

REBUTTAL OF AFILIAS/ PIR/ NEUSTAR SUBMISSION

ON CROSS-OWNERSHIP

We reference the Afiliast/ PIR/ Neustar letter to ICANN of 8 May 2009

(<http://www.icann.org/correspondence/raad-to-dengate-thrush-08may09-en.pdf>)

We have identified each of the assertions made in this submission and provide the following arguments in rebuttal of each assertion:

They assert: ***“The DAG Goes Beyond the Recommendations of the CRAI Report”***

Our rebuttal:

- The CRAI report, produced by independent experts in the fields of economics and competition, provided significant argument and evidence in support of vertical integration.
- The CRAI report recommended a gradual liberalization of existing rules and proposed two ‘*possible test cases*’ for such liberalization. It did not mandate these as the only possible methods of liberalization.
- The current DAG does exactly what CRAI recommended. It provides a slight liberalization of current rules, namely, that a registry controlled registrar can sell up to 100K names. After this 100K is achieved the DAG reverts policy to status quo. As an example, if .ORG was operating under the new rules 2% of .ORG names would be managed by the registrar owned by the registry and 98% by other registrars. Whereas the test cases mentioned by CRAI would only benefit a sub-set of new registries the DAG proposes a fairer model for liberalization in that its proposal will benefit all new registries and not just ‘brand’ or ‘hybrid’ registries.
- The Afiliast/ PIR/ Neustar submission in fact contradicts CRAI. While CRAI clearly recommends the liberalization of existing cross ownership, their submission represents significant backward steps from the current model --- a model which has worked successfully the last seven years.

The moat around registries is currently 10 feet wide. CRAI recommend it be narrowed to 9 feet. Afilias/PIR/Neustar want to widen the moat to 20 feet and stock it with crocodiles.

They Assert: ***“The Proposed Rules Will Harm Competition and Consumers”***

Our rebuttal:

- They present no evidence or rationale that consumers will be harmed. The only rationale they do provide is that existing registries will face more competition.
- In this part they are right. Existing registries will face competition from many new entrants, including from existing registrars. By the same token, the existing registrars will face new competition by the liberalization of rules which now prevent registries from owning and operating registrars.
- All of this new competition is likely to benefit consumers – if generally accepted economic theory and the independent papers by CRAI and Dr Carlton are correct that competition helps consumers.
- Any possible problem that a registry would treat its own registrar in a preferential way is specifically addressed in the registry contract. Such treatment would be a breach of the contract and the registry would face significant sanctions. In practice registries are likely to scrupulously follow their contractual obligations for equal treatment as they have too much to lose by doing otherwise. Afilias (which is owned by registrars) has been careful to do this for the last nine years. Afilias knows it has too much to lose by breaching its agreement -- both in terms of ICANN sanctions and in terms of market place rejection by any unfairly treated registrars.
- The DAG does not propose a change in the legal separation of registries and registrars. The reason for this long standing legal separation has nothing to do with cross-ownership issues but is simply a framework developed for contractual clarity.
- In a market with potentially numerous new TLDs, registries need the ability to market their product direct to consumers. If registries are prevented from doing this they may face a situation where existing registrars choose not to offer the product. Such registries will have incurred considerable cost with ICANN and will have no route to market.

- If registrars are not allowed to provide registry services then companies such as Google, Microsoft and AOL would not be allowed to provide registry services for their own, or any other TLD, because of the sole fact they are ICANN accredited registrars. Presumably their choice would be narrowed to incumbent registries such as Afilias and Neustar.
- There are long established and effective laws in most countries that safeguard the interests of consumers and allow competition to flourish.

They Assert: ***‘We Need to Close Loopholes and Gaming Opportunities’***

Our Rebuttal:

- The ‘loopholes’ they claim are not loopholes at all but rather an existing set of rules that have worked well. They have been in place for seven years in existing gTLDs contracts. If these provisions cause harm, where is the evidence of such harm in COM, NET, ORG, BIZ and INFO for the last seven years? In fact, there is no evidence of any harm over a seven year period in these large, existing TLDs and no indication they would harm in the new round.
- The Afilias/ PIR/ Neustar proposal would be a significant backward step towards more regulation of cross ownership, not less regulation as was recommended by CRAI and endorsed by most commentators on this issue.

They Assert: ***‘Existing Registrars Have an Unfair Advantage Over Them (Existing Registries) in Providing Registrar Services’***

Our Rebuttal:

- Any new entrant to a market faces competition from existing players. In many cases this new entrant overtakes the incumbent market leaders. Evidence should it be needed can be found in our own industry with GoDaddy (a late entrant to the registrar market) and with Lexus gaining significant market share over Jaguar.
- Afilias/ PIR/ Neustar argue that liberalization of cross ownership should not occur as existing registrars have a ‘head start’ in the registrar market. This argument works both ways. Existing registries have a significant ‘head start’ in the registry market by virtue

of the market share their TLDs have achieved over the last nine years in a closed TLD market. If ICANN creates policy based on the argument that existing registrars have an unfair advantage then ICANN must presumably provide a counter-balancing policy that adjusts for the 'head start' of existing registries. An appropriate mechanism for this might be that existing registries are barred from providing registry services for TLDs in this first round of open competition. If ICANN is going to engage in this sort of management of marketplace 'fairness' it should also, logically, provide even more benefit and incentive to completely new entities who are neither currently a registry nor a registrar. It seems to us this sort of marketplace manipulation is not an appropriate role for ICANN, and our examples above illustrate its unsuitability. Absent of any clear harm to consumers, ICANN should let any qualified and contractually compliant party perform as any of the following: registry; registrar; back-end service provider.

- Further, if Afilius/ PIR/ Neustar believe that registrars should not be allowed to enter the registry market because of their existing retail presence then they should also argue that Walmart should not be allowed to operate a registry because Walmart has retail presence. This example illustrates the absurdity of their argument.

They Assert: ***“Cross Ownership Should Only Be Allowed for Single Registrant or Community Registries”***

Our Rebuttal:

- The rationale for this argument appears to be that these registries will somehow be small and will therefore compete less with other registries. This is clearly not the case. Single registrant and Community TLDs have the potential to be the biggest and most successful of TLDs. For example, if Google operates .Google and offers free domains to every user (with Google as the registrant of record in all SLDs) this TLD has the potential to be huge. Similarly if the Vatican obtains .CATHOLIC as a Community TLD this affinity group has the potential to be very large and competitive TLD. There is no rationale why a Community or Single Registrant TLD should be treated any differently from fully open TLDs.

Conclusion

The Afiliastar/ PIR/ Neustar submission argues for a highly restrictive market (significantly more restrictive than the current contractual framework). It contradicts the CRAI report's recommendation of liberalization would strengthen the existing advantaged position held by incumbent registries. It is an attempt to limit competition and therefore it is likely to harm consumer interest.

There is no rationale why registries (the 'manufacturers' of domain products) should not be able to sell their product directly to the public (via an affiliated registrar). The implication of Afiliastar/ PIR/ Neustar is that this will somehow harm consumers, but in fact this model operates in almost all other industries without any harm to consumers. In fact it is more logical that a registry owned registrar will be motivated to provide better service, support and value to end users as they have a vested interest in the success of the TLD. We are at a loss to understand the Afiliastar/ PIR/ Neustar argument for consumer protection. Could they explain where the incentive to the manufacturer would be in harming their end user customers? As explained in detail in Dr Carlton's Competition and Pricing Reports this would contradict economic and business logic.

The DAG does not propose changing any of these important, existing provisions (i) registry/ registrar legal separation; (ii) open access by all interested registrars; and (iii) equal treatment of participating registrars. Rather, it proposes a limited liberalization of existing cross-ownership such that registry owned registrars can sell a limited number of domains in the registry's TLD.