

COMMENTS OF
COALITION FOR ONLINE ACCOUNTABILITY

April 13, 2009

The Coalition for Online Accountability (COA) offers the following comments on version 2 of the Draft Applicant Guidebook (DAG v.2) for ICANN's new generic Top Level Domain (gTLD) launch. For information about COA, see the comments filed on DAG v.1 in December 2008, at <http://forum.icann.org/lists/gtld-guide/msg00148.html>.

The "Overarching Issues"

In its December 2008 comments on version 1 of the DAG (see link above), COA called for "substantial clarification, supplementation and revision" of the DAG before the launch of new gTLDs. Version 2 of the DAG reflects very little of the needed changes on issues of consequence. However, COA is pleased to see that ICANN has apparently at least partially heeded COA's second general recommendation, that ICANN "devote the necessary time and resources to making these improvements before the new gTLD application window opens." This, at least, is how COA interprets ICANN's recognition of "overarching issues."

In mid-February, ICANN identified four "overarching issues" that it said "require further work and so remain unchanged" in DAG v.2.

<http://www.icann.org/en/announcements/announcement-3-18feb09-en.htm>. ICANN needs to express more clearly the significance of the "overarching issues," beyond stating that they "require further work." We gather from statements made by ICANN senior staff that the new gTLD round will not be launched until these "overarching issues" have been satisfactorily resolved. This should be clearly stated by ICANN. Its failure to be clear that these are "threshold issues" for the new gTLD launch simply increases the already high levels of uncertainty (and, in many quarters, anxiety) about the timing and status of the new gTLD process.

The first of these issues, identified as "trademark protection," generally corresponds to the "intellectual property issues" addressed in section III of COA's December comments on DAG v.1. COA commends ICANN for the establishment of an Implementation Recommendation Team (IRT), under the auspices of the Intellectual Property Constituency, to propose concrete solutions for these issues. COA participants are playing an active role in the IRT. Accordingly, with one exception -- registry Whois obligations -- COA will not address in these comments the issues covered by section III of its comments on DAG v.1.

COA also has strong interests in the other three "overarching issues" identified by ICANN staff. In particular, with regard to the issue identified (somewhat inaccurately, in our opinion) as "TLD Demand and Economic Analysis," COA reiterates the concerns expressed in its DAG v.1 comments. We noted there that one of the key questions about the new gTLD initiative is whether it will "really provide greater competition and choice for the general public,

or will it mainly impose costs on current registrants...?” Our December 2008 comments continued:

ICANN would be much better situated than it is to provide a credible answer to these questions if it had carried out the direction of its Board in October 2006, and commissioned a comprehensive economic study of the domain name marketplace by a respected independent expert. See <http://www.icann.org/en/minutes/minutes-18oct06.htm>. Such a study would have provided answers to basic questions, such as whether the gTLD space constitutes one market, in which an influx of competitors might deliver consumer benefits, or whether it comprises multiple markets, perhaps one per TLD, in which case a new gTLD launch could be expected to deliver mainly fragmentation. It is not too late to commission such a study, and to hold in abeyance the opening of the general application window, until the study results have been published, studied, and incorporated into the design of the new gTLD launch.

We believe these comments remain timely and relevant. The economic studies commissioned by ICANN and released during the Mexico City ICANN meeting do not even purport to fulfill the Board directive of October 2006. Yet, at least as of the date of this submission (April 13), the ICANN wiki on the overarching issues gives no indication that any further steps beyond these economic studies are contemplated. See https://st.icann.org/new-gtld-overarching-issues/index.cgi?new_gtld_overarching_issues.

ICANN should make it clear now that the new gTLD application window will not be fully opened until it has commissioned, received, and published an economic study fully responsive to the 2006 Board resolution, followed by a reasonable opportunity for public review and discussion of the study and its impact on plans for the new gTLD rollout. Furthermore, reiterating our December 2008 comments, such an approach “would not be incompatible with carrying through the IDN ccTLD ‘fast-track’ initiative, and perhaps even a limited launch of other IDN gTLDs, and thus responding to the one area where there is a documented demand for new TLD space whose satisfaction is likely to deliver clear benefits. COA urges ICANN to consider seriously this option.”

Finally, with regard to another “overarching issue” -- the threat that the new gTLD space could become an amplifier for malicious conduct carried out via the domain name system, such as phishing, pharming, and malware – the registry Whois issue is critically important. COA reiterates the dismay it expressed in its December comments that ICANN proposes to sharply curtail the obligations of new gTLDs to make full Whois data on registrants publicly available, in contrast to the requirement shouldered by nearly every other new gTLD registry recognized by ICANN over the past decade. This inexplicable (or at least, completely unexplained) policy shift will hamper efforts to identify and address promptly incidents and patterns of malicious behavior, just as it will impede the efforts of copyright and trademark owners to identify and address incidents and patterns of online infringement, piracy and counterfeiting. This policy shift must be reversed, and every new gTLD should be required to take on so-called “thick Whois” obligations.

Other Issues Identified by COA

Section II of COA's December 2008 comments concerned topics that are not addressed by ICANN as "overarching issues." These topics include "community-based gTLD applications," the "community objection procedure," the "comparative evaluation" procedure to which community-based applications would be subjected, and the post-delegation obligations of successful applicants. A few of the concerns we raised then have been addressed or clarified in v.2; most have not. COA makes the following recommendations for inclusion in v.3 of the DAG on these topics.

1. Recognize a separate category of "corporate gTLD." Questions have been raised by many commenters concerning the status of applications for a so-called "corporate" gTLD – one that is submitted by a corporation or similar entity and whose only intended registrants are employees or agents of that corporation or entity. While such an application shares some characteristics with a "community" application, in fact under ICANN's existing typology it could be considered an "open" application with highly restrictive registration policies. Such applications may have some unique features not shared by other applications, and may deserve separate treatment in the new gTLD process.¹

2. State clearly that an economic or creative sector could qualify as a community for new gTLD purposes. This would be consistent with the implementation recommendations of the GNSO which make up the "legislative history" of this process. As cited in the previous COA submission, among others, there are enough ambiguous references in the DAG to communities as being made up only of "persons" to justify a clarification of this critical point.

3. Review and reform the "complete defense" to a community-based objection. As drafted in both v.1 and v.2 of the DAG, an applicant faced with a community objection who claims to represent a very small community automatically prevails against an objector who speaks on behalf of a much larger community with an interest in the same gTLD string. This constitutes an unjustified conclusive bias toward allocating the gTLD string to someone, even if the representatives of the great bulk of the community do not consider any applicant an appropriate representative.

While we understand that staff feel impelled to reflect that bias in the Applicant Guidebook, as part of the overall rejection of the comparative evaluation model used in previous new gTLD rounds, at a minimum the bias should be moderated in several ways.

- First, the "complete defense" should be denied to any application not initially presented as a community-based application.

¹ In responding to questions about the applicability of the community designation to "corporate brand owners," ICANN's Analysis of Comments received states, on page 65, that "No change of the applicant's freedom to select the type of application to file is foreseen for the next version of the Applicant Guidebook." <http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>. (Emphasis added) Since this analysis was released almost simultaneously with DAG v.2, this seems to rule out any change in this area in v.3 as well. While it is difficult to understand why this should be the case, if it is, then COA suggests that the separate status of corporate TLDs be considered for DAG v.4.

- Second, the burden of demonstrating entitlement to the defense should be placed squarely on the applicant (i.e., it must prove to the adjudicator that it would have standing to maintain a community objection to a hypothetical application for the same string).
- Third, rather than constituting a “complete defense,” proof of such standing should at most be a factor for consideration by the adjudicator, who could also take into account factors such as the strength of opposition, degree of detriment demonstrated, and the degree to which the objector represents a wholly distinct community that should not be forced to accept the allocation of the string to an unsuitable applicant.

4. Minimize the risk of needless duplication in objection procedures. Publishing an running list of objections received (after administrative review to determine completeness and similar checks) could reduce the pressure for other entities to file similar challenges. Providers should be given greater encouragement to consolidate objections into a single proceeding, not only for the benefit of applicants facing challenges from multiple objectors, but also for the benefit of objectors who wish to challenge multiple applications for the same or virtually the same string.

5. Lower the threshold criteria in “comparative” evaluations. COA explained in detail in its comments on DAG v.1 why the “comparative evaluation” process will likely serve simply as a funnel to subject community applicants to auctions.² The revised criteria spelled out in v.2, while slightly more granular, would probably lead to the same result. This gives insufficient weight to the GNSO’s expression for giving preference to community-based applications as against “open” proposals that seek to monetize the domain space without providing any benefits to a particular community.

At a minimum, the requirement to score 14 out of a possible 16 points in order to avoid an auction should be relaxed when there is only one community-based application undergoing so-called “comparative” evaluation for a particular gTLD string. Furthermore, the problem remains that if a community applicant has successfully defeated a challenge at the objection phase by an objector with standing, that applicant must then achieve a perfect score in order to survive comparative evaluation. See DAG v.2, page 4-12 (9th criterion – two points lost if there is “strong and relevant opposition”).³ Thus, an applicant in that situation that allows “people or groups formally associated with the community” who are not “members of the community” to register in the new gTLD is doomed to an auction, since such an eligibility policy costs one point on the shaded “criteria [sic] #2” on DAG v.2 page 4-10. Clarification is also needed on several of the nine evaluation criteria identified in DAG v.2.⁴

² COA participants continue to share the strongly stated concerns of the Intellectual Property Constituency regarding the inappropriateness of resorting to auctions to award new TLDs.

³ All citations to page numbers in DAG v.2 are to the redlined version, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-18feb09-en.pdf>.

⁴ To give just one example, the fifth listed criterion (page 4-11) is for “satisfactory enforcement measures,” but it is not clear whether this refers to enforcement of eligibility restrictions (3rd criterion), name selection rules (4th criterion), or both.

In sum, the relatively minor changes made between v.1 and v.2 do not alter COA's conclusion that comparative evaluation "need[s] to be re-thought [if it] is to achieve its stated purpose and not serve simply as the anteroom to the auction process."⁵

6. The role of third parties in enforcing obligations post-delegation should be recognized. While COA commends ICANN for including in DAG v.2 (in section 2.11 of the draft registry contract) a requirement that community-based TLDs actually adopt and implement, once the gTLD has been delegated to them, certain policies promised in the application, it should be recognized that third parties (including but not limited to members of the community in question) may be in the best position to identify and document violations of these obligations. This role should be explicitly recognized.

In this regard, COA is concerned by another change in the draft registry contract, dealing generally with the accuracy of material statements made in the application and during negotiations. (These could include, but are not limited to, statements concerning the applicant's relationship to a defined community.) If statements that were true and correct when made become inaccurate prior to the effective date of the registry operator's agreement with ICANN, the registry operator's only obligation now appears to be to inform ICANN in writing. Draft Registry Agreement v. 2, section 1.3 It is not clear when this disclosure must be made, and no indication that it must be made publicly, even though the public may well have relied upon such representations in deciding, for example, whether or not to launch an objection to the application. Perhaps most disturbingly, ICANN proposes to surrender any right to audit compliance with this warranty after delegation. As revised, section 2.10 limits ICANN's audit authority extends only to the "covenants contained in Section 2" of the registry agreement, and this warranty of the accuracy of statements made in the application is found in section 1.3, not section 2. This flaw must be corrected so that ICANN has full authority to audit registries for material misrepresentations made in the application, as well as material statements that are no longer true.

Thank you for considering the views of the Coalition for Online Accountability.

Respectfully submitted,

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⁵ COA also remains concerned about how the risk of bias in comparative evaluation will be minimized. DAG v.2 remains totally silent on that issue. At a minimum, the identity of the evaluator needs to be disclosed to the parties whose applications are being evaluated.