

November 20, 2009

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

**Re: Comments on the New GTLD Program and Process:
Version 3 of the Draft Application Guidebook**

Dear Mr. Beckstrom, Mr. Dengate-Thrush and the ICANN Board of Directors:

MarkMonitor Inc. ("*MarkMonitor*") appreciates the opportunity to submit these comments on behalf of the undersigned, in connection with Version 3 of the Draft Application Guidebook ("*DAG3*"). In a separate letter, MarkMonitor, on its own behalf, will submit detailed comments relating to the six (6) modules in the DAG.

In addition, the undersigned would once again like to commend ICANN staff for the significant amount of time and effort they have put into the latest revisions to the DAG3, as well as the considerable work that has gone into the condensing and the analysis of public comments submitted in the last round. The redlined version and the accompanying detailed analysis are invaluable tools that allow the Internet community to better organize and understand the vast amount of information contained within the underlying documents.¹

We are also aware that ICANN has indicated that the DAG3 would not contain the vast majority² of rights protection mechanisms ("*RPMs*") that were developed and recommended by the Implementation Recommendation Team ("*IRT*").³ Although this position is of significant concern to us, we also recognize that the ICANN Board has requested that the GNSO review and evaluate (on an expedited basis) several of the recommendations⁴ contained in the IRT Report. With cautious optimism, the undersigned look forward to reviewing the recommendations of the GNSO with respect to these important RPMs that are described in the IRT Report.

Introduction

ICANN staff previously outlined four (4) overarching issues that were raised during the first comment period. ICANN staff indicated that these issues needed to be properly addressed prior to moving forward with the introduction of new gTLDs. These overarching concerns were issues related to: (i) trademark protection, (ii) malicious conduct, (iii) economic demand and analysis, and (iv) the impact on security and stability of Root Zone Scaling. As set forth below, we believe

¹ Given that a number of issues that were raised in the MarkMonitor letters to ICANN regarding version 1 posted on December 15, 2008 ("Letter1") and version 2 posted on April 13, 2009 ("Letter2") have not been addressed to date, the undersigned hereby restate their original comments set forth in Letter1 and Letter2.

² The two IRT RPMs contained in the DAG3 are (i) a modified version of the Trademark Post Delegation Dispute Resolution Policy and (ii) the implementation of a Thick Whois model for all new gTLD registries.

³ The Affirmation of Commitments Agreement recently executed on September 30, 2009 between the Department of Commerce and ICANN states that: "ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation."

⁴ The GNSO will be providing input with respect to the creation and implementation of the IP Clearinghouse and the creation and implementation of the Uniform Rapid Suspension Process.

that significant concerns remain with respect to these four overarching concerns and that there is still additional work to be done before ICANN can proceed with the introduction of new gTLDs.

1. Trademark Protection:

We appreciate that ICANN recognizes the importance of brand holder rights protection issues and has specifically acknowledged that it must protect brand holder's rights and prevent abusive registrations. We are also encouraged that ICANN has shown a commitment toward providing this protection to brand holders by recommending that all proposed registry agreements for new gTLDs be modified to reflect a requirement that they offer a "Thick Whois" service. As set forth in the IRT Report, Whois information at the registry level under the Thick Whois model is essential to the cost effective protection of consumers and intellectual property.

We are also pleased that ICANN has incorporated a second RPM in the DAG3 that was recommended by the IRT. This is the specification of a trademark post-delegation dispute procedure ("*PDDRP*") that allows trademark holders to lodge complaints against new gTLD registries in certain cases. However, the PDDRP incorporated into the DAG3 deviates markedly from the PDDRP originally recommended by the IRT. Specifically, the PDDRP under the new ICANN version places the burden of policing and enforcement back on rights holders and requires that complaints be lodged and prosecuted not with ICANN, but with a relevant dispute resolution provider; thus allowing ICANN to relinquish any investigative or enforcement role. This falls short of the recommendation made by the IRT which required ICANN to investigate potential breaches of the Registry Agreement, and accept responsibility for deciding the appropriate remedy for an infringing registry.⁵ ICANN has already indicated that it will continue to pursue its contractual compliance activities and enforcement for all of its contracted parties.⁶ We therefore believe that ICANN should take a greater leadership role with respect to the investigation and enforcement of complaints in connection with the Trademark PDDRP.

We continue to believe that RPMs are critical for protecting consumers from abuse and would serve a positive function by significantly reducing the need for defensive registrations. We are looking forward to reviewing any additional input from the GNSO reflecting original comments⁷ from MarkMonitor to the IRT report and hope that these will ultimately be incorporated into a future version of the DAG. We also ask that ICANN (i) reconsider its position not to allow a Reserved Names List that would include marks of rights holders as recommended by the IRT and (ii) consider eliminating the registry/registrars separation requirements in cases of single brand holder registries.

⁵ The IRT Report recommends that if "ICANN's investigation should not discover that the Registry Operator is directly in material breach of its contractual obligations, then ICANN, the complainant and Registry Operator must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days".

⁶ Proposed Trademark Post-Delegation Dispute Resolution Procedure at Page 1.

⁷ See MarkMonitor Comments to the IRT Final Report published July 2, 2009

2. Malicious Conduct:

As we indicated in our previous comments to DAG1 and DAG2, we firmly believe that malicious conduct and brand abuse will likely increase upon the introduction of hundreds or thousands of new gTLDs.

As set forth in the RISG Statement on New gTLDs:

“A TLD may become more of a target for criminals once it becomes accepted by and known to end-users. Criminals also tend to migrate from TLD to TLD (and registrar to registrar) over time. The criminals move on as the affected registries and registrars become aware of problems and implement mitigation procedures. This already happens in the 200+ TLDs already in existence, and among the hundreds of ICANN-accredited registrars. We assume this pattern will continue...New gTLDs have the potential to transform the organization of the DNS, and for this reason should be pursued in a cautious manner.”⁸

As set forth in our previous comments, 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 losses of their time, money and even health and safety. Although ICANN has identified a number of measures it will implement to mitigate malicious conduct with respect to the new gTLDs⁹, it has not yet identified the types of malicious conduct that these measures are intended to affect.

We believe that additional work is necessary to ensure that risk areas are identified and specific solutions are implemented to address malicious conduct. We encourage ICANN to pursue the course of forming a working group “combining members within the security industry and ICANN community to help develop and assess solutions and specific implementations of proposed mitigation measures.”¹⁰

3. Economic Demand and Analysis:

The introduction of new gTLDs could not come at a worse time for business owners. The international business community is facing a calamitous event in the form of a worldwide recession that is having a significant impact on the pocketbooks of business owners. Although there are signs of a slow and positive turnaround, companies are still being forced to cut budgets and continue layoffs. Stated simply, companies simply do not have the internal funds or human resources to cover the application costs and ongoing operations of a new TLD program or even in some cases to object to third party applications. Currently, there is no adequate economic analysis of what the true impact of new gTLDs will have not only on registries and registrars, but also on individuals and businesses. Given that billions of dollars of eCommerce are transacted over Internet, ICANN should move forward with a more comprehensive study regarding these potential costs.

We recognize that an economic study was commissioned by ICANN and posted on March 4, 2009 that studied the effect of the introduction of new gTLDs on competition

⁸ See RISG Statement on New TLDs published May 19, 2009

⁹ See Mitigating Malicious Conduct published October 3, 2009

¹⁰ Id at Page 2.

and price. This study however did not evaluate the global demand for these gTLDs nor the economic impact on registrants for these new gTLDs, particularly in light of this global recession. In its previous comments, the undersigned requested that an additional study be commissioned to evaluate the actual demand by individuals and businesses for new gTLDs and recommended that ICANN take a phased approach to this introduction. Given the results of the Root Scaling Study as discussed in Section 4 herein, this phased approach seems to be prudent at this time. A request for further study is also supported by the comments made by the Government Advisory Committee (“GAC”) in its missive dated August 18, 2009 to Mr. Dengate-Thrush, Chairman of the Board of ICANN regarding the DAG2. In that letter the GAC stated:

“The GAC notes that the economic reports commissioned by ICANN have failed to distinguish adequately between real demand and derived demand arising from widespread concern in the business community about the multiplication of the opportunity for cybersquatting, fraud and malicious conduct generally...However, the GAC believes that there is an urgent need for separate empirical research to be undertaken regarding the cost of defensive registrations and the impact on consumers of the availability of new gTLDs.”

The undersigned believes that a study that evaluates actual demand versus derived demand would be more appropriate given that it might suggest that ICANN launch a controlled TLD program which is targeted first to IDNs or geographic based TLDs that are supported by significant community demand.

4. Impact on Security and Stability of Root Zone Scaling:

The recent report submitted by the Root Scaling Team (“[Scaling Report](#)”), indicates that:

“Adding new TLDs, IDNs, and IPv6 addresses would also increase the size of the root zone; adding IPv6 addresses would in addition increase the size of the priming response. With aggressive re-planning (some of which is already underway), the system is capable of managing the risks associated with adding either (a) DNSSEC or (b) new TLDs, IDN’s, and IPv6 addresses over a period of 12-24 months—but not both. **If a choice must be made, DNSSEC should come first.**”¹¹

The Scaling Report seems to suggest that there are significant risks attendant to increasing the size of the root without first deploying DNSSEC. This is a recurring comment that has been made over the course of the last several comment periods by a number of commentators. It would therefore appear to be prudent for ICANN to slow the process of increasing the size of the root with the introduction of new gTLDs until it has deployed DNSSEC and introduced ccTLD IDNs and IPv6.

¹¹ Scaling the Root: Report on the Impact on the DNS Root System of Increasing the Size and Volatility of the Root Zone

Conclusion

Although there is deep concern with respect to the fate of the RPMs recommended by the IRT, we do recognize that ICANN may incorporate certain RPM policy changes in the next version of the DAG as recommended by the GNSO. We are further pleased that ICANN has recommended the implementation of the Thick Whois model for all registries of new gTLDs. There are however, a number of issues that remain in connection with the four (4) overarching issues which, if left unresolved, would pose significant consumer health and safety risks. We therefore look to ICANN and the general community to work these issues toward a positive and effective resolution.

Respectfully submitted,



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