

Intellectual Property Interests Constituency
Constituency Statement on Domain Name Tasting
December 5, 2007

Pursuant to GNSO Council Resolution 20071031-2, the Intellectual Property Interests Constituency (“IPC”) submits this Constituency Statement on Domain Tasting. The IPC arrived at the positions below in accordance with the requirements of the GNSO Policy Development Process as outlined in the ICANN bylaws. These positions incorporate by reference Section 4.3 of the [Outcomes Report of the GNSO Ad Hoc Group on Domain Tasting](#), October 4, 2007 (hereinafter “Outcomes Report”), and Annex 5 thereto.

I. Constituency Position

A. Domain Tasting Harms Intellectual Property Rights Holders

1. Domain tasting harms holders of intellectual property (“IP”) rights (“IPR”) when, as is often the case, the tasted domain names (“tasted names”) are anticipated typographical errors of trademarks. A recent report by McAfee, Inc. characterizes domain tasting as one of the most significant factors in the recent growth in typosquatting. What’s In a Name: The State of Typosquatting 2007, available at http://us.mcafee.com/root/identitytheft.asp?id=safe_typo&cid=38296#WhatIsDriving. Domain tasting that is also typosquatting causes consumer confusion, erodes brands, and harms the goodwill represented by those brands. See Outcomes Report, page 14 and Annex 2.

2. Domain tasting prevents IPR holders from registering and using for legitimate purposes the tasted domain names (“tasted names”). Outcomes Report, pages 18-19.

3. Large IPR holders and those that own famous or well-known brands are more likely to have their brands/marks be the subject of tasted names. Consequently, they are more likely to incur the greatest costs in preventing and taking action against domain tasting involving typosquatting. On the other hand, smaller IPR holders and those that do not own famous or well-known brands often do not have the resources to take prophylactic measures or aggressively combat domain tasting.

4. Many IPR holders have significant and extensive domain name portfolios. As registrants, IPR holders subsidize domain tasting when any increased costs attributable to domain tasting are passed on by registrars and registries. Outcomes Report, page 15.

5. Many IPR holders suffer the harmful effects of domain tasting on their businesses, including lost advertising and sales revenues from parked landing pages associated with the tasted names, and misdirection of potential customers to direct competitors, who exploit the goodwill of their established brands. Complaint ¶¶ 114-39. Dell Inc. v. BelgiumDomains, LLC et al., Civ 07-22674 (S.D. Fl. filed Oct. 10, 2007); Outcomes Report, pages 135-41.

6. IPR holders are harmed when the tasted names effectively require them to pay twice for keywords. An IPR holder pays once when “purchasing” the keyword from the advertiser as part of its intended advertising efforts. It pays a second time when it pays the taster

for directing Internet users via links from parking pages associated with the tasted names to the trademark owner's site.

7. Domain tasting imposes significant costs on IPR holders to police tasted domain names, and efforts to police are often unsuccessful. The Uniform Domain Name Dispute Resolution Policy ("UDRP") and remedies under national law are ineffective against domain tasting because of the ephemeral nature of tasted names. Outcomes Report, page 22; Response of the World Intellectual Property Organization to the UDRP Providers RFI in Outcomes Report, pages 113-15.

8. The tremendous incidence of domain tasting increases IPR holders' costs for prophylactic budgets on defensive domain name registrations, for increased enforcement needs attributable to domain tasting, and for registration of previously tasted names. Outcomes Report, page 22.

9. IPR holders' responsibility to police their marks will result in increased litigation against those registrants widely known as domain tasters.

B. Domain Tasting Harms Internet Users

1. As a result of tasting, Internet users who seek branded goods, services or information must sort through numerous false hits for tasted names when searching for legitimate sites and suffer confusion, wasted time and frustration: Outcomes Report, pages 14ff.

2. Users sometimes may not be able to navigate through all of the false tasted names and may ultimately do business with someone other than an intended trusted IPR holder or licensee thereof. When the "substitute" entity provides goods or services inferior to those provided by the trusted IPR holder, users are disappointed and consumer confidence in Internet-based commerce is damaged. Outcomes Report, page 14ff; McAfee report.

3. Other times, users seeking goods, services or information may be diverted to unexpected and potentially harmful sites: Outcomes Report, page 14.

4. Embedded viruses, malware, and related illegitimate activity may be associated with sites at tasted names: Outcomes Report, pages 15ff.

5. The temporary nature of tasted names encourages anonymity and discourages identification of registrants of tasted names. Bad actors who seek to do harm on the Internet and decrease their exposure or possible detection by authorities may be attracted to tasting: Outcomes Report, page 15.

6. Individual registrants must also bear those costs passed on both by registrars and registries, and by businesses. See A.4 above.

7. Tasting harms businesses and users because it restricts the choice of available domain names for would be registrants at any point in time: Outcomes Report, page 15.

C. Domain Tasting Harms the Domain Name System Generally

1. All of the foregoing factors combine to reduce the user trust of the domain name system and Internet navigation generally.

2. Domain tasting risks turning the domain name system into a mostly speculative market. Domain names, which are meant to be primarily specific identifiers of businesses and other Internet users, are characterized as becoming mere commodities of speculative gain: Press Release, March 12, 2007, World Intellectual Property Organization, "Cybersquatting Remains on the Rise with Further Risks to Trademarks from New Registration Practices", (http://www.wipo.int/edocs/prdocs/en/2007/wipo_pr_2007_479.html).

D. Only Domain Name Speculators Would be Negatively Impacted by Prohibition of, or Action that Effectively Prohibits, Domain Tasting

1. Prohibiting domain tasting, or taking action to effectively prohibit tasting, would negatively impact only a small class of domain name speculators. This class of domain name speculators includes some ICANN-accredited registrars. Preliminary Injunction, Verizon California, Inc. v. Ultra RPM, Inc., CV 07-2587 PA (C.D. Cal. entered September 10, 2007); Response of the World Intellectual Property Organization to the UDRP Providers RFI in Outcomes Report, pages 113-15;

2. Non-speculating registrars have come to rely on the Add Grace Period ("AGP") for purposes that can – and should – be better addressed through other mechanisms.

a) Several ccTLD registries are identified as not having an AGP. Outcomes Report, page 4. Registrars of domain names in these ccTLDs have presumably developed mechanisms for achieving the "benefits" identified in Section 4.4 of the Outcomes Report. These registrars should be consulted about such alternative mechanisms.

b) Any losses through non-payment by registrants would be expected to be more than offset by the reduction in registrar costs arising from tasting and kiting transactions.

c) Registrars could require registrants to double verify information, including the spelling of a domain name, during the registration procedure. Such double verification is widely used in Internet commerce.

d) The registration agreements for a number of large ICANN-accredited registrars either state that all registration fees are non-refundable or do not identify misspelled domain names as a refundable event.

e) The AGP was first adopted when domain name registrations were significantly more expensive than they are today. The retail price of a domain name registration is now sufficiently low that it is not unreasonable for registrants to expect – in accordance with the registration agreements noted above – that refunds for misspelled domain names will not be forthcoming.

f) Other industries and business do not require the equivalent of an AGP to address fraud. Many traditional bricks and mortar businesses and online businesses provide immediate activation of services with a credit card payment, and do not rely on a 5-day grace period such as the AGP. Long distance telephone service providers and Apple's iTUNES[®] retail store services are examples of both traditional and online businesses that provide such services.

g) Use of the AGP as a “cart hold to provide access to domain names” calls into question whether the participating registrar is in compliance with Section 3.7.4 of the Registrar Accreditation Agreement.

h) Registrars in ccTLD registries that do not have an AGP presumably find it necessary to monitor, test, and develop systems. Similarly, registrars must have found it necessary to monitor, test, and develop systems before the AGP was widely used. One potential area of fact finding that merits development is what mechanisms are used by registrars in ccTLD registries that do not have an AGP, what mechanisms were used by gTLD registrars before the AGP, and what mechanisms other than the AGP would permit the registrars to monitor, test, and develop systems.

E. Domain Tasting Harms ICANN

1. Domain tasting adversely impacts ICANN by artificially suppressing its revenues because tasted domains are not subject to ICANN fees. For example, levying the \$0.20 per name fee on all domain names deleted during the AGP in July 2007 alone would have resulted in over \$12.5 million in revenue.

TLD	Number of Deletes Add Grace	Revenue if ICANN had levied USD 0.20 per name fee
.com	57,021,555	11,404,311
.net	5,466,679	1,093,336
.org	84,880	16,976
.biz	37,922	7584
.info	109,000	21,800
.pro	?	?
.jobs	71	14
.museum	no report	n/a
.travel	0	0
.cat	232	46
.aero	no report	n/a
.coop	?	?
.mobi	473	95
.name	?	?
TOTAL	62,720,812	USD 12,544,162

That amount, which represents only one month of lost potential revenue, exceeds 25% of the projected revenues under [ICANN's approved FY 2007-2008 budget](#).

ICANN could certainly put such additional revenues to use by, for example, expediting the rollout of IDNs and the introduction of gTLDs; defraying the gTLD application fee for qualified applicants; increasing the number of ICANN fellowships; expanding the number of languages into which ICANN documents are translated and for which real-time translation is available at the meetings; supporting the expenses for travel to the meetings by GNSO and ccNSO Councilors; and innumerable other projects. In the alternative, even if imposing the fee were to reduce the number of registrations, and thus ICANN did not realize the full sum stated above, the levying of the fee could dramatically decrease the incidence of domain tasting.

[There was not unanimous support within the IPC for the preceding paragraph. A small minority expressed the view that ICANN may financially benefit from domain tasting.]

II. Methodology for Reaching Position

The issue of domain tasting has been discussed within the IPC on numerous occasions, including the meetings of the IPC held in conjunction with the San Juan and Los Angeles ICANN Meetings. A draft constituency statement was circulated to IPC officers and leadership on November 27, 2007, and was discussed on a teleconference of the IPC membership, including its officers and GNSO Council representatives, on November 28. Revisions and additions proposed by members and officers via email were discussed via email and incorporated as agreed upon. Additional revisions were subsequently circulated and discussed via email.

III. Impact on Constituency

The impact of the PDP on the IPC depends upon its ultimate outcome. In general, it is expected that elimination of domain tasting should eliminate the harms outlined in Section I above.

IV. Time Period Necessary to Complete Implementation

This depends on the outcome of the PDP.

Respectfully submitted,

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