

April 10, 2009

To: ICANN (gtld-guide@icann.org)

Re: **Comments on the New GTLD Program and Process**

Dear Dr. Twomey, Mr. Dengate-Thrush and the ICANN Board:

MarkMonitor Inc. ("*MarkMonitor*") appreciates this opportunity to submit these general comments on behalf of the undersigned in connection with the second version of the Draft Application Guidebook ("*DAG*"). In a separate letter, MarkMonitor, individually, will be submitting its comments relating to the distinct modules of the DAG.

At the outset, we would like to commend ICANN for the significant amount of time and effort that has been put into revising the DAG as well as all of the work that has gone into the condensing and analysis of the public comments ("*APC*") made to the DAG to date. The redlined DAG and the detailed analysis work have created a simpler mechanism from which to evaluate how the ongoing comments are shaping the DAG.

We are aware that in the second version of the DAG, ICANN outlined several concerns that were not addressed by the DAG including trademark issues. In connection with addressing the trademark protection issues, the undersigned recognize that the ICANN Board of Directors has approved the creation of an Implementation Recommendation Team ("*IRT*") (comprised of an "internationally diverse group of persons with knowledge, expertise, and experience in the fields of trademark, consumer protection, or competition law, and the interplay of trademarks and the domain name system") to develop and propose solutions to the overarching issue of trademark protection in connection with the introduction of new gTLDs.

We look forward to reviewing the next version of the DAG (and the solutions offered by the IRT as adopted by ICANN staff) where these safeguards and protection mechanisms will be further explained.

Introduction

The introduction of the new gTLDs and the current ongoing application process raises a host of issues for brand rights holders including the: 1) significant risk to the health and safety of consumers, 2) lack of adequate consumer and rights holder safeguards to protect those parties from abuse in the new name space, 3) potentially large economic impact on brand rights holders, and, lastly 4) risk for a safe implementation given the compressed launch timeline expectation communicated by ICANN staff.

These issues are addressed in further detail as follows:

1. Risk to Health and Safety of Consumers

As we indicated in our previous comments to the First Draft Application Guidebook, we believe that brand abuse and online fraud will likely increase exponentially upon the introduction of hundreds or thousands of new gTLDs. Pursuant to the MarkMonitor 2008 - Year in Review Brandjacking Index®, 30 of the most popular brands experienced a weekly average of over 450,000 instances of cybersquatting targeting their brand. The

resulting cost to companies to protect their valuable brands as well as the potential threats to the health and safety of consumers without adequate protections and safeguards will also increase. As delineated in the presentations from the eCrime Summit at the Mexico City ICANN Meeting, domain name abuse problems are growing both in terms of number of incidents and in the complexity and ingenuity of the attacks perpetrated. Consumers are the ultimate victims of these abuses and they suffer loss of their time, money and even health and safety.

Although this risk may be mitigated by enabling brand rights holders through the implementation of rights protections mechanisms and pre-delegation and post-delegation dispute resolution safeguards (which may be proposed by the IRT and adopted by ICANN), the tangible and intangible costs of policing and remediation of top-level and second-level strings will continue to be shouldered by brand owners.

2. Potential Brand Owner Safeguards and Protections

We are encouraged that ICANN recognizes the importance of brand holder rights issues and has specifically acknowledged that it must “protect brand owners’ rights and prevent abusive registrations”. In fact, the APC sets out the numerous comments that have been made to date by brand owners relating to the lack of trademark and rights protection and safeguards in this new gTLD process. However, there continue to be additional issues that were not addressed adequately in the DAG:

• A Transparent “thick” Whois Policy

ICANN should reconsider its minimum requirement calling only for registry operators to support a “thin” Whois registry model. As we have seen in the past, thin registries do not afford proper safeguards to protect brand holder rights given that control of the registrant’s data is largely held by the individual registrar. ICANN’s decision is purportedly based on issues related to a “multitude of laws (including data protection and privacy laws)”. But the recent conduct of some registrars and registrants under the thin registry model approach has also run afoul of agreements and laws as well. Without a centralized Whois database at the Registry Operator level, brand owners will once again struggle to obtain accurate Whois information required to combat online fraud.

ICANN has indicated that it is evaluating a “possible requirement that Registry Operators would have to collect additional data”. We would support this policy and ask that the data be escrowed by the Registry Operator and made immediately available in the event of the non-cooperation of any registrar and, in the event of online fraud or abuse. As it stands now, Whois issues have not been addressed adequately in this DAG and, without more stringent policies, registrars will have control over the Whois information with no binding obligation to insure publicly accessible and accurate Whois information.

• Rights Protection Mechanisms To Help Brand Rights Holders Prevent Online Abuse

ICANN should institute Rights Protection Mechanisms (RPMs) that both protect consumers from abuse and reduce the need for defensive registrations. ICANN recognizes that the “proliferation of defensive registrations is a concern”. We are looking forward to reviewing the solutions offered by the IRT and hope that they will alleviate the need for costly defensive registrations. Some of the safeguards

that ICANN and the IRT should also consider implementing are: (i) an Expedited Remediation Process; (ii) an expanded Reserved Names list which would include marks of rights holders; (iii) the availability of open, publicly available Whois information with strict proxy registration guidelines; and, (iv) flexible rights protection mechanisms that can be adopted by new gTLDs.

Moreover, as we pointed out in our comments to the first version of the DAG, existing rights protection mechanisms are insufficient to protect consumers and rights holders. Moreover, it is unfair to force companies to increase their legal expenditures by requiring expensive sunrise registrations and UDRP filings in order to correspond with the rising number of gTLDs. These approaches are not reasonable in light of the economic conditions and in the face of potentially thousands of new gTLDs. In addition, sunrise periods have amounted to a fee shifting exercise from registries to brand owners to help fund the initial start-up costs associated with launching new extensions.

3. Economic Impact on Brand Owners

Although we are pleased with the creation of the IRT, the fact remains that brand owners are deeply concerned with the significant impact of the economic recession on their businesses. Stated simply, the introduction of these new gTLDs will put an undue cost burden on businesses that are already financially strapped. As the recession deepens, companies are now struggling to find the internal capital resources to fund the application costs and ongoing operations of a new TLD program or even to object to third-party applications.

In its previous comments, the undersigned requested that a study be commissioned to evaluate the actual demand for new gTLDs and recommended that ICANN take a phased approach to this introduction. We recognize that an economic study was commissioned by ICANN and posted on March 4, 2009 which studied the effect of the introduction of the gTLDs on competition and price. This study, however, does not evaluate the global demand or the economic impact on registrants for these new gTLDs, particularly in light of this global recession. A study that evaluates this demand would be more appropriate given that it might suggest that ICANN launch a TLD program which is isolated only to IDNs or geographic-based TLDs that are supported by a significant community demand.

4. Adequate Time to Evaluate the Revisions to the DAG

We are concerned that by not having addressed any brand owner issues to date, brand owners may not have sufficient time to fully digest, analyze and comment on any pertinent changes. The process of allowing for public comments and subsequent revisions is an iterative one; changes are made to the DAG over a period of time and a number of versions are subsequently released. This process allows interested parties to observe how their requested changes are affecting the substance and nature of the DAG as a whole, over a period of time. ICANN has not indicated with specificity when it intends to begin the application process and the APC seems to suggest that the application process will begin around December 2009. To the extent the next version of the DAG contains changes protecting brand holder rights; brand owners will only have one comment period to address any relevant concerns. The current timeline proposed by ICANN is too tight. ICANN should take its time evaluating the comments from all interested parties including brand owners before formally beginning the application process.

Conclusion

We recognize that ICANN will attempt to incorporate certain policy changes in the next version of the DAG as recommended by the IRT and approved by ICANN. We are pleased that ICANN is seeking solutions to address the trademark issues that have affected brand owners in previous gTLD rounds. We ask that ICANN take note of the numerous comments which were posted as well as those referenced in the APC, and implement those changes that will sufficiently protect brand owners and ultimately the health and safety of consumers as a whole. However, resolution of the aforementioned issues notwithstanding, there are evolving consumer health and safety risks that require further analysis and we look to ICANN and the general community to work on these issues.

Respectfully submitted,



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