

COALITION FOR ONLINE ACCOUNTABILITY

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Comments of Coalition for Online Accountability on April 2011 Discussion Draft of the New gTLD Applicant Guidebook May 15, 2011

The Coalition for Online Accountability (COA) provides the following comments on the April 2011 Discussion Draft of the Applicant Guidebook for new gTLDs.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 on January 14, 2011.² All these submissions can be reviewed at http://www.onlineaccountability.net/gTLD_submissions.htm.

Introduction

We open these comments with a reflection on the fundamental premises of the new gTLD program, and on an issue that has been part of the debate throughout the process. Over virtually the entire life span of this program, many voices have called on ICANN to take a more focused,

¹ See <http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf>.

² See http://www.onlineaccountability.net/pdf/2011_Jan14_COA_supplemental_comments_on_PFAV.pdf.

American Society of Composers
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Entertainment Software Association (ESA)

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Broadcast Music Inc. (BMI)

Motion Picture Association of America (MPAA)

Time Warner Inc.

Recording Industry Association of America (RIAA)

The Walt Disney Company

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targeted and incremental approach to the roll-out of new gTLDs. Those calls have come from governmental agencies around the world; from a wide spectrum of commercial and non-profit entities; from large institutions and from individuals; and even from the economic experts ICANN hired to advise it.

Now, as the planning for this venture moves into its final phases, it is clear that all these voices have been spurned. The basic features of the new gTLD program today are virtually the same as those announced some three years and six guidebook iterations ago:

- The number of new gTLDs to be approved will be essentially unlimited, constrained only by ICANN's ability to process applications;
- The process is biased toward approval of all applications meeting minimum technical and financial criteria, with only extremely limited grounds for objection recognized;
- Auctions will be used to resolve conflicting applications for the same TLD character string, with almost no detail on how the proceeds will be used;
- A "one size fits all" approach prevails, with very little categorization. Essentially the same process will apply whether the application is for a Top Level IDN in a script used by billions of people; a so-called ".brand" TLD intended to serve a single registrant; or an open, unrestricted Latin character TLD in the mode of .com.

ICANN's refusal to re-orient the scope, pace and targeting of the new gTLD launch is profoundly disappointing, and casts serious doubt on ICANN's claim to be acting in the public interest and in conformance with a consensus of stakeholders. Despite the long track record of the organization's imperviousness to this perspective, COA urges ICANN to grasp what may be the last opportunity to re-focus the new gTLD launch on the types of applications that offer the greatest potential benefits for the public, while minimizing the costs imposed on third parties. Some proposed new gTLDs may be targeted toward enhancing the Internet experience for "the next billion Internet users," whose everyday languages are written in non-Latin scripts, or toward fulfilling clearly specified needs of limited and well-defined communities; others will add little but confusion and noise to an already chaotic online environment. As ICANN must realize by now, unless it relaxes its insistence on welcoming all these new gTLD applications without distinction, it will do nothing but buttress the position of those clamoring to call the ICANN experiment a failure and to move to an entirely different method of managing the Domain Name System.

In coming to grips with this fundamental question, ICANN must not adhere obsessively to the arbitrary deadline set by the Board to take final action on the applicant guidebook by June 20. It must take the additional time needed to re-orient this exceptionally important initiative into a more targeted, better focused, and more incremental approach.

While we are disappointed that ICANN has not made virtually any of the needed modifications to the overall framework of the new gTLD launch, we must acknowledge that it has made some significant progress in some specific areas of the Applicant Guidebook over the

years, including in the most recent adjustments found in the April 2011 Discussion Draft. We discuss a few of these below, and describe the further work that is needed in these areas. We must reiterate, however, that these incremental suggestions are secondary to the critical overall task of appropriately narrowing the focus of this entire project.

I. Whois

No feature of the domain name system within ICANN's scope is more critical to ensuring accountability and transparency than preserving public access to domain name registrant contact data, and improving its accuracy and reliability. We are pleased that ICANN will require all new gTLD registries to make publicly available unified and comprehensive Whois databases covering every registration in the TLD, on a so-called "thick Whois" basis. While this decision is significant, it represents virtually no forward progress, since nearly all new gTLDs chartered by ICANN in the two previous rounds are already required to provide thick Whois.

At the same time, ICANN has taken a major step backward by declining to require all the new gTLDs in this round to take on the expanded Whois data quality and accessibility obligations agreed to by three of the gTLDs in the previous round. The registry agreements for .asia, .mobi, and .post require fully searchable Whois services, not only at the registry level, but also for all registrars sponsoring registrations in those domains. They also call on registries to enforce a compliance review policy for registrars, under which the latter must (1) "designate a contact point to which evidence of false or fraudulent contact data may be reported"; (2) "institute procedures for investigating claims that registrations may contain false information"; (3) "for registrations found to contain false information, require their speedy and efficient correction, or otherwise cancellation"; and (4) allow "interested third parties [to] invoke these procedures."³ These eminently reasonable and practical requirements represent the current best practice for gTLD registry agreements, and ICANN has never adequately explained why all new gTLD registries should not be required to meet them.⁴

The April 2011 discussion draft improves on its predecessor in two important respects regarding Whois, but it does not go nearly far enough. First, in evaluation criterion 26, it clarifies that a "plain vanilla" public Whois service is a "minimum requirement." It then encourages (through the potential awarding of an additional evaluation point) the provision of a fully searchable Whois service, which must "include appropriate precautions to avoid abuse of

³ See <http://www.icann.org/en/tlds/agreements/asia/appendix-s-06dec06.htm#6>;
<http://www.icann.org/en/tlds/agreements/mobi/mobi-appendixS-23nov05.htm>;
<http://www.icann.org/en/tlds/agreements/post/post-appendix-S-11dec09-en.htm>

⁴ Its latest justification is that although these provision are included in ostensibly enforceable contracts with the three gTLD registries in question, they "were inserted voluntarily by the applicable registry as part of the negotiation process and were not required by ICANN." Public Comment Summary, <http://www.icann.org/en/topics/new-gtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf>, at 152. This negotiating history is irrelevant, and ICANN's reliance on it can only suggest that ICANN plans to pick and choose which provisions of its agreements it will enforce. These provisions are part of the registry agreements; they represent good practice; and they should be part of the base registry agreement with all the new gTLDs.

this feature.” ICANN has never explained why a fully searchable Whois presents greater risks of abuse than the current model offered by registrars in the thin Whois environment, which can be searched only by domain name. In this regard, it is worth noting that at its birth, ICANN inherited a .com/.net/.org Whois service compliant with RFC 1580 that could be searched on a variety of data elements, such as by e-mail address appearing in the Whois results. Under ICANN’s stewardship, this service has been allowed to degrade to its current feature-poor level. Indeed, as early as December 2000, ICANN’s General Counsel concluded that “most registrars appear not to be in compliance with the requirement for true ‘Whois’ service,” one that offered the features, such as greater searchability, of the Internic Whois that preceded the introduction of competition in gTLD domain name registration.⁵

Second, in evaluation criterion 28, the new draft authorizes the awarding of an extra evaluation point on the “abuse prevention and mitigation” criterion if, among other things, the registry commits to “measures to promote Whois accuracy.” It goes on to specify examples of such measures, which “may include, but are not limited to, authentication of registrant information as complete and accurate at time of registration; ... regular monitoring of registration data for accuracy and completeness...; [and] policies and procedures to ensure compliance [by registrars].” COA appreciates the encouragement ICANN would be giving to these important steps to improve the quality of Whois data in the new gTLDs, but we urge ICANN to recognize that all or at least some of these steps ought to be required of all applicants for new gTLDs, as necessary to achieve even the required minimum of one point on the “abuse prevention and mitigation” criterion. An especially good candidate for such treatment would be the last example given in the discussion draft⁶, under which the new gTLD registries, like their counterparts in .asia, mobi, and .post, would take on some responsibility for ensuring that registrars, which deal directly with the registrant and which collect all Whois data, even in the thick Whois structure, do more to ensure that the data they collect and maintain is accurate and current.

II. Preventing Malicious Conduct

COA commends ICANN for steps taken in this area in the most recent guidebook draft, but urges that they be extended further. The evaluation criteria continue to include (in criterion 30) the requirement to demonstrate “security measures [that] are appropriate for the applied-for gTLD string,” and we are pleased to see that at least a summary of this security policy will be made public. This will enable the community to evaluate the appropriateness or adequacy of the measures contemplated, and (through the public comment process) to alert ICANN’s evaluators if the proposals fall short. COA also appreciates the acknowledgement that this requirement is not limited to financial services-oriented TLDs, but also applies to “other strings with exceptional potential to cause harm to consumers.”

⁵ See <http://www.icann.org/en/committees/whois/touton-letter-01dec00.htm>.

⁶ “...If relying on registrars to enforce measures, establishing policies and procedures to ensure compliance, which may include audits, financial incentives, penalties, or other means.”

While we welcome this recognition from ICANN that one size does not indeed fit all, ICANN should go further to meaningfully reduce the foreseeable risks of opening up an unlimited range of new gTLDs. The requirement for enhanced protections “commensurate with the nature of the applied-for gTLD string” should 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. COA supports the GAC approach, which calls for enhanced protections in proposed new gTLDs that “refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or *are targeted to a population or industry that is vulnerable to online fraud or abuse.*” (emphasis added) Among other advantages, such a formulation would clearly signal that ICANN would provide more rigorous scrutiny for any proposed new gTLD string targeted to sectors such as music, movies or videogames, in order to guard against the risk that the new gTLD would be infested with copyright infringement.

It is unfortunate that the ICANN Board has so far rejected this GAC proposal. Nevertheless, given the pervasiveness with which the Internet space has been characterized by services built on copyright theft, we believe that such new gTLDs targeted to copyright industry sectors clearly fit the “exceptional potential to cause harm” criterion in the current draft applicant guidebook. We urge ICANN to confirm this interpretation of its proposed guidebook language, such as by specifying that any gTLD targeted to a population or industry that is especially vulnerable to online fraud or abuse is also a string with exceptional potential to cause harm to consumers.

Finally, returning to evaluation criterion 35, we commend ICANN for providing applicants with incentives to commit themselves to various other mechanisms to prevent and remedy abusive or malicious behavior, and to safeguard against domain name hijacking through requirements such as multi-factor authentication to process update or delete requests. As with the mechanisms to promote Whois quality, we urge ICANN to incorporate these mechanisms into the minimum requirements for “abuse prevention and mitigation,” so that applicants failing to commit to them will receive a failing score of 0 on this criterion.

III. Due Diligence

COA commends ICANN for reversing, at least partially, its proposal to cloak in anonymity the identities of the key players behind new gTLD applications, such as directors, officers, and controlling shareholders. Requiring at least the names and positions to be disclosed, as now provided in evaluation criterion 11(a), will enable members of the public to alert evaluators to applicants whose fitness to operate the proposed TLD should be investigated further.

With regard to new criterion 11(d), dealing with applicants whose legal form lacks directors, officers, partners or shareholders, we suggest that the individuals whose identities must be disclosed should include not only those with “direct responsibility for registry operations,” but also those with legal or senior management responsibility for such operations, which is roughly equivalent to what is required to be disclosed by other applicants.

Criterion 11(e)(1) appears (perhaps as a drafting error) to relieve applicants of the responsibility to disclose all felony convictions within the past ten years. We recognize that in most cases, such convictions will be caught by other subparagraphs of this criterion; but for clarity and comprehensiveness, the language here should be conformed with that of section 4.3(f) of the draft Registry Agreement, which disqualifies a person convicted of “any felony” from continuing to serve as an officer or director of a registry operator.

IV. Treatment of .Brand applications

In view of ICANN’s stated desire to encourage new gTLD applications from businesses seeking new ways of establishing their brand identity online, it is puzzling that ICANN has done so little to shape the applicant guidebook to account for the particular needs of such applicants. In the April discussion draft, ICANN has proposed two steps in the right direction, but needs to go further.

First, ICANN proposes to exempt certain .brand registries from the strictures of the Registry Operator Code of Conduct (Specification 9 to the Base Registry Agreement), and in particular from the requirement of non-discrimination among accredited registrars. This would facilitate a .brand registry entering into an exclusive arrangement with a registrar that it controls to handle the allocation of registrations within the TLD, so long as none are made available to any unaffiliated third parties. We urge ICANN to take the next logical step, and to allow the registry operator in this situation to dispense with the use of accredited registrars altogether.

Second, Section 4.5 of the draft registry agreement addresses the “end-of-life” problem of .brand registries. ICANN’s sole discretion about whether to re-delegate a TLD at the termination of a registry agreement would be modified to require consent of the Registry Operator (which shall not be unreasonably withheld, conditioned or delayed) to any re-delegation in these circumstances. This certainly helps to remove one barrier to companies considering .brand applications – the risk that the company will lose control of the TLD string corresponding to its brand or company name if it chooses to discontinue operation of the TLD.

We note that each of the two changes just summarized applies only under stated conditions, which differ from one another.⁷ It’s not clear whether this distinction is intended or inadvertent, and it may be unclear to potential .brand applicants how they should structure their applications and domain name allocation procedures in order to benefit from either one or the other exception to the otherwise applicable rules. We urge ICANN to clarify this before proceeding to the final version of the applicant guidebook.

V. Rights Protection Mechanisms

⁷ The Code of Conduct exception applies “if (i) Registry Operator maintains all registrations in the TLD for its own use and (ii) Registry Operator does not sell, distribute or otherwise make available to any unaffiliated third party any registrations in the TLD.” <http://www.icann.org/en/topics/new-gtlds/draft-agreement-specs-redline-15apr11-en.pdf>, Specification 9, paragraph 6. The exception regarding redelegation applies “if all sub-domains in the registry for the TLD are registered or licensed to and used exclusively by Registry Operator or individuals or entities that are Affiliates of Registry Operator.” *Id.*, at section 4.5.

After a period of stasis in the preceding guidebook drafts, the April discussion draft includes some constructive changes with regard to the rights protection mechanisms that registry operators will be required to employ to prevent the consumer confusion, ameliorate the externalized costs, and remedy the harm to intellectual property rights that the massive rollout of new gTLDs threatens to inflict. However, further steps are needed. While COA defers to other commenters for detailed analysis of these changes and of the RPM landscape as presented in the discussion draft, we offer the following summary reactions:

- The sunrise and IP claims services, enabled by the Trademark Clearinghouse, will still fall well short of effectively addressing the problem of wasteful defensive registrations unless they can be expanded beyond exact matches between domain name registrations and trademarks. Most cybersquatting involves typographical variations of marks, or combinations of marks with generic words (e.g., cnnn.[new TLD], or disneymovies.[new TLD]). The preventive mechanisms provided still do nothing to discourage these abuses, and should be expanded to encompass them.
- If the IP claims service has value in the first 60 days after launch, it will continue to have value thereafter, both in terms of warning domain name registrants about potential collisions with trademarks, and in terms of alerting right holders to problematic registrations. Certainly the risk of abusive registrations does not disappear so quickly. We urge that the IP claims service requirement be extended throughout the life of the TLD, or at least for a substantially longer period than 60 days.

VI. Other Issues

COA commends ICANN for dropping the infeasible requirement that an objector representing a community targeted by a proposed TLD string must prove, among other things, “material detriment to the broader Internet community” in order to prevail. The revised standard found in the discussion draft at section 3.5.4 – “material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted” – is much more appropriate and realistic.

More than two years ago, in version 2 of the Draft Applicant Guidebook, ICANN promised to provide, in “updated Applicant Guidebook materials,” “further detail on the potential uses of funds” generated by auctions to resolve string contention between competing new gTLD applicants. <http://www.icann.org/en/topics/new-gtlds/draft-string-contention-redline-18feb09-en.pdf>, at page 4-13, footnote 2. This “further detail” is still not forthcoming. While ICANN continues to “expect that most contention cases will be resolved through other means before reaching the auction stage,” section 4.3, several aspects of the new gTLD process give rise to skepticism about that expectation.⁸ Particularly if the skeptics prove correct, auctions

⁸ For example, the only method provided for “self-resolution of string contention” is withdrawal of all but one of the contending applications. If a resolution among contending parties results in any “material change” in the surviving application, then “re-evaluation” of the application is required, entailing unspecified “additional fees” or deferral to a subsequent application round. Section 4.1.3. Thus, “self-resolution” avoids an auction only when there is virtually unconditional capitulation by all contending applicants save one. COA has explained in previous submissions its view that the only other possible means of avoiding an auction --- a single community-based

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could generate considerable revenue to ICANN, and the interests of accountability and transparency call for ICANN to present a more specific plan for use of these proceeds for consideration by the community well before the new gTLD round launches.

Respectfully submitted,

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application prevailing in the community evaluation procedure – is unlikely ever to occur, because ICANN has set the bar for success in this procedure unreasonably high. See, e.g., pages 5-7 of COA's November 2009 submission (http://www.onlineaccountability.net/pdf/2009_Nov22_COA_comments_DAG_v3.pdf)