



**COMMENTS OF THE INTELLECTUAL PROPERTY CONSTITUENCY ON THE PROPOSED AMENDMENT TO THE .XXX REGISTRY AGREEMENT TO TRANSITION TO NEW FEE STRUCTURE AND TO ADOPT ADDITIONAL SAFEGUARDS**

The Intellectual Property Constituency (IPC) appreciates the opportunity to provide comments and clarifications regarding proposed amendments to the .XXX Registry Agreement (RA).<sup>1</sup>

The IPC continues to support the initiative of Registry Operators that undertake to exceed ICANN's minimum requirements for rights protection. The decision among Registry Operators to proactively address registration abuse promises to create new tools that will benefit the whole ICANN community. The Global Domains Division of ICANN should encourage innovation by engaging with Registry Operators during the amendment process and affording them the opportunity to adopt practices that suit their circumstances. Furthermore, that process should also be more open and transparent, because it can have potentially wide-ranging consequences for the broader community.

The IPC applauds ICM Registry LLC (ICM) and other Registry Operators<sup>2</sup> that choose to implement rights protection mechanisms (RPMs) contained in the base New gTLD Registry Agreement.<sup>3</sup> The IPC also encourages Registry Operators to voluntarily adopt industry best practices beyond the minimum rights protections required by ICANN, such as adding new restrictions against abusive registrations and suspension mechanisms, implementing blocking prior to registration, and creating new dispute procedures. In addition, it would be useful to implement the URS in a restricted TLD like .XXX where a rapid suspension mechanism could be helpful in stopping reputational or similar harm, and where a brand owner may not wish to defensively register the domain in its own name. The IPC also encourages ICANN to educate Registry Operators that the required RPMs are not a "ceiling" but a "floor"—the minimum required— and the Internet community is best served by Registry Operators that strive to go above and beyond the minimum by adopting industry best practices. ICANN need not undertake a policy development process for Registry Operators to voluntarily implement new RPMs.

This extends to other features of the New gTLD Registry Agreement, such as the adoption of Specification 11 in the .XXX Registry Agreement, including (among other things) the standard Public Interest Commitments (PICs).<sup>4</sup> We support ICM's decision to include both the "standard" PICs and other

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<sup>1</sup> See <https://www.icann.org/public-comments/xxx-amendment-2016-10-12-en> (Request for Public Comment on the Proposed Amendment to .XXX Registry Agreement)

<sup>2</sup> See <https://forum.icann.org/lists/comments-travel-renewal-12may15/msg00007.html> (IPC Comments on Proposed Renewal of .TRAVEL Registry Agreement); <https://forum.icann.org/lists/comments-pro-renewal-28may15/msg00009.html> (Comments of Intellectual Property Constituency on Proposed Renewal of .PRO Registry Agreement); <https://forum.icann.org/lists/comments-cat-renewal-28may15/msg00009.html> (Comments of Intellectual Property Constituency on Proposed Renewal of .CAT Registry Agreement)

<sup>3</sup> See <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.htm> (The New gTLD Registry Agreement)

<sup>4</sup> Compare *id.* with <https://www.icann.org/sites/default/files/tlds/xxx/xxx-amend-4-12oct16-en.pdf> (Proposed Amendment to .XXX Registry Agreement)



safeguards appearing in proposed Appendix 9. However, the negotiation of Registry Agreements should be more transparent. The amendments to the .XXX Registry Agreement were carried out in a bilateral fashion in which there was little transparency or accountability. Many IPC stakeholders could be affected by the terms of the .XXX Registry Agreement, either directly or indirectly, and yet no opportunity was provided to observe or provide input directly or indirectly during the course of these negotiations.

For example, due to the lack of transparency, it is unclear why neither the proposed amendment to the .XXX Registry Agreement nor the agreement as presently amended contains the base template PIC mandating that the registry operator use only ICANN accredited registrars that are party to the 2013 Registrar-Accreditation Agreement (RAA).<sup>5</sup> The lack of transparency raises further questions as to how and why the novel “registry-level fee adjustment” was developed.

Finally, the IPC notes that ICM voluntarily chose to go above and beyond the minimum rights protections required by ICANN for the .XXX TLD, by implementing a Rapid Evaluation Service Policy (RES).<sup>6</sup> However, given the lack of transparency, it is unclear whether possible coexistence between the RES and the URS within the .XXX TLD was ever addressed during negotiations with ICANN; in other words, whether either policy alone or a new policy altogether might present the optimal approach for all potential parties to a given dispute.

Accordingly, the IPC encourages ICANN staff and the ICANN community to continue considering how other stakeholder groups can have both a view and a voice during negotiations, rather than being limited to *ex post facto* public comment periods that offer little opportunity for any practical impact.

Respectfully Submitted,

Intellectual Property Constituency

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<sup>5</sup> See New gTLD Registry Agreement, Specification 11, Section 1 (Jan. 9, 2014).

<sup>6</sup> See ICM Registry, Rapid Evaluation Service Policy, available at <http://www.icmregistry.com/about/policies/res-policy/> (September 1, 2011).