufficient?

If the person is not a top officer of the organization (Chair, etc.), you should submit a Board resolution (certified by the secretary or similar officer) authorizing the application. A top officer may simply state that she or he has authority to make the application.

FAQ #70: I am located in the Southern California area. May I hand deliver my application to ICANN at its Marina del Rey office or do I have to send my application by mail or courier as stated in [Item I22 of the Instructions](#)?

You may mail your application, have a messenger deliver it to our offices, or act as the messenger yourself. The deadline is 5:00 pm California time. Please note that we will not discuss your application in any way with you on 2 October.

FAQ #71: What level of detail is necessary for the pro-forma financial projections required by [Item D13.3 of the Registry Operator's Proposal](#)? Are the following categories sufficient levels of detail: personnel costs, research and development,

marketing expenses, general administrative expenses exclusive of salaries?

The level of detail is ultimately up to the organization preparing the Registry Operator's Proposal. In reviewing the proposals, however, ICANN will place significant emphasis on their completeness and the extent to which they demonstrate that the applicant has a thorough understanding of what is involved, has carefully thought through all relevant issues, has realistically assessed the business, financial, technical, operational, and marketing requirements for implementing the proposal, has procured firm commitments for all necessary resources, and has formulated sound business and technical plans for executing the proposal. These characteristics are more likely to be demonstrated by specific pro-forma financial projections, based on clearly articulated assumptions, than by general ones.

FAQ #72: We are submitting our proposal with a letter of intent from our subcontractor for the registry operations/data center. Is it acceptable to submit a complete detailed document of their operations no later than Wednesday, 4 October? The additional document is in the final stages of completion for that section of the proposal.

[Item 24 of the New TLD Application Instructions](#) states:

I24. The complete application, including all forms, attachments, and accompanying materials, along with the check for the non-refundable application fee (or wire-transfer documentation), must be received by ICANN at its office in Marina del Rey during the period beginning 5 September and ending 2 October 2000. All materials must be received before 5:00 pm, California time, on 2 October 2000.

Only the following materials will be accepted after the 5:00 pm (California time) 2 October 2000 deadline: (a) notification of a material change in circumstances (b) withdrawal of the application, and (c) items requested by ICANN. (Please note the completion after the deadline of documentation required as part of the application does not constitute a "material change in circumstances".) If you submit your application on 2 October without some element of documentation, ICANN will consider the application without that element. If the element is required by the application materials (such as [Item D15.3\(c\) of the Registry Operator's Proposal](#), which requires a comprehensive technical proposal from certain subcontractors), omission of that element may reflect negatively on the application.

FAQ #73: I understand application must be in both hard copy and electronic format. For attachments such as lengthy shareholder's agreements from participating organizations --- can they be scanned and submitted as jpeg or tiff or must they be submitted in Word format?

The portions of the application specified in Items [17](#) and [110](#) of the New TLD Application Instructions must be submitted in both hard copy (paper) form and electronic form on one or more 3 ½" floppy diskettes (IBM high density) or on

a CD-ROM in a common word-processing format and in HTML format. (MS Word is acceptable for the word-processing format.) Accompanying materials requested in these portions (such as the articles of incorporation, association, etc. sought by [Item C1 of the Sponsoring Organization's Proposal](#)) must be submitted in HTML and word-processing format.

See [FAQ #40](#) and [FAQ #60](#) for related information.

Comments concerning the layout, construction and functionality of this site should be sent to webmaster@icann.org.

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