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Microsoft

November 22, 2009

VIA EMAIL

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

Re: Comments of Microsoft Corporation on Version 3 of the new gTLD
       Draft Applicant Guidebook

Dear Messrs. Dengate Thrush and Beckstrom:

Microsoft Corporation ("Microsoft") welcomes this opportunity to provide its comments to ICANN on Version 3 of the new gTLD Draft Applicant Guidebook ("DAG 3").

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 two versions of the new gTLD Draft Applicant Guidebook ("DAG 1" and "DAG 2") and remains well positioned to do so on DAG 3.

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 principal interest to Microsoft as we anticipate using these processes extensively. Microsoft had commended 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

allocating the resources necessary for the IRT to meet in person for this important work. However, Microsoft is disappointed that the Board of Directors was unable to take the opportunity for a briefing from IRT members, which resulted in misunderstandings of the IRT recommendations that continued through the Seoul meeting. Those misunderstandings presumably underlie the Board's direction to staff to reject the IRT's recommendations for a Globally Protected Marks List, request for reconsideration process in connection with Initial Examination findings of string confusion, and revised string confusion analysis; to develop different iterations of the IRT's Post-Delegation Dispute Resolution Process, IP Clearinghouse, and Uniform Rapid Suspension System ("URS"); and to seek GNSO Council advice on the Trademark Clearinghouse and URS.

While it is helpful to have available the draft rules for the Legal Objection Dispute Resolution Proceeding Process, ICANN must complete its agreements with the Dispute Resolution Service Providers (DRSPs) and the DRSPs must finalize all aspects of the respective objection processes.

We incorporate by reference our comments on DAG 1 and DAG 2, and provide below our comments on DAG 3.

Overarching Issues

Microsoft provides below its comments regarding each of the overarching issues identified by ICANN.

Security and Stability. Microsoft submitted to ICANN on December 15, 2008 and April 13, 2009 comments on the technical considerations related to the introduction of new gTLDs. The Root Scaling Study Team's September 7, 2009 report, "Scaling the Root: Report on the Impact on the DNS Root System of Increasing the Size and Volatility of the Root Zone," was thorough, well-written, and raised several important issues. In particular, the observation that "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, IDNs, and Ipv6 addresses over a period of 12-24 months -- but not both." and the ensuring recommendation that "If a choice must be made, DNSSEC should come first." appears to have garnered scant attention from ICANN staff and the ICANN Board. Having requested that such esteemed experts conduct the Root Scaling Study, ICANN should heed the recommendations of that team. Microsoft looks forward to ICANN's release of further documents identifying how it plans to implement the Root Scaling Study team's recommendation.

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." We read with interest the recent "Mitigating Malicious Conduct" Explanatory Memorandum and the recommendations contained therein. Regrettably, the recommendations, even if fully implemented, fall short and will not

"greatly help to mitigate the risk [sic] increasing malicious conduct arising from new gTLDs."[1] Set forth below are specific comments on the recommendations.

- Vetted Registry Operators. In its DAG1 and DAG2, Microsoft called for applicants and certain principals to disclose several types of past conduct, convictions, and disciplinary measures. Microsoft is pleased that ICANN is proposing to request disclosure of that information and is considering conducting background checks. Additional measures would decrease the likelihood of malicious conduct by registry operators. These include: (i) making background checks mandatory; (ii) rendering denial of an application automatic (as opposed to discretionary, as suggested by the wording of the notes to question 11); (iii) making any felony grounds for disqualification; (iv) reducing to 5% the ownership threshold of persons or entities for whom/which "prior bad acts" is relevant; (v) extending the class of persons to include persons who operate, fund, or invest in the Registry Operator; (vi) eliminating the temporal restrictions in (d) relating to disqualification by ICANN such that any disqualification at any time -- not simply at the time of application -- is relevant; (vii) revising (f) to read "is the subject of a pattern or practice of either liability for, or findings of bad faith in connection with, trademark infringement or domain name registrations, including"; and (viii) adding a new category (g) that covers "has materially breached an existing registry agreement or the Registrar Accreditation Agreement".

- DNSSEC, Wildcarding, Thick WHOIS, Centralized Zone File Access, and Abuse Contact. The proposed requirements to deploy DNSSEC, to prohibit wildcarding, to provide thick WHOIS, to allow centralized zone file access, and to designate (and require contracted registrars to designate) single abuse points of contact are excellent. It is essential, however, that ICANN's contractual compliance program encompass registry operator failure to comply with these requirements. It is also essential that ICANN improve, in particular, WHOIS accuracy compliance efforts; otherwise, the thick WHOIS requirement is of less value. Making available an expedited registry security request process is an important and helpful contribution.

- Orphan Glue Records. It is not clear if ICANN intends to "encourage" removal of orphan glue records or to require registry operators to do so. ICANN should require registry operators to do so and, if ICANN currently intends to do so, ICANN should so state in the next version of the DAG.

- Rapid Takedown or Suspension Systems. Similarly, language in the sections of the Explanatory Memorandum relating to orphan glue records and abuse points of contact suggests that registry operators must provide rapid takedown or suspension systems to combat malicious conduct, but it is unclear if ICANN is suggesting or requiring such systems. ICANN must require registry operators to adopt and implement rapid takedown or suspension

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[1] "Mitigating Malicious Conduct" at 2.

systems. Indeed, such systems are and have been one of the most widely discussed mechanisms for combating the expansion of malicious conduct that is expected as new gTLDs are introduced. An acceptable system must (i) require the reporting party to provide documented evidence of the alleged abuse; (ii) require the registry operator to review evidence within a set time period; (iii) if documented allegations of abuse are substantiated, require the registry operator to take down or suspend the relevant website or web page within a set period of time and simultaneously notify the domain name registrant; (iv) provide registrants with an opportunity to demonstrate that the allegations are not documented and, if so, have the website/web page restored; and (v) provide that registry operators that comply with the established process should have "safe harbor" against lawsuits from registrants whose websites or web pages are taken down and/or suspended. Microsoft has numerous employees who specialize in security and enforcement issues, and would be amenable to having one or more work on an ICANN-convened expert group to develop a required rapid takedown or suspension system.

- **High Security Zones Verification Program.** In order to be effective, the HSZV must be mandatory for all new gTLDs. At a minimum, ICANN should subtract points from any applicant that does not state its intention to seek HSZV certification. Barring such a requirement, ICANN would have no basis for denying an application for a gTLD with high potential for trust and malicious conduct (e.g., .medicine) submitted in a well-thought out and detailed application by an entity that is, through many layers, a front company for organized crime. That possibility is deeply troubling. In addition, ICANN should ensure that the denial of verification for any applicant be disclosed on ICANN's website.

Trademark Protection. Microsoft had commended 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 allocating the resources necessary for the IRT to meet in person for this important work. However, Microsoft is disappointed that the Board of Directors was unable to take the opportunity for a briefing from IRT members, which resulted in apparent misunderstandings of the IRT recommendations that continued through the Seoul meeting. Those misunderstandings presumably underlie the Board's direction to staff to reject the IRT's recommendations for a Globally Protected Marks List, request for reconsideration process in connection with Initial Examination findings of string confusion, and revised string confusion analysis, and to develop different iterations of the IRT's Post-Delegation Dispute Resolution Process, IP Clearinghouse, and Uniform Rapid Suspension System.

As noted in its July 2, 2009 comments on the IRT Final Report, Microsoft fully supports the recommended solutions set forth in that report. The *IP Clearinghouse*, a centralized database of authenticated data about existing rights, should reduce the costs and administrative burdens associated with protecting trademarks in new gTLDs for trademark owners, registries, and registrars. In addition, the IP Clearinghouse would facilitate the administration of the Uniform Rapid Suspension System, the Globally Protected Marks List, the IP Claims process and the Standardized Sunrise process, all recommended by the IRT. The *Globally Protected*

Marks List ("GPML"), which was based on solutions recommended by Microsoft and other trademarks owners in their DAG1 comments, struck an appropriate balance between protection of those marks that are globally protected and the ability of third parties to use domain names that are identical or confusingly similar to marks on the GPML. As recommended by the IRT, the GPML was neither a "famous marks list" nor a "well known marks list" and, accordingly, avoided the issues and concerns that have historically been associated with such a list. At the top level, marks on the GPML would have been afforded the same protection afforded by ICANN to itself and its registry contracted parties. The IRT's recommendation that applicants of strings found to be confusingly similar have available to them an opportunity for reconsideration recognizes that such applicants may have a right or legitimate interest in using such string. Moreover, the potential initial block at the top level avoids the possibility of a trademark owner having to initiate numerous objections against the same or very similar strings. At the second level, the GPML would have eliminated the need for defensive registrations and facilitated the best utilization of the registry space, while preserving the opportunity for third-party legitimate use of the string.

The *IP Claims* process, which is an alternative to the Standardized Sunrise Process, balanced the trademark rights of owners of marks not on the GPML against third-parties that may have rights or legitimate interests in using a string that is identical to a registered mark contained in the IP Clearinghouse. The representations and warranties that the potential registrant must make to proceed with registration are simple and are closely modeled on representations and warranties contained in most domain name registration agreements regarding the registration information provided and the intended use of the name. The *Standard Sunrise Process*, which also provides recommendations about the grounds on which challenges must be permitted, would have decreased the costs and administrative burdens on registries, registrars, and trademark owners associated with designing, implementing and facilitating multiple slightly different iterations of Sunrise pre-launch registration processes. The limitation of both processes to the pre-launch phase underscores the balance of the protection of trademark rights against the rights of third parties to make legitimate use of strings that correspond to trademarks.

The *Uniform Rapid Suspension System ("URS")*, as recommended by the IRT, is a fast, efficient, and fair mechanism for addressing the most blatant instances of cybersquatting. The URS would have allowed trademark owners to take action to have a blatantly infringing domain name frozen without having to spend the thousands of dollars necessary to use the UDRP and the tens of thousands of dollars necessary to pursue judicial remedies under national law. *Post-Delegation Dispute Mechanism ("PDDM")*. The PDDM recommended by the IRT was properly balanced to protect the interests of consumers and trademark owners from abuse by Registry Operators and to protect Registry Operators from abuse by trademark owners. The IRT's limitation of the PDDM's scope to three specific situations further underscored this balance. Finally, the IRT's recommendation that complainants that file complaints "without merit" are suspended or banned, as appropriate, from using the PDDM provided additional protection to Registry Operators from trademark owner abuse of the process. The expansion of the string confusion analysis in the Initial Examination process beyond the *algorithm* to include

similarity in sound and meaning will improve the accuracy of the assessment and, based on the test s conducted by IRT members, should increase the number of strings that clear the Initial Examination process.

Instead of directing staff to include the IRT's recommendations in DAG3, the ICANN Board of Directors apparently instructed ICANN staff to (i) reject the IRT's recommendations for a GPML, request for reconsideration process in connection with Initial Examination findings of string confusion, and revised string confusion analysis; and (ii) develop different iterations of the IRT's PDDM, IP Clearinghouse, and URS.

When the ICANN Board rejected the IRT's recommendation for a GPML, it rejected the IRT recommendation that (1) was based on the Rights Protection Mechanism ("RPM") most widely requested in public comment, (2) was the only IRT recommendation directed at minimizing the need for defensive registrations, and (3) was an effort to extend to trademark owners benefits that ICANN had reserved for itself and its revenue collectors. Further, the reasons set forth in the Analysis of Public Comment ("APC") for rejecting the GPML demonstrate a poor understanding of the GPML recommendation and are factually inaccurate, circular, and illogical.

The idea behind the GPML was not that "certain marks were . . . most recognized." To the contrary, the idea behind the GPML was that certain marks are so widely protected globally through registrations (not recognition) that they are, for all intents and purposes, protected around the world and, as a result, are entitled to higher protection. Moreover, it is simply inaccurate to state that the "GPML would lead to treating similarly situated applicants differently". The criteria for inclusion on the GPML are objective. Applicants that met the criteria and were thus "similarly situated" would be treated similarly. Applicants that did not meet the criteria would not, by definition, be "similarly situated". Under the APC reasoning, the owner of one national registration in one country should be entitled to the same protection as the owner of 170 national registrations in 170 countries. That outcome would be truly inconsistent with "the global nature of the Internet."

If ICANN is, in fact, so concerned about disparate treatment, it should delete from Sections 2.1.1.1 et seq. of DAG3 all references to, processes for, and outcomes of assessing similarity of applied-for strings against ICANN Reserved Names, Existing TLDs, and strings requested as IDN ccTLDs. Rejecting applications on the ground that they are "confusingly similar" – a trademark-law based standard – to those three categories treats those entities differently from entities that do, in fact, have global protection for their marks. The IRT Final Report specifically addressed and pre-empted concerns about "expanding rights"; to use that argument as a rationale for rejection suggests that the IRT Final Report was not, in fact, fully understood.

ICANN's reliance on the contention that "the proposed standards for inclusion in the GPML appeared to be unclear to many and it is doubtful that uniformly accepted standards could be implemented" is surprising and, in light of the facts, circular. The GPML eligibility

criteria were not finalized, which would have clarified the standards and resulted in increased acceptance, because ICANN staff failed to complete quantitative research that was requested by the IRT and that ICANN staff agreed to perform (or have performed). During the IRT working sessions in San Francisco, the IRT requested that ICANN staff conduct research to determine, for certain marks selected by ICANN staff, the number of national registrations and countries of protection for those marks. The IRT requested that staff conduct this research both because of the limited time available for the IRT to complete its work and, more importantly, to avoid any allegations of bias by IRT members in establishing the specific numerical criteria. ICANN staff agreed to perform this work and never advised any IRT member that the work was not being or would not be done. In fact, IRT members learned for the first time during the Seoul meeting that the research had not been completed. Had ICANN staff rejected the original request or advised IRT members subsequently that the research would not be done, IRT members would have performed (or arranged for the performance of) that research. To now provide as a justification for rejecting the GPML recommendation the absence of specific eligibility standards where the absence of such standards is directly attributable to ICANN staff's failure is unacceptable.

Furthermore, it is illogical to contend that "the GPML would be difficult to establish" and "would only apply to a small number of names" where no final numerical eligibility criteria were established because ICANN did not perform the agreed-upon quantitative research necessary to establish those criteria. Without the research, how does ICANN know it would be difficult to establish GPML criteria? Without the final criteria, how does ICANN know that the GPML would apply to only a small number of names?

The basis for rejecting the request for reconsideration process and revised string confusion analysis is not known. The analyses of public comment on the IRT recommendations contain no reference to either, notwithstanding the generally supportive comments received during the public comment period. Taken together, these recommendations would have resulted in more new gTLD strings clearing the Initial Examination process; an outcome that would have otherwise seemed a desirable one from the perspective of the ICANN Board.

The staff iteration of the PDDM, referred to as the Proposed Trademark Post-Delegation Dispute Resolution Procedure, varies dramatically and in key aspects from the IRT's proposed PDDM.[2] In its iteration, ICANN removed itself from the entire process, changed the grounds for the dispute, and eliminated protection from abusive filings. Based on at least one registry operator representative's statements, the ICANN staff iteration will not have the support gained by the IRT recommendation. Such an outcome is needlessly counter-productive.

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[2]For an excellent analysis of the differences, see Jeff Neuman, "Post Delegation Dispute: A Once Supportable Concept Proposed by the IRT is Unsupportable", CircleID (Oct. 7, 2009), accessible at http://www.circleid.com/posts/post_delegation_dispute_irt_concept_unsupportable/.

As for the staff implementation models of the "Trademark Clearinghouse" and URS, Microsoft reserves comment until after the GNSO Council has provided to the Board of Directors answers to the questions posed in the Board's October 12, 2009 letter. Because it is expected that the GNSO Council will present the Board with alternatives to the staff implementation models, it is simply not an efficient use of resources to comment at this time. Microsoft views both the IP Clearinghouse and URS as RPMs that are critical to its ability to protect its brands and to prevent consumer confusion in an expanded name space.

Demand/Economic Analysis. We note with interest that the second Carlton report argued that trademark protection concerns do not support restrictions on entry because other mechanisms exist or can be adopted. Every mechanism identified by Professor Carlton – "loser pays", submission of bond, IP Clearinghouse, GPML, and URS – has either been rejected by ICANN staff or has not been accepted. Accordingly, the reasonable conclusion is that, at this point, the rejection of the trademark protection-related rationale no longer has any valid basis.

Dispute Resolution 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. Microsoft appreciates the opportunity to review the Draft WIPO Rules for New gTLD Dispute Resolution ("WIPO's Draft Rules"), provides its comments below, and looks forward to reviewing draft rules for the other DRSPs.

"Limited" Interests and Rights. ICANN should clarify that "limited" refers to the bases encompassed by the dispute resolution processes, and not the underlying interests or rights of a particular objector. One potential revision would be: "The independent dispute resolution process is designed to protect certain interests and rights encompassed by the objection grounds and processes set forth herein and based upon the GNSO Policy recommendations."

Applicability of gTLD Dispute Resolution Process. It is remains unclear what is meant by reference to "applicability of this gTLD dispute resolution process."

String Confusion Objection Standing. ICANN should clarify that "an applicant does not have standing to object to another application on the ground of string confusion with which it is already in a contention set." (Suggested language underscored).

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 its previous comments, it remains unclear how WIPO 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 those 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?

Deadline for Filing Objections. ICANN should extend the deadline for filing an objection from two weeks after the Initial Evaluation results are posted to 30 days after those results are posted. It is simply not an efficient use of resources to prepare and file an objection until it is known if a potentially objectionable application has cleared the Initial Evaluation process, and two weeks is not enough time to do so.

Combining Multiple Objections. 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.

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

Objector Prevails by Default. If an objector prevails by default, the application should not be permitted to file a new application for the same objected-to string unless the application includes documentation of the objector's written consent.

Panelists. WIPO's Draft Rules require that both parties agree to a three-expert panel, which is likely to preclude full utilization of a three-expert panel. Either party to 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 confirm that "The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process" means that ICANN Board will act on and in accordance with the expert determination in making a final disposition of the application.

Community Objections. ICANN should clarify the inconsistency on page 3-4 regarding the factors considered in determining if the objector has an ongoing relationship with a clearly delineated community ("factors that may be considered" vs. "balancing of the factors

listed above"). It is unclear why an objector with standing must still prove detriment above and beyond allocation of the challenged string to the applicant. Further, the provision of a "complete defense" appears likely to effectively nullify the entire community objection process, and should be removed.

Post-Delegation

Requiring (under Section 2.13 of the registry agreement) Registry Operators to agree to be bound by the Registry Restrictions Dispute Resolution Procedure ("RRDRP") is a positive step as is the creation of the RRDRP itself. However, several aspects of the RRDRP should be revised. The Introduction suggests that ICANN will not exercise contractual compliance efforts regarding "community-based domain eligibility requirements and use restrictions". If that is the case, ICANN should so state. The standing requirements appear to contain a contradiction. The first sentence of the second bullet point states that "established institutions and individuals" are "eligible to file a community objection." The third sentence of that bullet point states, however, that only an established institution has standing (provided it meets the other requirement.) Individuals should have standing and ICANN should clarify accordingly. In addition, the standing requirements should be expanded to allow the Independent Objector to have standing.

The 30-day period to appoint a panel is too long; 14 days should be sufficient. The Provider should bear the parties' costs if the Expert wants to conduct discovery, to have the parties submit additional written statements, or to hold a hearing. The burden of proof should be clear and convincing evidence given the potential remedies. The remedies should include deletion of domain name registrations that were made in violation of the registry agreement restrictions. It is irrelevant that the registrants of those names are not parties to the action. The Registry Operators should include in their registrar contracts a requirement that the registration agreements provide notice to potential registrants and a registrant's willingness to proceed with registration should be deemed to constitute consent to deletion of the domain name if an RRDRP Expert finds deletion to be an appropriate remedy.

Secondary Market

In its DAG1 comments, Microsoft expressed concern about the possibility of a secondary market in new gTLDs:

> 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.

Microsoft welcomes the requirement in Section 8.5 of the registry agreement that a change of control be accompanied by an affirmation that the "ultimate parent entity of the party acquiring such ownership or control" complies with the "ICANN-adopted specification or policy on registry operator criteria then in effect." However, this requirement and ICANN's ability to request additional information from the Registry Operator and to require the Registry Operator to supply it is not an acceptable substitute for requiring such changes of control to be approved by ICANN. Microsoft's first, third, and fourth recommendations noted above remain outstanding. Microsoft urges ICANN to adopt them to decrease the risk that a "bad actor" can gain control of a Registry Operator.

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. Microsoft continues to believe that ICANN should change the standard for string confusion to include phonetic and conceptual similarity.

String Examination. 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.

Transition of Registry Upon Termination of Agreement

Section 4.5 of the Registry Agreement grants ICANN sole discretion to transition operation of the TLD to a successor Registry Operator. Registry Operators of .brand gTLDs must have the discretion to terminate operation of the .brand g TLD registry without concern about ICANN's redelegation of the TLD to a third party, possibly a competitor. Moreover, ICANN may wish to consider the potential liability to it and the successor Registry Operator if ICANN transitions a .brand gTLD to a third party not affiliated, connected, or associated with; or sponsored or approved by the brand owner.

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

Deadline for Filing Objections See page 9.

Module 2

Code of Conduct and Conflict of Interest Guidelines. Microsoft appreciates the addition of the Code of Conduct and Conflict of Interest Guidelines for Evaluation Panelists. ICANN should revise the Conflict of Interest Guidelines to add to the prohibited conflicts on page 2-33 the ownership or operation of any current contracted party. Moreover, ICANN should advise applicants of the identity of the Evaluation Panelists assigned to their application and allow the applicant to object to the assignment in the event of undisclosed conflicts or bias.

Module 5

Use of Registrars. Microsoft reserves comment at this time.

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 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.

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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.

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 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,

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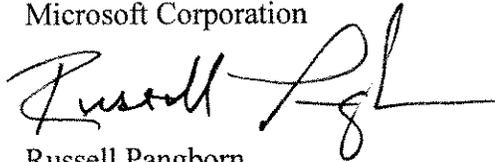
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