



April 13, 2009

VIA EMAIL

Mr. Peter Dengate Thrush
Chairman of the Board of Directors
Dr. Paul Twomey
President and CEO
ICANN
4676 Admiralty Way, Suite 330
Marina del Ray, CA 90292

Re: Comments of Microsoft Corporation on Version 2 of the new gTLD
Draft Applicant Guidebook

Dear Mr. Dengate Thrush and Dr. Twomey:

Microsoft Corporation ("Microsoft") welcomes this opportunity to provide its comments to ICANN on Version 2 of the new gTLD Draft Applicant Guidebook ("DAG 2").

Microsoft is a worldwide leader in the IT industry, with a mission to enable people and businesses throughout the world to realize their full potential. Since the company was founded in 1975, it has worked to achieve this mission by creating technology that transforms the way people work, play, and communicate. Microsoft is also an owner and champion of intellectual property rights. It maintains sizable trademark and domain name portfolios and takes pride in the worldwide recognition of multiple of its trademarks. Further, Microsoft's businesses rely heavily on the Internet and the current system of top level domains, and Microsoft is an ICANN-accredited registrar. As such, Microsoft was well positioned to provide meaningful comments to ICANN on the first version of the new gTLD Draft Applicant Guidebook ("DAG 1") and remains well positioned to do so on DAG 2.

At the outset, Microsoft wishes to restate its objection to the introduction of an unlimited number of new ASCII gTLDs.

Executive Summary. The dispute resolution procedures and provision for rights protection mechanisms remain of principle interest to Microsoft as we anticipate using these processes extensively. Microsoft commends the ICANN Board of Directors for authorizing the creation of an Implementation Recommendation Team ("IRT") to develop solutions to trademark protection issues in connection with the introduction of new gTLDs and for allocating the

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resources necessary for the IRT to meet in person for this important work. To provide potential objectors and applicants alike with the required certainty about the objection procedures, processes, standards, and requirements, ICANN must complete its agreements with the Dispute Resolution Service Providers (DRSPs) and the DRSPs must finalize all aspects of the respective objection processes.

Microsoft continues to endorse the concept of post-delegation dispute resolution procedures and will provide comments soon on WIPO's proposal. Microsoft's earlier-articulated concerns about cost considerations remain. Finally, ICANN should change the standard for string confusion and revise the string examination protocol.

We incorporate by reference our comments on DAG 1 and provide below our comments on DAG 2.

Overarching Issues

Microsoft appreciates ICANN's recognition of the importance of the concerns regarding the four "overarching issues" identified in the "New gTLD Draft Applicant Guidebook: Analysis of Public Comment" ("APC"), and looks forward to participating in the discussions of those issues, as appropriate, and to receiving the results of ICANN's examination of them. We provide brief comments regarding each of these overarching issues.

Security and Stability. Microsoft submitted to ICANN on December 15, 2008, comments on the technical considerations related to the introduction of new gTLDs. Microsoft is pleased that the ICANN Board has requested the SSAC and RSSAC to conduct jointly a study of the potential impact on DNS security and stability of the combined introduction of IPv6, DNSSEC, IDNs, and new TLDs. It remains unclear, however, whether the noted study will consider all of the issues previously raised in Microsoft's comments on the technical considerations as "within scope" of the study. Accordingly, Microsoft reserves comment until the results of that study are made available.

Microsoft welcomes ICANN's acknowledgement that registrant protection and avoidance of end user confusion are security and stability issues.

Malicious Conduct. In its comments on DAG 1, Microsoft voiced its grave concerns that the "introduction [of potentially hundreds of new ASCII gTLDs] will expand the environment and opportunities for online fraud, an environment and opportunities that will most certainly be seized upon by criminals and their enterprises." The APC indicates that ICANN staff intends to solicit feedback to ICANN staff on this issue. Microsoft awaits the opportunity to provide its feedback.

Trademark Protection. Microsoft applauds the authorization by the ICANN Board of Directors of an Implementation Recommendation Team ("IRT") to develop solutions to trademark protection issues in connection with the introduction of new gTLDs as well as the

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Board's decision to allocate the resources necessary for the IRT to meet in person for this important work. Microsoft has substantiated the offer in its DAG 1 comment to support the pursuit of scaleable, cost-effective, and efficient rights protection mechanisms; Russell Pangborn, Microsoft's head of trademarks and co-signatory to this letter, is an IRT member. ICANN should take now the steps necessary to ensure that sufficient time at the Sydney meeting is scheduled for presentation of the IRT's work to the community and discussion of the IRT's output between the IRT and the community.

Demand/Economic Analysis. We intend to comment separately on the recently released economic studies.

Dispute Resolution Procedures

Microsoft appreciates that the APC referenced many of its comments on DAG 1. Regrettably, however, many of the issues that Microsoft noted in those comments remain outstanding. For example, ICANN has not yet entered into contracts with the three Dispute Resolution Service Providers (DRSP) identified in Module 3 of DAG 2 and the DRSPs have not yet finalized their respective procedures. As stated in Microsoft's comments on DAG 1, "Potential applicants and objectors need the certainty of final procedures, processes, standards, and requirements. In particular, rights owners that may use the objection process extensively must be able to assess and predict now their likelihood of success." This statement holds even more true now as the opening of the first application round draws closer.

Applicability of gTLD Dispute Resolution Process. It is not clear what is meant by reference to "applicability of this gTLD dispute resolution process." ICANN should clarify this language.

Combining Multiple Objections. Microsoft continues to believe that objectors should be permitted to file against one application a single objection document that delineates the bases for all of its objections against that application. Similarly, an applicant should be permitted to file a single response document that responds to multiple based objections filed by the same objector. The DRSPs should each issue a decision based on the portion relevant to it.

Objector Prevails by Default. In proceedings in which the objector prevails by default (regardless of whether the applicant withdrew its application or failed to respond to the objection), the applicant should be precluded from filing another application for the same objected-to string.

Consolidation. Microsoft continues to believe that both the objector and the applicant should be permitted to refuse consolidation of objections proposed by the DRSP.

Panelists. Microsoft endorses the decision to allow a legal rights objection proceeding to be heard by three experts. However, requiring that both parties agree to a three-expert panel is likely to preclude full utilization of a three-expert panel. Instead, either party to

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the proceeding should have the opportunity to request a three-panelist panel and the requesting party should bear the additional costs associated with two additional panelists. This system works well for the UDRP and there is no reason to think it would not work for these dispute resolution proceedings.

Decision. ICANN should clarify what is meant by “The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.” Microsoft presumes it means that the ICANN Board will act on and in accordance with the expert determination in making a final disposition of the application. Confirmation or clarification, as appropriate, would be helpful.

Legal Rights Objection Standard. Microsoft continues to believe that greater certainty as to the likely application of the listed factors would be very helpful to both rights owners and potential applicants. As noted in comments on DAG 1, it is not clear from the listed factors how a DRSP would resolve an objection where both the objector and applicant have legal rights in the same mark, but the geographic scope of the objector’s rights far exceeds that of the applicant’s, or the objector’s mark is more well-known than the applicant’s.

Preclusive Effect of Determinations in String Confusion and Legal Rights Objection Proceedings. ICANN should clarify if determinations in string confusion and legal rights objection proceedings will have any preclusive effect and, if so, to what extent. For example, will an expert determination in a string confusion proceeding apply to a legal rights objection proceeding between the same applicant and objector regarding the same string? Will an expert’s finding in a legal rights objection proceeding that the applied-for gTLD is not confusingly similar to the objector’s mark preclude a finding of string confusion should the objector apply in the second round for a gTLD identical to the mark on which it based its objection?

Post-Delegation

Microsoft appreciates the inclusion in the registry agreement of Section 2.11,¹ which will impose on a successful applicant for a community-based gTLD the contractual obligation to operate the gTLD in a manner consistent with the restrictions of the community-based designation. Although the language of Section 1.2.2 of DAG 2 suggests that ICANN would consider changes to the community-based nature of the gTLD to be material changes, the next version of the DAG should specifically state if such changes would, in fact, be deemed

¹ ICANN should revise Section 2.11 to clarify that the obligation of the Registry Operator to “operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD” relates to the development of future policies and practices. As a practical matter, the Registry Operator will have developed its policies and practices well before the registry agreement is signed and may not have had the opportunity to consult with the entire TLD community beforehand.

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material changes and, if so, under what circumstances ICANN would approve such material changes. In addition, ICANN should state if an assignee's adherence to these contractual obligations would be a prerequisite for ICANN's approval of an applicant's intended assignment of the registry agreement for a community-based gTLD.

Microsoft continues to support the development and imposition of post-delegation dispute resolution processes to address post-launch infringement by a gTLD registry. Microsoft is evaluating WIPO's proposed Post-Delegation Dispute Resolution Procedure and will provide its comments on that proposal soon.

Secondary Market

The APC refers to some comments submitted regarding the possibility of a secondary market in new gTLDs, but contains no Proposed Position on the issue. Accordingly, and in light of Microsoft's concern about the possibility of an active secondary market in new gTLDs, set forth below in their entirety are Microsoft's DAG 1 comments on this issue:

The possibility of an active secondary market in gTLDs raises significant concerns. ICANN should take action to minimize the likelihood that such a market will come to fruition and, to the extent it does, that participants do not successfully evade the examination and objection processes.

Four possible measures are immediately identifiable. First, ICANN should revise Section 8.4 of the Registry Agreement to prohibit assignment of the Registry Agreement within a defined period (12-18 months) after delegation. Prohibiting assignments within this time period should decrease significantly the possibility of "gTLD flipping." Second, ICANN should ensure that post-delegation dispute resolution procedures apply to assignees of the Registry Agreement. This measure would mitigate considerably the risk that the assignee of the Registry Agreement ("gTLD Assignee") itself or its intended use of the gTLD would essentially elude the objections that could have been levied had the gTLD Assignee been the original applicant. Third, ICANN should develop "Assignment Guidelines" that set forth the conditions and criteria that a proposed gTLD Assignee must satisfy to obtain ICANN's approval of the proposed assignment. To be effective in ensuring that gTLD Assignees are qualified to be Registry Operators, these conditions and criteria must – at a minimum – be the substantive equivalent of the full range of evaluation criteria for new gTLD applicants. Finally, ICANN should revise Section 8.4 of the Registry Agreement to require that ICANN must provide its prior written approval of a change of control. The value of having prior notice of a change of control is low if ICANN can take no action to prevent the change. Further, guidelines comparable (if not identical) to the Assignment Guidelines should be developed to ensure that a change of control is not used as a mechanism to evade substantive evaluation of the new controlling entity or person.

Cost Considerations of the New gTLD Program

Microsoft continues to have many of the concerns articulated in its comments on cost considerations set forth in DAG 1, and refers ICANN staff to those comments.

Annual Registry Fees. Even though ICANN has reduced the annual registry fee to not less than \$25,000, ICANN has still failed to provide sufficient justification for an annual registry fee of this amount given that some current annual registry fees are as low as \$500 and it is conceivable that a number of successful new gTLD applicants could operate registries with a relatively low number of registrations. There is no justification for the proposition that new gTLD registries should, through the annual registry fee mechanism, bear the costs of registrar-related compliance and “possible increased registrar activity.”

Refunds. The proposed refund schedule may encourage abuse of the refund process. Two modifications may discourage abuse. First, the percentage amount of evaluation fee refunded after posting of initial applications should be reduced to 50%. Second, the percentage of evaluation fee refunded should be 35% for those applications withdrawn after objections are filed against them.

String Confusion Review

ICANN should change the standard for string confusion, revise the string examination protocol, and provide clarification of several points.

String Confusion Standard. For the reasons stated in its comments on DAG 1, Microsoft continues to believe that ICANN should change the standard for string confusion to include phonetic and conceptual similarity.

String Examination. Microsoft is disappointed that ICANN continues to grant itself and existing TLD operators, which are its revenue sources, “most favored party” status by allowing a finding of string confusion in comparison against Reserved Names and TLDs to result in failure of Initial Examination for which no appeal or extended evaluation is permitted. Microsoft agrees that, as ICANN conceded, it is far easier to block a name than to recover it (APC, p. 45-46) and, accordingly, believes ICANN should extend this benefit to globally strong and well-known trademarks. Microsoft is hopeful that the IRT may propose a solution based on this concept and trusts that ICANN will support the IRT’s output.

The first reference to string confusion review in 2.1.1.1. identifies comparison as “preliminary.” What does this mean?

During a question and answer session with the GNSO Council during the Cairo meeting, ICANN staff indicated that an algorithmic string similarity score of 60% would trigger closer review by the String Similarity Examiners panel. Has ICANN made a final decision to use

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a 60% string similarity score as the threshold? If not, what is the new threshold? What is the floor below which no review will be conducted?

Microsoft continues to believe that ICANN should publish the names, affiliations, and qualifications of the String Similarity Examiners (SSEs), require the SSEs to abide by a strict conflict of interest policy, and allow applicants to submit to ICANN written objections to having a particular SSE assigned to its application if the applicant has reason to believe the SSE may have a conflict of interest.

Identified below are a number of additional issues and concerns that, although of lesser importance than the issues and concerns described above, warrant consideration by ICANN.

Module 1

Public Comments. The proposed creation of a public comment forum is a positive development as is the stated intention to provide Evaluators with the comments themselves, and not merely ICANN-generated summaries. It would be helpful to the community to include in the next version of the DAG examples of the subject matter categories of comments that ICANN anticipates would be properly raised in public comment.

Open, Community or Brand gTLD? Microsoft acknowledges ICANN's reference in the APC to Microsoft's earlier question of whether ICANN intends to allow the community-based community gTLD designation to apply to corporate, branded gTLDs. Unfortunately, however, the APC did not answer the question. On further consideration, Microsoft proposes the creation of a new category of gTLD -- brand gTLD (bTLD) -- that is subject to fewer restrictions than community gTLDs, but receives some of the benefits associated with community gTLDs. A bTLD is a corporate, branded gTLD for which the brand owner is the applicant, that the brand owner will operate for its own benefit and in connection with the provision of the goods and/or services identified by the brand, and for which the brand owner will restrict the registrant population.

Required Documents. Microsoft welcomes ICANN's clarification that new gTLD applicants that are newly formed entities may comply with the financial statements requirement by providing a pro forma balance sheet.

Confidentiality Designations. Microsoft supports the position in DAG 2 that applicant responses to security and financial questions will be considered confidential and not posted.

Applicant Obligation to Update. Microsoft endorses the new requirement that applicants notify ICANN and submit updated information if previously submitted information becomes untrue or inaccurate.

Module 2

Probity and Conflicts of Interest. Microsoft has concerns about the removal from Section 2.3 of the reference to a conflicts of interest policy for Evaluators. Further, the reference to a conflicts of interest policy in the Evaluation Questions and Criteria is vague. For example, what type of “precautions will be taken to ensure that no member of the Evaluation Teams will have any interest or association that may be viewed as a real or potential conflict of interest with an applicant or application”? Why not publish the policy?

Evaluation Criteria. Expanding the evaluation criteria scoring scale is helpful, but a broader expansion (to 10 points, instead of 4 points) would provide greater flexibility and granularity.

Financial Crimes, Fraud, and Breach of Fiduciary Duty Inquiry. The ongoing omission of questions intended to ascertain if the applicant or any of its officers, directors, or managers has been convicted of financial-related crimes, found to have committed fraud or breach of fiduciary duty, disciplined by government for such offenses, or is currently involved in pending matters relating to such offenses or conduct is startling. The APC states that Evaluators will be “given tools to verify information” about applicants. Facilitating verification is very different from requiring disclosure. There is absolutely no reason not to require disclosure. Moreover, an Evaluator’s discovery of an applicant’s failure to provide the requested information has far greater import than an Evaluator’s discovery that an applicant has provided incorrect information – especially if ICANN remains unwilling to impose a disclosure obligation on applicants.

Continuity. Microsoft continues to believe that operators of bTLDs should have the flexibility to decide to stop operating the bTLD if they so choose. In such a circumstance, it would be inappropriate for a third party with no rights in the brand to operate the bTLD.

Measures Against Abuse. Microsoft continues to support requiring applicants to identify and describe Measures Against Abuse that will be implemented in their respective gTLDs and also supports the broader illustrative scope of potential measures. If the IRT recommends the adoption of standardized measures to serve as a “floor”, Microsoft would endorse such a recommendation.

Contention Sets and Objections. The statement on page 2-5 of DAG 2 that “[t]he objection process will not result in removal of an application from a contention set” seems inconsistent with statement on page 3-3 that “[I]f an objection by one gTLD applicant to another gTLD applicant is unsuccessful, the applicants may both move forward in the process without being considered in contention with one another.” ICANN should resolve the apparent inconsistency or provide clarification.

Module 4

Self-Resolution of Contention Sets. If applicants resolve string contention by forming a joint venture, ICANN should post the fact of that joint venture as it may influence decisions by potential objectors whether to object.

Module 5

Publication of Registration Data (Section 2.4 of the Base Agreement). Specification 4 should require publication of “thick” Whois. It is essential to our efforts to combat online fraud that full Whois information be available at the Registry Operator level.

Use of Registrars. We understand that at least one alternate proposal will be offered soon and defer comment until that time.

Termination by Registry Operator. If the Registry Operator operates a closed, branded gTLD or a gTLD with fewer than a set number of registrants, the Registry Operator should have the right to terminate the Agreement and cease operating the registry. The Registry Operator right to terminate should be added to Section 4. Section 4.4 would require appropriate revision.

Module 6

Paragraph 6. The covenant not to challenge and waiver contained in Paragraph 6 is overly broad, unreasonable, and should be revised in its entirety.

Paragraph 9. An Applicant’s permission to ICANN should be limited to use of the Applicant’s name in ICANN public announcements relating solely to that Applicant. ICANN must obtain specific permission from an Applicant to use its logo.

Paragraph 10. This paragraph should be revised to distinguish, in the case of branded gTLDs, an Applicant’s pre-existing rights in the brand reflected in the applied-for gTLD.

* * *

In conclusion, Microsoft continues to object to ICANN’s planned introduction of an unlimited number of new ASCII gTLDs. The introduction will not result in true competition among them, but will introduce unparalleled opportunities for fraud and abuse, is likely to destabilize the Internet as a commercial platform, and the current plan will impose tremendous financial burdens and resource allocation requirements on virtually the entire non-contracting party, non-gTLD applicant business community. Microsoft shares the concerns articulated by MarkMonitor and National Association of Manufacturers and has either endorsed or is a signatory to their comments to ICANN.

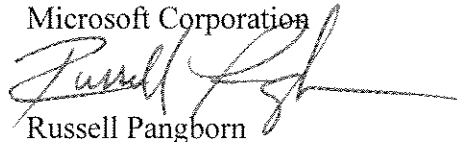
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If ICANN nonetheless proceeds with the introduction of new ASCII gTLDs in the face of such widespread opposition and in spite of the current economic downturn, Microsoft encourages ICANN to take the time necessary to consider and address the issues and questions raised by the community about the intended implementation plan. It is essential that ICANN “get it right” and the current, compressed timetable effectively ensures that it will not.

Thank you for your consideration. If you have questions or wish to discuss any of the points raised herein, please contact Russell Pangborn (russpang@microsoft.com) or Peter Becker (peterbe@microsoft.com).

Respectfully submitted,

Microsoft Corporation



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