



**AT&T Comments on ICANN's Second Draft New gTLD Guidebook
April 13, 2009**

I. INTRODUCTION AND SUMMARY

AT&T welcomes the detailed analysis of all responses received by ICANN in the Public Comment process, as well as ICANN's acknowledgment that there are at least four 'overarching' threshold concerns that were not adequately addressed by the draft Applicant Guidebook.¹ However, ICANN published a Second Draft Guidebook, giving the appearance that it was continuing to move forward to implement unlimited generic Top Level Domain (gTLD) expansion in spite of the acknowledged importance of first resolving the threshold issues. ICANN must be open to the fact that one possible outcome of threshold issue resolution may be a fundamental change to ICANN's initial implementation proposals.

We have concerns about a process in which ICANN moves forward with development of the guidebook and application process before it has thoroughly studied the overarching threshold concerns and developed concrete solutions to address them. By moving ahead with a second version of the Guidebook, ICANN appears largely to have either ignored AT&T's specific proposals, most of which were primarily directed to the threshold, overarching concerns identified by ICANN, or to have relegated these issues to collateral and ancillary processes.²

AT&T's initial comments set forth constructive proposals for pre-award safeguards, including registration safeguards for global brand holders which were specifically designed to avoid unnecessary disputes and user confusion in the allocation and use of new strings at both the top level and the second level.³ In addition, we identified a number of important overarching concerns that ICANN must address before opening the floodgates to allow an unlimited number of new gTLDs in the marketplace – including security and stability concerns, the potential new opportunities for fraud and abuse, and, perhaps most importantly, the economic justification for and impact of such a flood.⁴ We proposed that ICANN move forward with a more limited number of new TLDs, such as sponsored domains and Internationalized Domain Names (IDNs).⁵

¹ Those issues are: (1) security and stability; (2) malicious conduct; (3) trademark protection; and (4) demand/economic analysis. New gTLD Applicant Guidebook: Analysis of Public Comment (ICANN, Feb. 2009) ("ICANN Analysis") at 3-4.

² AT&T Comments on New gTLD Guidebook (Dec. 15, 2008) ("AT&T Comments").

³ AT&T Comments at 3-5.

⁴ Id., 2-3.

⁵ Id.



In these comments to the Second Draft Guidebook, AT&T demonstrates that all four threshold issues which ICANN and its stakeholders have identified must be thoroughly analyzed, and that solutions must be incorporated into the implementation process, before any new gTLDs are introduced. ICANN itself recognizes that its current timeline must “depend on the resolution of the overarching issues raised by the community in response to the proposed draft applicant guidebook” and that “[i]t is very important to take the time appropriate to resolve the overarching issues...[of]... DNS stability, user protection and property rights...”⁶ However, it is still unclear how solutions to the threshold issues will be taken into account and how the implementation process and Second Draft Guidebook will be modified.

For instance, with respect to the threshold issue of trademark protection, ICANN’s Second Draft Guidebook appears to adopt safeguards similar to those proposed by AT&T, but makes these safeguards applicable only to ICANN itself as well as certain geographic names and communities of interest, and not to global brand holders. ICANN’s decision to establish an Implementation Response Team (IRT) to examine trademark concerns and proposed solutions is a positive indication that it is taking these issues seriously, but it does not otherwise provide valid grounds for ICANN to defer immediate consideration of the specific comments submitted by AT&T and other brand holders. In these comments, AT&T submits its further refined proposal for a reserved list of global brands as well as other specific mechanisms necessary for the avoidance of conflict and user confusion (see Attachment A). In addition, AT&T will submit the attached set of safeguard mechanisms directly to the IRT.

With respect to the threshold need for a prerequisite demand and economic analysis, the two reports ICANN issued subsequent to the release of the Second Draft Guidebook fall short of the foundational economic study that AT&T and others (including ICANN’s Board of Directors) have called upon ICANN to undertake prior to any final decision on the introduction of additional gTLDs. AT&T will fully address the March 4 reports later this week. In the interim, these comments highlight our concerns that the March 4 reports, which purportedly demonstrate the consumer benefits of new gTLDs and the lack of a need for price caps, are based on unproven and untested assumptions.

Finally, with respect to the remaining threshold issues, AT&T continues to support the establishment of expert teams to fully and critically examine important issues of Internet security and stability, and Internet fraud and abuse. As with the other threshold issues, all of these concerns should be addressed first, and any subsequent new TLD roll-out should be managed holistically in light of the other important issues that ICANN is currently managing, such as GNSO reform, improving institutional confidence and enhanced contract compliance efforts.

⁶ ICANN Analysis at 9.



II. ICANN SHOULD IMPLEMENT ADDITIONAL SAFEGUARDS TO AVOID UNNECESSARY DISPUTES AND USER CONFUSION

The ICANN Board of Directors recognized, appropriately, that consumer confusion and trademark protection are key threshold issues in connection with the introduction of new gTLDs. To this end, ICANN created a list of reserved names for “ICANN” and related terms, reasoning that allowing applications for these TLDs would create confusion and it would be harder to recover a TLD than to keep it reserved in the first place.⁷ ICANN also included some special protections for geographic names and communities of interest. In its analysis, ICANN staff noted that “if” additional trademark protection mechanisms were agreed upon, the aim would be to reduce costs to trademark holders and increase and build more confidence in protection measures.⁸ ICANN’s post-draft Guidebook establishment of the IRT will hopefully facilitate the development of robust and meaningful trademark protection mechanism. Experience confirms what common sense should dictate: preventative safeguards are far less expensive, and far more effective, than after-the-fact remedial measures. All brands of all sizes should have the benefit of such protection mechanisms.

The reasoning underlying the constructive proposals ICANN has put forward with respect to ICANN-related names compels the conclusion that similar safeguards are also needed for global brands. ICANN’s treatment of the constructive comments submitted by AT&T and others with regard to the protection of global brands is, therefore, inexplicable. It would be unwise and arbitrary for ICANN to afford protection for some types of end-user confusion but ignore the largest source of such confusion when it involves global brands – the very engines of global commerce, industry, economic and social welfare, and prosperity. While all brands are deserving of protection, global brands by their very nature are most susceptible to exploitation in order to create consumer confusion and serve as vehicles for fraud and abuse. It is arbitrary and capricious for ICANN to fail to include safeguards for global brands in the Second Draft Guidebook.⁹ Permitting the unfettered registration of new gTLDs that infringe on global brands is simply a recipe for protracted disputes, user confusion and increased business costs. Infringing and confusing domains should not be registered in the first place regardless of the nature of the brand, and the reserve list established in the Second Draft Guidebook must be expanded to include global brands.

1. Pre-Award Safeguards for Top Level Domains – Establishing a Global Brands Database

AT&T and many other enterprises, whatever their domiciliary, have long operated globally. Many other business enterprises, and an increasing number in the developing

⁷ Second Draft Guidebook at 46.

⁸ ICANN Analysis at 4.

⁹ In addition to submitting these comments, AT&T plans to comment on the draft IRT recommendations once they become public later this month.



world, are expanding their reach to global markets. In the case of established global brands, much money and time has been spent to register and maintain trademarks and service marks, as well as to secure, maintain, and protect other forms of intellectual property. It is critical to the world's economic recovery that today's global brands not be forced to assume unnecessary burdens and expenses in connection with brand protection, and that emerging global brands not face artificial economic barriers to entry in this form. Under the Second Draft Guidebook, both existing and emerging global brand holders will undoubtedly be constrained to assume the time and costs of multiple defensive applications for multiple domain name registries in order to keep their brands (or confusingly similar derivatives) from being exploited by third parties.¹⁰

ICANN should therefore modify the draft Guidebook so that the reserve list for all new gTLD registries includes a category of 'global brands' reserved names, based on clearly defined, objective criteria, together with contract terms in registry agreements that require all new string applicants to adopt and adhere to this list, in order to minimize disputes between new registry applicants and global brand holders. To the extent a new registry applicant pursues registration of a name on the reserved list, a dispute procedure should be provided, with the cost borne by the registry applicant.

In order to place a name on the reserve list, global brand holders should pay a one-time, cost-based fee and demonstrate objective criteria indicating their rights in the name. In its earlier comments, AT&T demonstrated that such criteria could include proof of trademark registration and use in jurisdictions within at least three of the five United Nations world regions. As an option, a combination of other indicia of global use might also be considered, including multiple marks registered and in use in several world regions, active use of marks with demonstrated international recognition, existing registrations of a brand name or trademark as a domain name in multiple gTLDs or ccTLDs, the existence of a resolving web site, with verifiable content for a reasonable period prior to the introductions of any new gTLD, or evidence that the rights holder has undertaken defensive actions against forms of infringement, cyber squatting, or other forms of online dilution, in any appropriate legal or alternative dispute resolution forum.

The global brand reserve list should be used by ICANN itself to deny third party applications for TLD strings that correspond with or are confusingly similar to reserved brands.¹¹ In order to discourage potential abuse of the ICANN-managed reserve list process, a World Intellectual Property Organization (WIPO)-operated mechanism for appealing ICANN decisions based on the reserve list should be established.

¹⁰ AT&T demonstrated in its initial comments that, except for sponsored gTLDs or community based gTLDs that have specific guidelines for qualifying to register, brand holders are forced to register in new gTLDs as a defensive strategy. AT&T Comments at 4, n.3.

¹¹ The IRT should be tasked with formulating the specific criteria underlying such determinations.



Beyond the global brand reserve list itself, ICANN should implement other safeguards to help all parties effectively and efficiently address trademark protection in domain name registrations. Two main types of safeguards – application safeguards and dispute resolution safeguards – should be established. For example, within the application process, a procedure should be developed to afford “automatic opposition” status to applications for TLD strings that correspond to or are confusingly similar to recognized global brands that have not yet been added to the reserve list or have otherwise been identified after the initial application screening. Second, efficient, reasonably priced and standardized dispute resolution mechanisms must be available throughout the gTLD application cycle to resolve conflicts about or between applications for new gTLDs.¹² Implementation of such safeguards will necessarily need to take into account operational issues, such as list management and credentialing, cost recovery, and cost allocation and other mechanisms designed to prevent abuse of the processes.

2. “At-Launch” Safeguards for Second Level Registrations

The global brand reserve list can and should also serve as an effective backstop to prevent third-party registration of infringing or confusingly similar strings at the second level. A name should not be released for registration at the second level by anyone other than the legitimate rights holder. All new gTLD registries must be required by contractual terms to proactively prohibit all reserved names, both those associated with ICANN and those associated with global brands. If the list is extended to geographical names of countries, such names should also be proactively prohibited at registration.

ICANN should also revise the dispute process at the second level to mandate a standard sunrise process. The central reserve list of global brands established by ICANN at the top level should be used to establish eligibility for second level domain sunrise priority rights, but sunrise protection cannot be limited to such names for trademark holders.

ICANN should develop a centralized credentialing process that permits one-stop confirmation of eligibility to participate in the new gTLD sunrise processes and to establish/rebuttable presumptions of rights in the context of dispute resolution processes. As AT&T demonstrated in its earlier comments, such a sunrise process should be available to all brands holders who are able to provide the necessary documentation. The cost of providing and establishing reserve list eligibility would then occur only once, and corresponding efficiencies in the administrative and operational aspects of the process will be achieved. ICANN should require all registry operators to both follow this

¹² The planned use of auctions to resolve conflicting applications and the establishment of a presumption in favor of granting applications for new gTLDs create stability concerns. ICANN should return to examination of other approaches to resolve conflicts, including creating a ‘not resolved’ category when a resolution cannot be identified through mediation or mutual agreement. Auctions are not a suitable approach to string contention resolution at the top level. Many members of the community have strong reservations about the use of auctions at the top level and there are also strong concerns about ICANN’s use of auction funds.



standard sunrise process and to establish a point of contact to facilitate the resolution of any anomalies that develop during a sunrise launch. ICANN should also establish controls consistent with these safeguards to ensure that community-based/sponsored TLDs operate sunrise processes in a manner consistent with this approach.

3. Post-Launch Safeguards and Dispute Resolution Mechanisms

3.1 *Whois*

The second draft Guidebook still fails to impose affirmative obligation on registrants to maintain open, publicly accessible, free and accurate Whois data. ICANN proposed to give extra ‘points’ to an applicant who provides thick Whois, but failed to mandate thick Whois in all cases. This is unacceptable. During the application process, part of the technical and business evaluation should include addressing the applicant’s commitment to maintaining and enforcing Whois requirements, with a focus on standard and accurate information. All registries should be required to maintain centralized “thick” Whois data as part of the standard registry contract; and all registrant agreements must include the acceptance of that requirement. To this end, ICANN should ensure that the terms and conditions included in all registry and registrar agreements assure the maintenance of accurate, publicly accessible, and thick Whois data, and appropriate standards for proxy registration services (including appropriate mechanisms to identify the actual registrant and obtain access to contact information). It also should ensure that these mechanisms are enforceable throughout the contract hierarchy.¹³

3.2 *Dispute Resolution Mechanisms*

Reasonably priced, standardized dispute resolution mechanisms must be available throughout the gTLD launch cycle to resolve conflicts about initial second level registrations or between prospective registrants at the second level. To this end, the Uniform Dispute Resolution Process (UDRP) should be reviewed and enhanced as appropriate to respond to any expansion of the TLD space. In turn, ICANN should assure that all new registry agreements should ensure that registrars are obligated to adopt, implement and enforce all UDRP enhancements. Examples of efficient dispute resolution procedures could include the establishment of a central list of strings found to be registered in bad faith via UDRP, automated notice to prevailing party of subsequent registration of a previously adjudicated string, and the opportunity to require registrants to demonstrate good faith registration. No ICANN-sponsored dispute resolution process should operate to preclude resort to legal processes provided under applicable law, and therefore all operative documents must provide that participation in any ICANN registration or dispute resolution process at any DNS level does not foreclose any avenues for rights holders to vindicate their rights in any available forum.

¹³ ICANN states that it is still only requiring the publication of “thin” Whois data “due to the multitude of data protection and privacy laws in different jurisdictions.” ICANN Analysis at 132. ICANN should accelerate efforts to identify and eliminate any actual barriers to a thick Whois requirement.



3.3 Other Tools

Finally, there are two additional post-launch safeguard initiatives that ICANN can and should undertake. First, given the growth of cyber crime and online fraud, ICANN needs to assert leadership in supporting the availability of the essential tools that allow law enforcement and other legitimate interests to identify both infringing registrations and as registrations that are used for malicious purposes, such as identity theft, malware, phishing, etc. ICANN should launch a process, similar to the IRT process, to identify best practices and develop mandatory rapid response and remediation procedures to minimize consumer harm from fraud and malicious conduct. Second, in the absence of demonstrated market-based controls with respect to defensive registrations, ICANN should establish price caps for registration fees in connection with all new gTLDs, while at the same time maintaining existing price caps for legacy registries. Given the scale of both upfront application fees and ongoing costs, it is reasonable to expect that the costs of monitoring, defensively registering and enforcing new TLDs will be excessive.

III. THERE IS NO EMPIRICAL BASIS FOR CONCLUDING THAT NEW GTLDS WILL ENHANCE CONSUMER WELFARE

Unfortunately, the ‘preliminary reports’ commissioned by ICANN from Professor Dennis Carlton do not address foundational economic issues, such as whether each TLD represents a distinct market and whether the successive expansion of 14 additional TLDs beyond the original 7 TLDs has stimulated innovation or enhanced consumer welfare, as opposed to primarily generating defensive registrations and sites designed to take advantage of user confusion (e.g., cybersquatting). The reports also fail to take into account data that is available both from ICANN and in the public domain to undertake the necessary analysis. In sum, these reports neither adequately address the proper foundational questions nor provide sufficient empirical information to support either the introduction of new gTLDs or the lack of domain name registration price caps for new gTLDs or to existing gTLDs.

ICANN’s provision of market data also ignores the changes that are underway in the spread and diversity of growth of the Internet itself into developing and emerging economies, with rapid growth of Internet hosts, Internet users from countries where English is not the preferred language of choice, the changing dynamics of the spread of IP addresses and the growth of Internet traffic. These indicators are readily and publicly available from a variety of sources, and would show that ICANN’s focus should have more logically and reasonably been on the role and priority of IDNs.

AT&T intends to submit separate comments and an economic analysis responding to the preliminary economic reports. In those comments, we will discuss what kinds of data should be gathered and analyzed, and point to the findings that would likely be the outcome of a valid market analysis. However, based on available information, we believe the evidence leads to the conclusion that ICANN’s previous introduction of 14 additional gTLDs beyond the original “legacy” 7 gTLDs has not had any effect on the clear market dominance of the .com domain. Indeed, the evidence shows that the post-



.com gTLDs introduced to date contain high numbers of defensive and duplicate registrations. Some gTLDs have large numbers of defensive registrations that were the direct result of practices that ICANN allowed kiting and domain name tasting - which resulted in creating massive numbers of names for the purpose of exploitation of the brand holders' good will and advertising presence on the Internet. These names often have to be 'recovered' and then are 'maintained' by the trademark holder as a defensive portfolio. For these reasons, which we will more fully discuss in our additional comments to be filed later this week, it is imperative that the ICANN Board provide the resources and leadership that will enable ICANN staff to undertake a thorough economic analysis, including an analysis of domain name growth characteristics in gTLDs, sponsored TLDs, as well as the fastest growing country codes.¹⁴

IV ICANN MUST MAINTAIN ITS FOCUS ON ITS PRIMARY MISSION TO ENSURE THE STABILITY AND SECURITY OF UNIQUE INTERNET INDICATORS

ICANN, recognizing there are clear risks associated with 'eco-system overload', has called for the Security and Stability Advisory Committee (SSAC) and the Root Server Advisory Committee (RSAC) to undertake a study of how the simultaneous introduction of vast numbers of gTLDs, Internationalized Domain Names (IDNs), IPv6 transition and will the DNSSEC affects the root zone operation. AT&T supports ICANN's acknowledgement of the importance of security and stability issues, and its decision to initiate an expert study of the broader concerns. As with trademark protections, security and stability concerns clearly are threshold issues that must be thoroughly analyzed and addressed before any future versions of the guidebook are released.

However, what has not been addressed is how these same activities affect the larger ecosystem of Internet intermediaries, such as network operators, ISPs and web hosting entities. AT&T urges that this process be extended to interaction with this layer of key players in the Internet, and has already reached out to the SSAC chair and others to propose such interactions.

ICANN should adopt a coherent, documented strategy to deal with the likelihood and consequences of multiple registry failures. Such a plan should both strengthen existing procedures for registrar failures as well as develop new uniform procedures designed to address the criteria for closing or transferring registries. In particular, ICANN should develop a protocol associated with "brand associated" registries – and specifically, how strings that serve as brands or trade names are addressed in the context of registry transfer or closure.

¹⁴ The economic analysis should also include a survey of the growth of web sites in non-English speaking markets.



ICANN should conduct further analysis of the potential risks of registry failures and the resources that will be needed to maintain the security and stability of the DNS.¹⁵ In addition, ICANN should assess the potential impact on ISPs and users if there are significantly increased numbers of failed registries and registrars. In this regard, ICANN also must consider its own stability in assessing the potential impact of introducing large numbers of new gTLDs and the potential for an increased number of registries to introduce destabilizing elements into the Internet ecosystem.¹⁶ The Second Draft Guidebook does not address the implications of massive numbers of applications and potential approvals on ICANN's ability to function and fulfill its responsibilities, including compliance and enforcement of exponentially larger body of contracts. ICANN also needs to consider the potential negative impact of the need to manage much larger numbers of registries and registrars, the inevitable outsourcing of most critical functions of the new TLDs and the very real likelihood of destabilization created by domain name auctions.

For these reasons, ICANN should examine the overall stability of the new gTLD application process, both internally and in the context of the overall Internet ecosystem. In so doing, ICANN should be able to determine whether it can scale and improve its contractual compliance mechanisms, registrant fees, and the scope and scale of the implementation of new gTLDs.

V. ICANN SHOULD DEVELOP AN EFFECTIVE PROCESS TO STUDY AND ADDRESS FRAUD AND ABUSE CONCERNS

Users of the Internet rely on the reliable and predictable resolution of domain names at both the top level and the second level. ICANN acknowledged this general concern, and, accordingly initiated outreach efforts with the community on fraud and abuse issues.¹⁷ Abusive exploitation of the DNS at the second level is well documented in various ICANN sponsored workshops, including most recently in the Mexico City workshop on e-crime.

In order to thoroughly analyze and address fraud and abuse concerns, ICANN should employ a process similar to the trademark IRT. The review team should include a number of experts who deal with investigations and enforcement within existing network operators, among others.

¹⁵ AT&T appreciates the work accomplished by ICANN in connection with its internal gTLD Registry Failure Table Top Exercise in 2008, along with the subsequent work of the SSAC in connection with this exercise, and ICANN's maintenance of a dedicated web page on the gTLD Registry Continuity Project.

¹⁶ The "sitefinder" incident is an example from recent history in which a "wild card" was introduced into the DNS resulting in a significant adverse impact on ISPs.

¹⁷ ICANN Analysis at 4 (concern with correlation between expanded gTLDs and expansion of malicious behavior), 6 ("user protection must not be undermined").



The new gTLD program must provide proactive mechanisms to address abusive use of domains by bad actors seeking to commit online fraud, phishing and other cyber crimes through the misuse or abusive use of a unique indicator, such as a domain name. There is an evident correlation between inadequate trademark protections and the proliferation of fraud and abuse on the Internet, but abuses are not limited to trademarked names. These issues require the establishment of an “IRT-like” group which can fully assess the problems that exist today and identify solutions. ICANN policies should also address how abusive use of a unique indicator will be addressed as new mechanisms for abuse of the use of domain names and other unique indicators emerge.

Given the importance of fraud and abuse concerns, ICANN should empower the ‘malicious use group’ to fully assess the problems that exist today and identify solutions. This group should specifically be tasked to consider a range of protection mechanisms that can easily be implemented by ICANN, which should include a form of ‘standard’ notice and take suspension down of a maliciously used second level registration.

ICANN should also address additional changes to the Guidebook in areas that can limit the benefit or incent bad behavior by its own accredited parties. Such changes must include maintaining price caps on all legacy gTLDs and requiring price caps in the new gTLDs. ICANN could also implement an anti-warehousing requirement as well as prohibitions against self dealing in all registrar and registry agreements, including secondary dealings by accredited registries and registrars with agents holding a financial interest. In addition, ICANN should prohibit registries and registrars from engaging in the mass registration of domain names for financial gain of the accredited party and adopt a mechanism to cancel, after appropriate warning, accreditation of a registrar when violations of safeguards are validated.

VI. IT IS NOT IN THE PUBLIC INTEREST TO MOVE FORWARD WITH NEW GTLDS UNTIL ALL THRESHOLD ISSUES ARE RESOLVED

AT&T is encouraged by the steps ICANN has indicating it will take to resolve the four threshold issues.¹⁸ All four issues must be thoroughly analyzed and solutions developed and implemented before any new gTLDs are introduced. The timeline must be adjusted accordingly, as ICANN itself recognizes.¹⁹ As AT&T’s comments have demonstrated, ICANN still has considerable work to accomplish before it can proceed with the launching of large numbers of new gTLDs in a manner that avoids the attendant potential for massive Internet ecosystem disruption. The available evidence indicates that ICANN should have serious doubts about whether to move forward the way it proposes.

¹⁸ For instance, Chairman Peter Dengate Thrush stated in Mexico City that “[t]he Board has clearly heard and believes strongly that the concerns of trademark holders must be addressed before this process is opened for applications.” Briefing Note – Overall Summary of the Mexico City Meeting, ICANN website, <http://mex.icann.org/briefing-note> (last accessed Apr. 9, 2009).

¹⁹ ICANN Analysis at 9.



Given the nature of the unresolved issues and the importance of the decisions that have yet to be made, ICANN should immediately suspend further development of the Guidebook and avoid creating any expectation that it would be feasible to move forward with the new gTLD application process at the end of the 2009. By establishing this artificial deadline and trying to work through complex and important issues on a concurrent track, ICANN is not engaging in sound.. The inevitable results can easily be predicted: either ICANN will not give due consideration to critical issues and take the necessary time to develop solutions, or it will end up further delaying the application process and potentially disrupting business plans that are being developed based on the current estimated timeline. Neither result serves the interest of the Internet community. ICANN, in order to maintain its credibility and trust, must be accountable to the global Internet community by prioritizing the resolution of the complex issues raised by AT&T and others over the desire for a rapid roll-out.

AT&T continues to support only a limited, rational rollout of “community based/sponsored” domains and the introduction of the 22 fast-track ccTLD IDNs.²⁰ As AT&T explained in its initial comments, community based/sponsored TLDs have inherent safeguards and do not pose the same potential for infringing applications, which could lead to vast numbers of defensive registrations, disputes and user confusion. AT&T further supports ICANN’s consideration of the pilot introduction of fast track ccTLD IDNS as a pilot program to broader IDN launch. The pilot program’s criteria should require adherence to IDNA, including a requirement of retroactive adoption of the IDNA when the standard is fully available. These domains satisfy a compelling policy interest to expand access to the Internet by making it more accessible to global users for whom English is not their primary or native language. The lessons learned from any such pilot will be invaluable as ICANN turns its attention to the IDNs in broader terms.

Although ICANN has expressed skepticism about limiting new TLD application rounds in particular, and to rethinking its approach to process in general, there is absolutely nothing stopping ICANN from doing so. The urgency created by an inexorable, drive toward a year-end 2009 gTLD roll-out, before any of the threshold issues have been resolved, creates unnecessary and unwarranted uncertainty and forecloses at least one potentially legitimate conclusion and outcome – ICANN ‘s priority must be on IDNs, and there must be a scale back of expectation about vast numbers of new ASCII gTLDs.

VII. CONCLUSION

In light of the importance of the various issues identified by ICANN itself – trademark protections, economic and market issues, security and stability concerns, and the potential proliferation of fraud and abuse – it is absolutely essential that ICANN not “rush to judgment” and attempt to move forward with the introduction of new gTLDs until it fully analyzes these issues and puts in place the appropriate safeguards and

²⁰ Id. at 14 (citing AT&T Comments).



solutions. ICANN simply cannot reasonably conclude that it must hold fast to a 2009 implementation date for gTLDs. The range of concerns and open issues is too broad, and the implications far too important, to allow an arbitrary timeline to drive the consideration and resolution of these important issues on concurrent, rather than sequential, tracks. ICANN should therefore suspend further development of the Guidebook and avoid establishing any arbitrary target dates for introducing new gTLDs so that it can focus its full attention on addressing the important threshold issues that it, and the community of internet stakeholders, has identified.



ATTACHMENT A

Summary of Additional Trademark Safeguards for New gTLDs

1. Pre-Award Safeguard Mechanisms for Trademarked Names.

- a) Global Brands TLD Reserve List (“GB Reserve List”)
 - i) Centralized, validated reserve list of brands that have developed worldwide recognition, as demonstrated by documented satisfaction of objective criteria (e.g., a single mark that is registered and used in [x] countries in [y] regions; [multiple] marks registered and in use in [y] regions, etc.).
 - ii) Prohibition on third party applications for TLD strings corresponding to/confusingly similar to strings on GB Reserve List.
 - iii) WIPO operated appeals mechanism for challenging names on the GB Reserve List (including mechanisms to discourage abuse of (i) GB Reserve List registration and (ii) appeals mechanism).
 - iv) ICANN responsible for managing the GB Reserve list and any fees should be cost based.
- b) Automatic Opposition Status or other mechanism to address applications for TLD strings corresponding to/confusingly similar to Global Brands that have not been included in the GB Reserve List or are identified after initial screen.
- c) Robust Dispute Resolution Mechanisms. Efficient, reasonably priced, and standardized mechanisms must be available throughout the gTLD application cycle to resolve conflicts about or between applications for new gTLDs.

2. At-Launch Safeguards for Second Level Registrations

- a) Global Brand Reserve List. The GB Reserve List described above should also serve as a reserve list to prevent third party registration of corresponding/confusingly similar strings at the second-level.
- b) Centralized Credentialing Process. One-stop confirmation of eligibility to participate in new gTLD sunrise processes and to establish existence/rebuttable presumption of rights in the context of dispute resolution processes. (Reasonable additional criteria could be required to establish eligibility/rights in the contexts of sponsored/community-based TLDs).
- c) Standard Sunrise Process. To be followed by all new gTLDs to facilitate registration of trademarks and confusingly similar strings at the second level, leveraging centralized credentialing process and employing standard methodologies for determining prevailing rights, overcoming rebuttable presumptions, etc.
- d) Robust Dispute Resolution Mechanisms. Efficient, reasonably priced, and standardized mechanisms must be available throughout the gTLD launch cycle to resolve conflicts



about initial second level registrations or between prospective registrants at the second level.

3. **Post-Launch Safeguards and Dispute Resolution Mechanisms**

- a) Terms and Conditions to be included in Registry and/or Registrar Agreements.
 - i) Accurate, Publicly Accessible, Thick WHOIS.
 - ii) Standards for Proxy Registration Services.
 - iii) Adoption of Enhanced Dispute Resolution Procedures (see below).
 - iv) Enforceable Contract Obligations
- b) Enhanced Dispute Resolution Procedures. Efficient, reasonably priced, and standardized mechanisms must be available to resolve conflicts about second level registrations.
 - i) The UDRP should be reviewed and enhanced as appropriate to respond to planned expansion of the TLD space. (Note: new registry agreements should ensure operator and registrars are obligated to adopt and enforce obligations of any UDRP enhancements.)
 - ii) Streamlined procedures for identifying and challenging registrations of strings previously found to be infringing/confusingly similar.
 - (1) E.g., central list of strings found to be registered in bad faith via UDRP; automated notice to prevailing party of subsequent registration of previously adjudicated string; opportunity to require registrant to demonstrate good faith registration.
- c) Preservation of Rights under National Law. No ICANN DRP should preclude resort to legal processes provided under applicable law.
- d) Fraud and Malicious Conduct. ICANN should launch a process, similar to the IRT process, to identify best practices and mandatory rapid response and remediation procedures in appropriate circumstances to minimize consumer harm from fraud and malicious conduct.
- e) Pricing Protections for Bona Fide Defensive Registrations and Renewals. To address absence of market-based controls with respect to defensive registration, based upon standardized criteria for such registrations (e.g., as evidenced by redirection to existing site or election to register as non-resolving name).