

Comments of Time Warner Inc.

Proposed Final Applicant Guidebook

<http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm>

December 9, 2010

Over the past several years, Time Warner Inc. has participated actively, consistently, and, we believe, constructively, in the ICANN process of developing the ground rules for the rollout of new generic top level domains (gTLDs). We have made numerous written submissions, participated in dozens of meetings, and otherwise expended considerable time, resources and expertise in an attempt to contribute to a new gTLD launch process that would meet real unmet needs, that would be fair to all participants, and that would safeguard the interests of consumers – of our customers – in an e-commerce environment protected against confusion, misrepresentation, and fraud. We recognize that some progress toward these goals has been made, but in our view the process has far to go to achieve them.

ICANN has clearly concluded that this process is virtually at an end, no matter what the status of resolution of the major issues, and no matter what many of the most engaged and knowledgeable participants in the process think. The Proposed Applicant Guidebook (PAG), and at least a dozen other voluminous documents, were posted over the weekend of November 13-14 for a public comment period that expires after less than four weeks. Even more troubling, the Board announced its intention to vote on approving the guidebook on December 10, while the comment period is still open. That is also the last day of the ICANN Annual General Meeting – an environment in which neither Board members nor ICANN staff have time even to read any public comments received, much less to consider and reflect upon them in more than the most superficial way.

This timetable would be problematic even if the PAG contained few changes from the previous version, labeled draft version 4. But in fact there are substantial changes. In one of the most significant policy reversals, the ICANN board, acting in an unscheduled business meeting on November 5, completely reversed its position on cross-ownership of registries and registrars in the new gTLD environment. Having adopted a default position of a strict prohibition against cross-ownership, in the absence of any community consensus on a different system, the Board suddenly decided a few weeks ago to eliminate all such restrictions, relying instead on enforcement of a “registry code of conduct” – unveiled for the first time in the PAG papers – to prevent or remedy any unfair or anti-competitive practices. This is precisely the sort of complex, multi-faceted decision that cannot intelligently be made on the accelerated timetable the board has unilaterally imposed on the process.

The elimination of cross-ownership restrictions will have consequential impacts, which have yet to be taken into account, on many other aspects of the process. To give but one example, the Post-Delegation Dispute Resolution Procedure, touted as a major protection for trademark owners, was designed for an environment in which there was strict separation between registrars and registries, but few if any restrictions on either type of entity becoming a domain name registrant. Now, separation between registrars and registries has been eliminated, but the

draft Registry Code of Conduct seems to impose a very broad ban on either type of entity (or its parents, subsidiaries or affiliates) registering domain names in its own right. The impact of this dramatic reversal on the PDDRP needs to be explained and considered over a period of more than a few days.

Overhanging the entire PAG, but never mentioned in its pages or in any of the resolutions adopted by the Board in “resolving” the outstanding new gTLD issues, is the Economic Framework study prepared by ICANN’s hand-chosen economists and issued last June. That report called for ICANN to consider major changes to the approach it had taken to the new gTLD process: to try to determine before launch “which application and evaluation processes are most likely to lead to the introduction of gTLDs that promote social welfare and economic efficiency”; to continue the time-tested practice of “introducing new gTLDs in discrete, limited rounds”; and to study the full external costs imposed on trademark owners by the launch of new gTLDs. None of this has happened. Indeed, ICANN delayed until the eve of its Annual General Meeting to release Phase II of the economic analysis, just days before the ICANN Board intends to vote on approving the PAG.

The economic study should have been undertaken much earlier in the process. An objective, data-driven finding of where new gTLDs were most needed should have preceded the entire guidebook development process, not followed it as an afterthought. The problem is that ICANN, by delaying so late, has effectively decided that it will never consider all the relevant facts, at least not until hundreds of new gTLDs have been launched. At that point it will be too late to remedy the problems that could have been avoided by a more rational process. This is not how any successful project is managed in the business world; and the prospects for success of ICANN’s new gTLD venture are similarly clouded.

Not only is there a process issue, but ICANN also has certain obligations under the *Affirmation of Commitments* that we, like the U.S. Chamber of Commerce, U.S. Department of Commerce and the Governmental Advisory Committee, want to ensure ICANN fulfills before implementing an expansion program for the Internet.¹

ICANN’s senior staffer on new gTLD issues explained six months ago that the goal is to “get to a place where there’s either consensus or people are worn out and we launch.”² Clearly there is no consensus on a number of major issues, starting with vertical integration/cross-ownership and including many others listed in the *Affirmation of Commitments* as prerequisites to the new gTLD launch.³ The issue, then, is whether “people are worn out and we launch.” This is not a sound basis on which to inaugurate a program that is intended to be a benefit to the

¹ See for example the National Journal article at <http://techdailydose.nationaljournal.com/2010/12/icanns-proposal-to-add-new-dom.php> outlining concerns from U.S and others.

² Kurt Pritz, ICANN, on the new gTLD guidebook process (GNSO Council briefing, 6/20/10) (transcript available via <http://brussels38.icann.org/node/12443>).

³ In paragraph 9.3 of the AOC, ICANN pledged: “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.”

global Internet community. ICANN should not approve the PAG on December 10 and should instead work to get it right, by addressing all of the issues it has identified, before the new gTLD program launches.

Respectfully submitted,

Sandra M. Aistars
Vice President, Associate General Counsel
Time Warner Inc.
One Time Warner Center
14th Floor
New York, NY 10019 USA

Fabricio Vayra
Assistant General Counsel
Time Warner Inc.
800 Connecticut Ave, NW
Suite 800
Washington, DC 20006 USA