

Comments of Time Warner Inc.

May 14, 2011

Time Warner Inc. offers the following comments on the April 2011 Discussion Draft of the Applicant Guidebook for new gTLDs.

At the outset, we reiterate our concern that ICANN plans to proceed with an unlimited, unrestricted and largely undifferentiated launch of new gTLDs. This despite the advice to the contrary from the Governmental Advisory Committee, international business representatives and ICANN's own economic consultants, all of whom stressed the serious risks of such an approach and provided suggestions on how to avoid such risks.

In Time Warner's most recent comments to ICANN dated January 14, 2011, we called upon ICANN to:

- REFOCUS the new gTLD launch on those applications that offer the greatest potential benefits, notably IDNs;¹
- REQUIRE comprehensive and effective rights protection mechanisms, such as those called for in the IRT report, at minimum, and insisted by Time Warner and other brand owners in their previous comments;
- RETAIN effective RPM's even after launch of a new gTLD, such as notifications to prospective registrants of Trademark Clearinghouse claims, to help reduce the need for unproductive defensive registrations.

The April 2011 draft does reflect some progress in a few of these areas. For example, we appreciate that the current draft of the guidebook moves in the direction of leveraging the Trademark Clearinghouse to a greater extent by recognizing additional forms of intellectual property to be recorded and extending the use of the Trademark Clearinghouse beyond Sunrise. This unified database of IP claims certainly has potential to reduce the costs faced by trademark owners in responding to a deluge of new gTLDs. That potential cannot be fully realized, however, so long as the Trademark Clearinghouse, designed for the relatively non-discretionary function of authenticating claimed trademark registrations, is also saddled with more substantive function of receiving and evaluating declarations and specimens of trademark use which are not required to obtain trademark rights in most countries. Requiring the Trademark Clearinghouse to make determinations about use threatens to add considerable and wholly unneeded complexity and cost to its function. The use requirement should be dropped.

¹ Time Warner agreed with ICANN's economic consultants that "[t]he benefits of top-level IDNs derived from reduced confusion, increased convenience, and the psychic benefits of inclusion could be meaningful." Economic Considerations in the Expansion of Generic Top-Level Domain Names: Phase II Report: Case Studies at 3.

Time Warner is glad to see that all new gTLD registries will be required to provide an IP claims service, but sees no justification for dropping this obligation 60 days after launch of any new gTLD. If domain name registrations are anticipated and encouraged to occur in perpetuity within each new gTLD, so too should IP claims services. In addition to benefiting trademark owners, a legitimate domain name registrant benefits from knowing about potential conflicts that they may face with a new domain name registration, even if the registration occurs months or years after the new gTLD launches.

While we are also pleased to see that the concept of “loser pays” has been granted a toehold in the uniform rapid suspension (URS) proceeding, we object to the arbitrary requirement that it apply only in cases where more than 25 domain names are at issue. It seems obvious that, if this cut-off is implemented, cybersquatters will simply make registrations in batches of 25 per fictitious registrant name, thereby enabling them to continue to profit from bad faith use of domain names until caught. The threshold for “loser pays” must be lowered to be somewhere in the range of 5-10.

Of course, this tactical use of fictitious registrant names would be less effective if the new gTLD registries were required to accept registrations only from entities whose identity and contact information had been verified and kept up to date in the publicly accessible Whois database. Although Time Warner is pleased that ICANN has recognized the importance of accurate Whois by offering new gTLD applicants an extra point in the evaluation process if they verify and monitor Whois, we see no reason why this should not be made mandatory. Such a requirement, if vigorously enforced, could help to prevent a wide range of abuses.

In sum, while we appreciate the progress that has been made, we believe there is still more work to do before launching a program that will affect millions of Internet users. We urge ICANN to continue to refine the new gTLD program with the goal of getting it right, not just getting it done... even if it takes beyond June 20, 2011 to do so.

Respectfully submitted,

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