

## VIA EMAIL

Mr. Rod Beckstrom  
President and CEO, ICANN  
4676 Admiralty Way, Suite 330  
Marina del Ray, CA 90292

Mr. Peter Dengate-Thrush  
Chairman of the Board of Directors, ICANN  
4676 Admiralty Way, Suite 330  
Marina del Ray, CA 90292

**July 19, 2010**

To: Mr. Rod Beckstrom, Mr. Peter Dengate-Thrush, the ICANN Board and Staff:

MarkMonitor Inc. ("MarkMonitor") appreciates the opportunity to submit these comments in connection with Version 4 of the Draft Application Guidebook ("DAG4"). MarkMonitor once again thanks ICANN staff for the significant amount of time and effort they have put into the latest revisions to DAG4 as well as all of the work that has gone into the condensing, and the analysis of public comments submitted in the last round.

At the most recent meeting in Brussels, the ICANN board and staff stated that the next Draft Applicant Guidebook (DAG5) would be final unless there are significant (and presumably substantive) public comments to the current version. MarkMonitor submits that there are at least three unresolved and substantive issues that mandate further consideration, work and resolution in DAG4 before the community's effort to create a new generic top-level domain (gTLD) program is complete. We question whether there is sufficient time to adequately address those issues within the proposed timetable, considering our current progress.

We therefore urge ICANN and the community to take more time to: carefully introduce new gTLDs so that they are safe for consumers and intellectual property rights holders, achieve the stated goals for the program, and do not jeopardize the technical infrastructure of the vehicle that companies and individuals worldwide rely upon for communication and trade.

The substantive issues that remain unresolved in DAG4 relate to: (i) the economic study; (ii) proposed rights protection mechanisms; and, (iii) root scaling.

### **Economic Study**

The Economic Framework document<sup>1</sup> was released just days in advance of the last ICANN meeting in Brussels leaving little time for the community to evaluate and discuss the conclusions expressed within this study. Examination of the work is instructive to the launch of new gTLDs and warrants consideration, further analysis as well as adjustments to the program. Our hope is that ICANN takes the time to seriously consider and act upon the conclusions of the Economic Framework and any future economic studies.

---

<sup>1</sup> An Economic Framework for the Analysis of the Expansion of Generic Top Level Domain Names by Michael L. Katz, Gregory L. Rosston and Theresa Sullivan dated June 2010 ("[Economic Framework](#)").

***ICANN has not yet performed an analysis of the economic effect of the program on trademark holders nor has it analyzed consumer demand as prescribed at the Nairobi meeting.***

At the meeting in Nairobi, ICANN Staff stated that an economic study would be performed in a phased approach.<sup>2</sup> In the second phase (after the Nairobi meeting) ICANN indicated that it would hire economists to perform empirical studies to determine the cost of defensive registrations (as well as the development of metrics and processes to evaluate the costs/benefits of the new gTLDs). The final phase would ostensibly be the development of mechanisms to enhance the benefits of the new gTLDs. This Economic Framework published by ICANN on June 2010 sets out the framework for additional future studies to be conducted by ICANN on the need and benefits of the introduction of new gTLDs, among other things. The document provides a framework for studying the costs of defensive registrations but is void of conclusions about their cost. Furthermore, the document does not provide any analysis of consumer demand for new gTLDs (not “derived demand”, as demonstrated by those that have indicated their intent to apply for the new gTLDs).

***ICANN has not yet demonstrated that the new gTLD program will achieve its stated goal of creating innovation and competition.***

The original premise for the introduction of new gTLDs was to promote competition in the current namespace and weaken the dominance of .COM in the legacy gTLD market. The Economic Framework specifically states that “it is doubtful that the additional, generic, unrestricted TLDs using the Latin alphabet and a traditional business model of registering domain names would provide significant additional competition for .COM”. The Economic Framework goes on to state that “the situation might be very different if a new gTLD registry offered an innovative service that significantly differentiated that gTLD in terms of the user benefits offered.” The Economic Framework later points to possible future differentiating business models, such as gTLDs with non-Latin characters (IDNs), sponsored TLDs such as .CAT, and perhaps models that can offer benefits such as security or guaranteed levels of customer service.

MarkMonitor agrees with the conclusion that new unrestricted gTLDs with traditional business models for domain name registration will not provide any significant competition to .COM. MarkMonitor further believes that community-based gTLDs (those designed for and supported by clearly, delineated, organized and pre-existing communities) and IDN gTLDs should be expedited. But the vast majority of gTLDs currently being proposed in this round are gTLDs that hide traditional domain registration models behind a veil of purported innovation and creativity. One can easily point to a number of existing gTLDs in this category.

Many gTLDs have not demonstrated a scalable and successful model. Moreover, of those gTLDs that have been relatively successful, none have managed to unseat .COMs dominance in the gTLD namespace.

---

<sup>2</sup> See New gTLD Program Update & Consideration of an Expressions of Interest Round dated March 8, 2010 (there is a three phased study that is referenced in the Presentation).

It is hard to predict a successful launch of the new gTLD program without further study and analysis as well as changes in policy and implementation to accommodate the issues they portend. In fact, the initial conclusions in the Economic Framework document contradict the original reasoning by ICANN for the introduction of new gTLDs (i.e., .COM is the dominant gTLD and introducing additional gTLDs may not untether its dominance)<sup>3</sup>.

## **Rights Protection Mechanisms (RPMs)**

MarkMonitor renews its call for a further review and revision to strengthen the proposed trademark protection mechanisms now detailed in the current version of the DAG. As we have repeatedly indicated in past comments, the current RPMs<sup>4</sup> still do not provide the proper protections to brand holders. Moreover, persistent calls from MarkMonitor for resolution of these issues in our previous comments have gone unaddressed.

First, the Trademark Clearinghouse (TC) is not an RPM. It is simply a database that is intended to make the already existing IP Claims and Trademark Claims processes more efficient. The TC will require an additional charge for brand holders and will not provide comprehensive coverage given that only identical marks can be registered with the TC. Moreover, common law marks are left out from any consideration and the TC is given unprecedented discretion to validate and authenticate trademarks for registration in the TC database.

In addition, the Uniform Rapid Suspension System (URS) (as currently proposed) is neither fast, efficient, nor cost-effective. The URS was conceived to be a quick remedy for clear cases of cybersquatting. The original process was intended to be faster than the already existing UDRP. As it is currently prescribed, and as analyzed by at least one expert dispute resolution service provider, the URS will be roughly equivalent to the UDRP with respect to time required to adjudicate and therefore is not “rapid”. Furthermore, because of the requirement to provide a panel for uncontested cases and other elements of the program the URS will not be inexpensive. Regardless of the aforementioned, given that the ultimate remedy yields only the suspension of a name, it is likely that the majority of brand holders will be forced to buy a domain name in each gTLD corresponding to their trademarks or will be filing requisite UDRPs as opposed to relying on the equally time consuming and costly URS process.

Finally, the entire goal of the original recommendations of the Implementation Recommendation Team was to provide for a “tapestry of rights protection mechanisms” that, working together, would give brand holders the necessary safeguards. Unfortunately, the watered down URS, the narrowly tailored TC, and the glaring omission of the originally proposed Globally Protected Marks List seriously calls into question the viability of these RPMs to protect brand holders.

## **Root Scaling**

ICANN is presently awaiting the response of RSAC and SSAC to the original Root Scaling Study published last year prior to the Seoul Meeting.

---

<sup>3</sup> Other pertinent statements and conclusions referenced in the Economic Framework document are that: (i) user confusion is an important issue and “ICANN [should] consider the potential for consumer confusion in deciding how quickly to proceed with the introduction of gTLDs; and (ii) “it may be wise to [introduce the] new gTLDs in discrete, limited rounds.”

<sup>4</sup> With respect to the Post-Delegation Dispute Resolution Procedure (PDDRP) we agree with and incorporate the comments made by the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center comments (<http://forum.icann.org/lists/4gtld-guide/msg00003.html>).

That study concluded that the convergence of DNSSEC, IDNs, IPv6 and the new gTLDs could put substantial and yet unknown pressure on the root.<sup>5</sup> Moreover, that study seems to suggest that a slow limited release of new gTLDs might be prudent until DNNSEC implementation is completed.<sup>6</sup> We agree; there is no indication as to how many gTLDs will be introduced and ICANN is yet to formally limit the size of the initial pool.<sup>7</sup> The original study is clear in that the issue is the convergence of the various implementation factors and it is this convergence that could potentially destabilize the root. Given the potential negative effect to the security and stability of the Internet, MarkMonitor urges ICANN to limit the initial pool of gTLDs (which would allow ICANN to evaluate the potential pressure on the root), and ask that ICANN significantly limit the initial round of gTLDs to community-based gTLDs (designed for and supported by clearly delineated, organized and pre-existing communities) and IDN gTLDs only in order to safeguard and protect the health and safety of consumers.

As set forth above, there are a number of significant issues that remain which, if left unresolved, would pose significant harm to brand and rights holders as well as negatively impact the security and stability of the Internet. We therefore look to ICANN and the community to work towards a positive and effective resolution on these issues.

MarkMonitor wishes to thank ICANN for its time and consideration of our comments.

Respectfully submitted,

Frederick Felman  
Chief Marketing Officer  
MarkMonitor

---

<sup>5</sup> The report submitted by the Root Scaling Team 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."

<sup>6</sup> On July 15, root operators will begin to offer the signed root zone with actual keys. This is the beginning of the implementation process. Thus there is still additional work to be done in this area.

<sup>7</sup> ICANN has indicated that based on market discussions the new gTLDs might be limited to a few hundred and this number might potentially relieve pressure on the root.