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# Comments of

# Coalition for Online Accountability on

# Proposed Final Version of the

# New gTLD Applicant Guidebook

# December 3, 2010

The Coalition for Online Accountability (COA) provides the following comments on the Proposed Final Version of the Applicant Guidebook for new gTLDs (PFV).[1]

## About COA

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); the Recording Industry Association of America (RIAA); the Software and Information Industry Association (SIIA); Time Warner Inc.; and the Walt Disney Company. COA has been an active participant in ICANN's work to develop the new gTLD program, both on its own account and as a member of the Intellectual Property Constituency (IPC). COA has filed more than a dozen submissions to ICANN on various topics related to new gTLDs, most recently in July 21, 2010.[2] All these submissions can be reviewed at http://www.onlineaccountability.net/gTLD_submissions.htm.

## Introduction

We note that only 28 days have been provided for public comment on the voluminous PFV, and on nearly a dozen supporting documents, and that the ICANN board has announced its

[1] See http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-12nov10-en.pdf. Any page references are to this redline version.

[2] See http://www.onlineaccountability.net/pdf/2010_Jul21_COA_Comments_DAGv4.pdf.

plans to take action on the guidebook on December 10, before even this truncated comment period has closed. See http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm. COA believes that this accelerated process is inadequate for full consideration of the significant new elements contained in the PFV[3], some of which are highlighted below, and that the fact that the ICANN Board appears to be rushing to take action on the guidebook before new Board members are seated creates a perception that the process lacks adequate transparency and accountability. Furthermore, as reflected below, COA believes that approval of the guidebook in its current form would not "adequately address" all the numerous issues identified in the Affirmation of Commitments, paragraph 9.3.

## I. Economic Framework

In our July 21 comments, COA identified the June 2010 Economic Framework paper as "a major step forward" and called on ICANN to "look to the 'Economic Framework' as the main roadmap for the path ahead. That map calls for giving top priority to analyzing 'the expected costs and benefits of various types of new gTLDs,' and then focusing on those 'types' that offer the greatest promise." We described whether or not to follow that roadmap as "the most important choice the Board faces when it meets September 24 on the topic of new gTLDs".

ICANN's response has been silence. To date, ICANN has not publicly followed up on the Economic Framework paper in any meaningful way. It is not mentioned in the PFV; it is not mentioned in the resolutions adopted by the Board at its September retreat in Trondheim, Norway, where it set out the outlines for resolution of outstanding new gTLD issues[4]; it is not mentioned in any of the ICANN staff responses to the numerous public comments calling on it to follow the Economic Framework roadmap.[5]

The choice the Board seems to have made in Norway, and to have embodied in the PFV, is to act as if the Economic Framework paper, which called for significant changes in the ICANN approach to new gTLDs, had never been issued. This is irresponsible. If the Board has chosen not to follow the advice its consulting economists have given it on the launch of new gTLDs, it must at least explain why, or else abandon any claim that it is acting in an accountable and transparent manner.

## II. Preventing Malicious Conduct

While COA was dismayed to read, in Trondheim resolution 2.8, the Board's conclusion that "the implementation work completed to date by the community and staff to address the mitigation of malicious conduct issue is sufficient to proceed to launch the first New gTLD application round," a conclusion with which we strongly disagree, we note some evidence of

[3] We note the comments filed by Mark Monitor explaining in more detail the view that the comment period is inordinately short. http://forum.icann.org/lists/5gtld-guide/msg00011.html

[4] See http://www.icann.org/en/minutes/resolutions-25sep10-en.htm.

[5] See http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf.

responsiveness in the PFV to the numerous complaints that this issue had not been adequately addressed.

COA has repeatedly suggested that someone be assigned the task of "objecting to any application for which, by its nature, the failure to provide enhanced protections would inappropriately expose some segment of the public to an unacceptable risk of harm," even if the application otherwise meets minimum security requirements. While we identified this objection approach as, by itself, the least desirable among several options, it is certainly better than nothing; and while we suggested the job be given to the Independent Objector, we acknowledge that the decision to give it to the application evaluator may not be unreasonable.

We refer to applicant evaluation criterion 35, which now includes a new requirement for *"security measures [that] are appropriate for the applied-for gTLD string (For example, applications for strings with unique trust implications, such as financial services-oriented strings, would be expected to provide a commensurate level of security)."* An applicant failing to meet this criterion will receive a failing score of 0 on this criterion. We also note that the application is supposed to include a "description of any augmented security levels or capabilities commensurate with the nature of the applied for gTLD string." Presumably this would help enable members of the public to evaluate the applicant was proposing adequate "commensurate" protections against malicious conduct, and, if not, to alert evaluators to this fact in the public comment process.

While we are disappointed that the more effective options we proposed were rejected, the revised criterion 35 could, if correctly implemented, provide at least some additional assurance that ICANN appreciates its public interest obligation in this area. However, one critical clarification is needed: that the reference to "financial services oriented TLDs" in this criterion is nothing more than an example, and that the requirement for enhanced protections "commensurate with the nature of the applied-for gTLD string" would also operate in other areas, including health care-related TLDs, TLDs directed to children, and all TLDs that present an unusually high risk of being the venue for criminal, fraudulent or illegal conduct, including but not limited to copyright piracy.

## III. Rights Protection Mechanisms

As little has changed in the PFV provisions in this area, COA simply references the comments it made on this topic July 21. The almost complete lack of support for the final outcome among the members of the community with the most at risk on the issue demonstrates that, to a disheartening extent, the process for reaching it – portrayed by ICANN as a triumph of the bottom up policy development process – has been a failure. The real losers will not be trademark owners, but the consuming public, on whose interests in avoiding marketplace confusion and fraud the entire trademark system is based.

The "Economic Framework" paper called for an objective study of the full costs to trademark owners of new gTLDs, taking into account monitoring and enforcement costs as well as defensive registrations. It is disappointing that this is evidently being jettisoned (along with the rest of the Economic Framework roadmap), or at least postponed until after the new gTLD launch occurs, when, of course it will be too late to tailor the launch to minimize these costs.

## IV. Vertical Integration

By contrast, with regard to vertical integration, the PFV reflects an entirely new approach, a 180-degree turn in the Board's stated policy, first announced in a resolution adopted at an unscheduled Board meeting held seven days prior to the release of the PFV.[6] The linchpin of the new policy is a draft "Registry Operator Code of Conduct" proposed as Specification 9 to the draft Registry Agreement. This is a prime example of an initiative floated in the PFV that deserves much more than 28 days of review, discussion and public comment before being adopted.

To give just one example, section 1[c] of the Code of Conduct would forbid any new TLD registry operator, or any parent, subsidiary, affiliate, subcontractor or "other related entity," from registering any domain name "in its own right," in any TLD (new or legacy), unless "reasonably necessary for the management, operations and purpose of the TLD." A few of the questions raised by this provision include:

- In the case of a vertically integrated registry-registrar, would this provision supersede the requirement for ICANN-accredited registrars to comply with any adopted consensus policies on warehousing of domain names?

- How would the provision apply in the case of a ".brand" TLD in which the registry operator intends to control all registrations in the TLD? Would all such registrations be considered "reasonably necessary for the management, operations and purpose of the TLD"? If so, what would prevent any other TLD from declaring that its "management, operations and purpose" require it to acquire (directly or through a related party) a domain name portfolio in the TLD, thus entirely negating the effectiveness of this provision?

- If the provision is read literally, as not being restricted to the TLD that the registry operator is operating, will it not require any party integrated with a new TLD registry operators to divest itself of some or all of its gTLD domain name portfolio in order to come into compliance? What would be the effect of such a massive divestment on the secondary market for domain names?

COA is acutely interested in the impact of the Board's policy pirouette on vertical integration on so-called .brand TLDs. While there is no evident reason why TLD registries in this category should be barred from controlling their own accredited registrar, it is equally unclear why they should be barred from entering into exclusive arrangements with an independent accredited registrar; or from dispensing with accredited registrars altogether, and allocating second level domains as they see fit. While the board's vertical integration decision addresses the first issue (though in an overbroad way, extending to every TLD registry of any description), it leaves the other two unaddressed.

[6] See http://www.icann.org/en/minutes/prelim-report-05nov10-en.htm.

COA looks forward to a full discussion of the draft Registry Code of Conduct, as well as of the broader question of the Board's sudden reversal of its position on vertical integration, but questions whether such a discussion will ever occur if the board acts on the guidebook in Cartagena. This rushed process is no way to resolve intelligently such a complex and consequential issue.

## V. Unexplained and Damaging Policy Lurches

The PFV is sprinkled with radical changes in various important aspects of the guidebook that could have a serious detrimental impact on the public. None of these lurches is explained, and some seem to have been plucked out of thin air. COA will mention three:

1. Ultra-high standard for community objection: The PFV has suddenly and without explanation raised the bar for community objections so dramatically that it is doubtful that anyone – government, community group, cultural group, language group, NGO, or business sector representative – could possibly win such a proceeding. Section 3.4.4 now requires, not only that the objector prove that the community it represents is likely to suffer a "material detriment" if the objected-to application is approved (the word "material" is newly added and undefined), but also that "material detriment" (presumably the same one) is likely to be inflicted on "the broader Internet community." Critically, this new term is also undefined.

To use an example that has been brought up countless times over the last 4 years: if the Navajo Nation were to object to a proposed commercial .navajo TLD, it would not only have to prove how it would be materially injured if the application were approved; it would now also, for the first time, have to prove how billions of other Internet users, most of whom have never heard of the Navajo, and might never visit the TLD, would also suffer "material detriment." We are unaware that any public commenter called for this radical shift, and ICANN staff makes no effort to explain or justify it, other than as in some way compensating for the elimination of the "complete defense" to a community objection (see page 3-22 of the redline version, footnote 7). This is an utter non sequitur, since by definition the "complete defense" would have applied no matter what level of detriment had been proven by the objector.

In sum, ICANN staff seems to have unilaterally and without explanation chosen to eviscerate the community objection process. This hardly advances ICANN's fulfillment of its public interest obligation.

2. Anonymity of applicants: While ICANN will still conduct a background check on new gTLD applicants, it has effectively cut the public entirely out of that process by removing from public disclosure all information about directors, officers, partners, or controlling shareholders of new gTLD applicants. In attachment A to module 2 of the "proposed final guidebook," a new column has been added indicating whether particular application items will be publicly posted. Among those items with "N" (for no public posting) in this column is item 11 ("applicant background"), which calls for identification of directors, officers, partners, or controlling shareholders of the applicant. ICANN will contract for the performance of a background check on these people; but the public will not even know who they are, and therefore will have no way to submit information about them to the evaluators, even if that information might reflect on their fitness to operate the TLD.

To use a concrete example, John Doe may have operated various shell corporations ABC, DEF, XYZ, that have regularly engaged in cybersquatting (application item 11(e)), or that have been sued for operating websites engaged in piracy or counterfeiting (application item 11(f)). If John Doe now becomes a principal in Dot Whatever LLC, which applies to operate a new gTLD, his name will be disclosed to ICANN, but not to the public. The background check may well not turn up derogatory information on Doe (because his corporations, not Doe himself, have been the party to the cybersquatting or piracy/counterfeiting proceedings); but if the public had been aware of his involvement in the new gTLD application, it is quite possible that public comments to the evaluators would have revealed it.

While it certainly may be reasonable for some of the contact information on new TLD applicants to be withheld from public disclosure, this total information blackout, extending even to the names of directors, officers, partners or controlling shareholders of applicants, is completely new to the process, completely unjustified, and completely inconsistent with the transparency and accountability with which ICANN should operate the new gTLD system. (Note that since individuals are not allowed to apply for new TLDs as sole proprietors, this blackout will apply to every single new gTLD application. If the applicant is a publicly traded company, some of this information would be available from other sources – but most gTLD registries now are not operated by publicly traded corporations, and that seems unlikely to change.) [7]

3. Searchable Registry Whois: While not entirely unexpected, the ICANN staff's treatment of this issue in revised application criterion 26 invites confusion and misunderstanding. COA has long called for ICANN to incorporate the best practices reflected in the most recent gTLD registry agreements (e.g., .mobi, .asia, .post) and require new gTLDs to offer (or to insist that their registrars provide) a fully searchable Whois service, along with several other features of the most recent registry agreements that set Whois data quality standards on registrars. ICANN has consistently refused most of this request, but did invite public comment on the concept of a fully searchable Whois requirement. Now, for some unexplained reason, ICANN is condemning the provisions it entered into with the 3 existing registries, and stipulating that, while an applicant can receive "extra credit" in the application process for offering fully searchable Whois, it only receives that credit if the facility is not open to all members of the public, but only to those qualify as "legitimate and authorized users," apparently as defined by the registry. In effect, this arrangement would penalize registries that choose to operate their Whois service as ICANN states is required by the .mobi,, .asia or .post agreements.[8]

The real danger of this confusing change is that registries might lose sight of the fact that they are required to offer "plain vanilla" Whois service – fully compliant with Specifications 4

[7] The decision to dispense altogether with a background check if the applicant is publicly traded on one of the world's 25 largest stock exchanges is also questionable, and contrary to ICANN's professed desire to bring new and diverse players—including SME's – into the gTLD registry business.

[8] This interpretation of those agreements is ICANN's, not COA's. We believe these agreements are more logically read as requiring the registry to impose a searchable Whois requirement on its registrars, along with the other, and potentially even more valuable, Whois data quality requirements that ICANN has rejected out of hand for the new gTLD registry agreement.

and 6 – to all members of the public, without imposing a gate-keeping function, and regardless of whether or not they also offer fully searchable Whois to a select group. ICANN should spell this out, as well as removing the provision under which a registry applicant forfeits its extra credit in this area if it does what ICANN says three existing registries have been required (in some cases for the past four years) to do.

## VI. Miscellaneous

Timely posting of objections filed: A chart in section 1.1.4 (Posting Periods) states that "Information on filed objections and status updates available via Dispute Resolution Service Provider websites. Notices of all objections [will be] posted by ICANN after close of Objection Filing period." However, text in section 3.2.1 states, "ICANN and/or the DRSPs will publish, and regularly update, a list on its website identifying all objections as they are filed and ICANN is notified." (Emphasis added in both cases). The chart should be corrected to reflect the requirement that objections be publicly posted as they are filed.

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