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By E-Mail

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Board of Directors

Internet Corporation for Assigned Names and Numbers (ICANN)

4676 Admiralty Way, Suite 330   
Marina del Rey, CA 90292-6601

Re: Second Version of New gTLD Draft Applicant Guidebook

Dear Members of the ICANN Board:

This comment letter is submitted by the Internet Commerce Association (ICA) in regard to ICANN’s February 19th notice establishing a fifty-two day period for public comments on Version Two of ICANN’s Draft Applicant Guidebook for new generic Top Level Domains (gTLDs).

ICA is a not-for-profit trade association representing the direct search industry. Its membership is composed of domain name registrants that invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. The ICA is an International Member of ICANN’s Commercial and Business Constituency and presently has more than 120 members located in the United States and thirteen other nations.

**ICA previously commented in a detailed December 15, 2008 letter regarding Version One of the Draft Applicant Guidebook; our letter may be found at** [**http://forum.icann.org/lists/gtld-guide/msg00164.html**](http://forum.icann.org/lists/gtld-guide/msg00164.html) **. As few if any changes have been made in Version Two of the Draft Applicant Guidebook as regards the major issues that we previously commented upon we hereby reference and incorporate that correspondence in this comment letter. We are therefore re-submitting the Executive Summary from that prior letter along with additional clarifications relating to provisions of Version Two.**

The ICA continues to have extremely serious concerns about the potential for new gTLDs to introduce differential pricing at both new and incumbent registries, and to undermine existing registrant rights by extending trademark-like rights to geographic names at the second level and by undermining and supplementing the Uniform Dispute Resolution Process (UDRP). We cannot support any opening of the application process for new gTLDs until these matters have been satisfactorily addressed.

**Summary of ICA Concerns Regarding Version Two of the Draft Applicant Guidebook.**

Pace and Prioritization

**ICANN must proceed cautiously in its consideration of new gTLD applications and should announce in advance a prioritization system to assure orderly and comprehensive review.**

While ICANN has announced that the initiation of application acceptance for the first round of new gTLD applications will not occur prior to December 2009, it has yet to provide convincing documentation that it is capable of properly processing hundreds of such applications simultaneously, nor has it indicated that it will establish any prioritization regime for consideration of these applications.

Length of Comment Period and Number of Drafts

**ICANN has not provided sufficient time for review of and comment upon the draft gTLD Applicant Guidebook and should provide a comment period of no less than sixty days following publication of the next revision, and should also consider a third comment period if considerable controversy or questions persist.**

The comment period for Version Two of the Guidebook is only one week longer than that for the initial version; we see no reason why this period was not made substantially longer given that Version Two will still be the focus of discussion at ICANN’s Sydney meeting to be held from June 21-26. We do commend ICANN for committing to at least a third version of the Guidebook. However, as the major issues of concern to ICA have not been substantively addressed, much less satisfactorily resolved, in Version Two we believe it is incumbent upon ICANN to commit to a fourth Version prior to finalization and first round application acceptance – assuming that those major issues are adequately addressed in the third version.

Price Controls

**The new gTLD process must not be used to resurrect much less validate the concept of differential pricing by registries; any exceptions to this policy must only be for a carefully circumscribed group of “closed” registries subject to strict numerical registration limits. Likewise, ICANN should continue adhering to vertical separation of registries and registrars and to enforcing equal access policies for registrars, with any exceptions limited to a narrow category of single organization gTLDs.**

In this regard, we have reviewed the March 2009 document prepared for ICANN, “PRELIMINARY ANALYSIS OF DENNIS CARLTON REGARDING PRICE CAPS FOR NEW gTLD INTERNET REGISTRIES”. We find this document to be more in the nature of an opinion piece than a well-documented and convincingly analyzed report, and we also find the author’s opinion to be non-persuasive. Mr. Carlton asserts:

The fact that major TLDs are currently subject to price caps further constrains the ability of new gTLD registry operators to charge non-competitive prices. More specifically, the current agreements between the U.S. Department of Commerce, ICANN, and VeriSign cap the price increases that VeriSign can charge registrars for both the .com and .net TLDs. Several other non-sponsored TLDs (such as .info and .biz) are also subject to price caps. While the appropriateness of these price caps may be debatable, the existence of the caps limits the prices that new gTLDs can charge by capping the price that the major registry operators can charge.

Mr. Carlton presumes that the current price cap that limits VeriSign’s ability to raise registry fees during its current contract period will constrain initial pricing at new open gTLDs. But there are serious flaws in this reasoning. The .com settlement entered into by ICANN allowed VeriSign to avoid a competitive rebid for operation of the registry, resulting in registry pricing that is widely believed within the ICANN community to be 50 to 100 percent above what market competition would have produced. In short, Mr. Carlton is relying upon an inexcusably high pricing regime to act as a restraint upon pricing at new open gTLDs. Additionally, the scale of registrations is so much greater at .com than what any new gTLD can expect during its initial years of operation (if ever) that none can anticipate achieving the economies of scale that should have resulted in a substantial reduction in registration costs for .com registrants.

Mr. Carlton also fails to address the concerns expressed by many that the authorization of new open gTLDs without any price restraints would permit operators of the very incumbent gTLDs cited in his report to assert that, under their contracts with ICANN, that very act would free them from being further subject to price constraints. If that contention is correct then the constraining effect he cites would no longer be operative. Further, his assertion that “Concerns about opportunistic behavior by registry operators are further limited to the extent that new gTLDs provide services using registrars” neglects to address the fact that ICANN is considering easing vertical separation of registries from registrars.

Finally, in regard to Mr. Carlton’s assertion that “The absence of price caps would likely facilitate experimentation by new gTLD registries with respect to pricing mechanisms…**new registry operators may choose to experiment with usage based pricing.**”(Emphasis added), this is exactly the scenario that most concerns us. “Usage based pricing” appears to be a euphemism for differential pricing; that is, the imposition of different prices on registrants for the same registry service based upon traffic to or the economic success of the particular domain name. Our view is that a registry fee is compensation for a ministerial service and that this fee should be the same for all domains at a particular registry. Once usage based or differential pricing is permitted registries will be able to “tax” the success of domains.

Mr. Carlton recognizes that “Registrants that adopt a particular Internet domain name face costs from switching registries because the use of the TLD in the domain name prevents Internet addresses from being ported across registries. That is, the holder of a domain name that wants to switch registries must, at a minimum, adopt a new TLD…This can create an incentive for registry operators to act opportunistically by raising prices above levels consumers might reasonably expect.” Yet his paper fails to address the issue of whether allowing the introduction of new gTLDs without price restraints, including the ability of registry operators to impose usage based or differential pricing, would allow the operators of the incumbent registries to assert the same right in regard to their registrants (who would stand to lose both substantial investment capital and customer traffic and goodwill if they were to switch from an incumbent to a new registry). Until that issue is adequately addressed ICA must insist, at a minimum, that the proposed standard registry contract for new gTLDs specifically prohibit differential pricing based on usage or any other factor.

Geographic Names

**ICANN should reverse its adoption of the GAC position relating to prior approval for any geo-gTLD and revert to the GNSO position providing governmental entities with standard objection rights. Any suggestion that governments have any ability to object to second level geo-domains on any grounds outside the scope of the UDRP should be rejected outright.**

Our prior letter conveyed our belief that ICANN had already conceded far too much to the GAC when it rejected the GNSO recommendation that nations and intergovernmental organizations be restricted to utilizing the standard objections procedure when they believed an abuse of their national or other significant geographic name would be subject to abuse at the first level under a proposed gTLD application. Despite the facts that these organizations already possess their own ccTLDs and that map names cannot be trademarked, ICANN has proposed to allow these entities to block any proposed gTLD that had not received their formal endorsement or statement of non-objection. The direct search industry created by domainers offers consumers an alternative to search engines when they seek information, and geographic names are one of the chief means by which consumers seek relevant information about providers of products and services associated with a particular locality.

Version Two does nothing to correct this error. Even worse, the GAC continues to press for control of geographic and other names of national significance at the second level of the DNS – and ICANN continues to entertain this overreaching. This is outrageous, and acquiescing to this demand will cripple the potential of new gTLDs to achieve commercial success and best serve the needs of global consumers.

A recent exchange of letters between GAC Chairman Janis Karlkins, ICANN Board Chairman Peter Dengate Thrush, and ICANN CEO Paul Twomey only heightens our concerns in this regard.

In his March 10th letter to Chairman Thrush(available at <http://www.icann.org/correspondence/karklins-to-dengate-thrush-10mar09-en.pdf>),, Mr. Karlkins reiterates the GAC’s unreasonable view that geographic name should enjoy protections not just similar to but superior to those of trademark owners under GAC Principle 2.7, which provides that “Applicant registries for new gTLDs should pledge to: a) adopt, before the new gTLD is introduced, appropriate procedures for blocking, ay no cost and upon demand of governments, public authorities or IGOs, names with national or geographic significance **at the second level** of any new gTLD; b) to ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance **at the second level** of any new gTLD.” **(Emphasis added.)**

ICANN CEO Paul Twomey wrote to Mr. Karlkins on this subject one week later, on March 17th (letter available at <http://www.icann.org/correspondence/twomey-to-karklins-17mar09-en.pdf> ). Mr. Twomey’s letter starts by referencing the Board’s Resolution of March 6th relating to geographic names, which reiterated the Board’s general agreement with the proposed treatment of geographic names at the top level in the Draft Guidebook and directed ICANN staff to make contact with the GAC by March 17th “in order to continue communications with the GAC to find a mutually acceptable solution. Mr., Twomey goes on to declare that the GAC’s demand for blocking and challenge procedures at the second level is “challenging” because of the need of multi-national companies seeking to establish new gTLDs for “geographic names at the second level to replicate their business operations” and because the term “names with national or geographic significance” is far too broad, Mr. Twomey further notes that ICANN generally lacks authority to establish challenge processes at the second level beyond the existing UDRP. But then, given the Board’s direction to ICANN staff, he nonetheless declares that “recent discussions suggest that there may be possible mechanisms that offer protections to country and territory names at the second level”.

We can only wonder what discussions he is referring to, and what these possible mechanisms might be? ICANN’s Board unfortunately seems committed to seeking compromise with the GAC’s unreasonable demand for trademark-plus protections for geographic names – when it has already compromised too much. Subjecting second level names to no-cost, on-demand blocking by countries and other entities would be a major policy error severely detrimental to the interests of consumers and private sector entrepreneurs who wish to serve them.

We also continue to be concerned by the apparent suggestion that if the needs of multinational companies can be protected in this process that a different and less favorable resolution might be acceptable for smaller business interests. As we stated in our December 16th letter, “the notion … that such second level restrictions might be inappropriate for “multi-national companies” and “brand name holders” implies that they might be acceptable vis-à-vis individual and small business entrepreneurs, a notion that we find offensive insofar as it would establish one favorable rule for large corporations and another far more stringent rule for small businesses. “

Rights Protections and the UDRP

**Strong, cost-effective, and readily implemented protections for rights holders should be established but they must be limited to enforcing their rights under existing law and not be premised upon the creation of broader rights by ICANN fiat. It is for this reason that we object to creation of a reserve list of trademark names as this would provide rights protections beyond the geographic and relevant marketplace limitations of trademark law. We also object to the imposition of any new rights or procedures that would supplant or supplement the UDRP absent extensive consideration of such proposals in a process that ensures that registrant concerns about current UDRP enforcement trends are heard.**

It has become clear since the filing of our first comment letter that significant potential alterations of the rights of registrants under the UDRP are being put in play in the context of the rules being developed for new gTLDs, and that the process for development and consideration of such proposals is one that is heavily biased toward intellectual property interests and that fails to meet normal ICANN transparency requirements.

Subsection 7 of Article I, Section 2 (Core Values) of the ICANN Bylaws states that ICANN’s decisions and actions should be guided by a commitment to “Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.” And Section 1 of Article III states that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” Unfortunately, these principles are not being observed in the development of proposed “solutions” for rights holders in new gTLDs, as ICANN has delegated the lead role in the development of new policies to the Intellectual Property Constituency (IPC) and it is now proceeding in a manner that unfairly excludes the views of registrants and that is not transparent as that term is generally understood and implemented in other ICANN undertakings.

During its March 6th meeting in Mexico City the ICANN Board adopted a Resolution on “Protection for Trademarks in New gTLDs”. The opening paragraph of this resolution notes that “these issues exist today within the existing gTLDs”, an admission that heightens our concern that any “solutions” adopted in the new gTLD process will be retroactively imposed upon existing gTLDs. In the Resolution the Board requests the IPC, in consultation with ICANN staff, to convene an Implementation recommendation team (IRT) “to develop and propose solutions to the overarching issue of trademark protection in connection with the introduction of new gTLDs”.

The IRT has now been constituted. The domainer community and many other registrant interests that will be directly affected by any alteration or supplementation of registrant rights in the UDRP have been excluded from its membership. Contrary to the Board’s directive that the IRT “solicit input from the interested constituencies prior to its first session” we know of no such outreach effort. Further, the IRT has chosen to avoid such standard transparency mechanisms as providing a publicly archived mailing list; audio recordings and transcriptions of all its teleconferences and face-to-face meetings; and a submission of interest disclosure statements by all IRT members. Rather, the IRT has chosen to only post minutes of its meetings and teleconferences on a delayed basis and, so far as we are aware, has neither collected nor publicly posted interest disclosure statements from its members.

In addition to these substantial procedural shortcomings, reports indicate that the IRT is discussing second level “solutions” that will substantially affect existing registrant rights under the UDRP, including the establishment of an expedited procedure for dealing with domains alleged to be “cybersquatting”, as well as creation of a protected marks list. The UDRP can hardly be uniform if one version exists, at least for the time being, in regard to incumbent gTLDs while another version less protective of registrants applies to new gTLDs. It remains our position that any alteration of the UDRP should only occur through a dedicated and transparent process that is open to the participation of all affected parties, and that it is unacceptable for this matter to be addressed on an expedited basis as a subsidiary issue within the new gTLD context through a truncated and non-transparent process controlled by a constituency with a particular bias.

Adding to our concern is the input being provided to ICANN and the IRT by the World Intellectual Property Organization (WIPO), which is proposed to be the only designated provider of dispute resolution services for legal rights objections in the new gTLD process. In an April 3rd letter to ICANN (available at <http://www.wipo.int/export/sites/www/amc/en/docs/icann030409.pdf> ) WIPO further elaborates its thinking on trademark rights protection mechanisms (RPMs) at new gTLDs. WIPO concedes that, under one of substantive criteria it is proposing for an Expedited Suspension Mechanism (ESM) **“a significant majority of UDRP disputed names would be captured”** , and also suggests that the UDRP’s present requirement for a complainant to demonstrate bad faith registration and use should be altered to one of bad faith registration or use.

This WIPO correspondence makes absolutely clear that a substantial substitution for and undermining of the UDRP is being put in play in the new gTLD process. ICA will continue to register our strong objections to any alteration of the UDRP proposed to be implemented through an expedited and one-sided process. As we stated in our December 15th letter: “Any alteration or supplementation of the UDRP should not be implemented as a footnote to new gTLD implementation but only after presentation to and consideration by the community -- and such process must take into consideration and redress concerns with the present UDRP voiced by registrants and not simply react to the complaints of trademark interests.”

Law and Public Morality Objections

**We oppose permitting law and public morality objections to new gTLDs unless narrow and clearly articulated criteria for such objections can be established, because if they are not then the DNS could become a censorship regime grounded in the whims and personal views of individual jurists.**

Version Two of the Guidebook, while providing some scant clarification on this matter, still fails to provide clear guidance as to what might trigger a determination that “an applied-for gTLD string would be contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law.” While we oppose the approval of gTLD strings that promote violent lawless action; discrimination based upon racial, ethnic, or religious grounds; or child pornography or other sexual abuse of children; we continue to have serious concerns about potential abuses of an open-ended morality and public order objection.

As we commented on December 15th, ICANN’s own background memo on this subject admits that “‘Extensive research has shown that it is difficult to identify existing generally accepted legal norms relating to morality and public order.’ Yet ICANN is still proposing that gTLDs not be contrary to norms that do not exist!”

**Conclusion**

We hope that ICANN will find our additional comments useful as it continues to revise the draft Applicant Guidebook. We certainly hope that the next version takes on the task of fully grappling with the issues that most concern our members, as Version Two has provided little if any clarification on these critically important matters. Indeed, as regards pricing regimes, geographic names, and trademark protections, the process seems to be developing in a manner that is quite adverse to the legitimate interests and expectations of commercial registrants.

Thank you for your consideration of our views in this matter.

Sincerely,

Philip S. Corwin

Counsel, Internet Commerce Association