

COALITION FOR ONLINE ACCOUNTABILITY

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Comments of Coalition for Online Accountability

Re: GAC Advice re Safeguards on New gTLDs

May 14, 2013

The Coalition for Online Accountability (COA) commends the ICANN Board's New gTLD Program Committee for providing this opportunity to comment on the advice delivered by the Governmental Advisory Committee (GAC) with regard to "Safeguards on New gTLDs." See <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>.¹

COA's overall input on "how the Board New gTLD Committee should address section IV.1.b and Annex I of the GAC Beijing Communiqué"² is that it should –

- welcome the GAC Advice;
- initiate an immediate dialogue with the GAC on how some elements of its Advice should be applied to certain .brand new gTLD applications; and
- direct affected new gTLD applicants to prepare additional Public Interest Commitment specifications to implement the GAC Advice in the form of contractual commitments.

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners (listed below). COA and its participants have engaged actively in many aspects of ICANN's work since the inception of the organization, including more than 20 formal submissions regarding the new gTLD program. Some COA participants are also applicants for new gTLDs. For further information, see www.onlineaccountability.net.

1. The ICANN Board Should Welcome Detailed Advice from GAC on New gTLDs

As with other ICANN initiatives, the GAC brings a unique perspective to the new gTLD launch: that of sovereign governments seeking to ensure that their citizens will benefit from, and

¹ As the public comment notice sought input solely on "how the Board New gTLD Committee should address section IV.1.b and Annex I of the GAC Beijing Communiqué," our comments are directed exclusively to those provisions.

² The GAC Beijing communiqué may be found at <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>. Annex I is found on pages 7-11 of that document. References in this submission to "GAC Advice" are to Annex I only.

not be harmed by, the new gTLD launch, in terms of competition, choice and consumer protection. By incorporating the GAC Advice into the new gTLD program, ICANN will strengthen and lend credibility to the multi-stakeholder process. It will also substantially increase the chances of a successful new gTLD launch, measured against the overall stated objectives of the new gTLD program, which include expanding competition and enhancing choice and consumer trust through a responsible roll-out of new gTLDs. ICANN incorporation of the GAC Advice is particularly appropriate on public policy matters, such as safeguards for strings related to intellectual property, since these issues impact broader government objectives in promoting creativity and innovation, well beyond the introduction of new gTLDs. COA participants welcome the detailed GAC Advice on these and related issues.

Some new gTLD applicants have expressed concerns that incorporating GAC Advice will substantially delay the actual launch of new gTLDs. But, properly managed, the delays should not be significant, and in any case would not justify ignoring the GAC Advice. Many other aspects of the new gTLD process remain incomplete, including the resolution of string contention, decisions on formal objections, and finalization of the base registry agreement that applicants will be asked to sign. Any argument that the GAC Advice comes too late in the process overlooks this context. In any event, the detailed Advice GAC has provided realistically could not have been delivered much sooner: it required an analysis of the full range of applications and their contents. The actual crop of applications received was not only much larger than anticipated, it also included many examples of types of applications – notably the so-called “closed generics” – that were not expected and that present unique challenges.

To minimize any unnecessary delay, ICANN should immediately begin a dialogue with the GAC to clarify the best way to implement the Advice. It should then work with applicants and the community to integrate key elements of the Advice into the contractual framework for the new gTLD registries. The result should be an improved program that more effectively achieves its stated goals.

2. The “Safeguards Applicable to All New gTLDs” Will Significantly Reduce the Risk of Abusive Registrations.

COA commends GAC for identifying six key safeguards that “should apply to all new gTLDs and be subject to contractual oversight.” Advice at 7. These six safeguards represent common sense implementation of sound business practices. Registry operators should support such propositions as knowing who registrants are and how they can be contacted; binding registrants by contract to avoid unlawful and abusive uses of the domain names they register; providing complaint channels to flag evident abuses; and imposing meaningful consequences when violations occur. While even these safeguards will not entirely prevent registrants from using domain name registrations to carry out abusive or illegal behaviors, they will certainly reduce the risk and help to manage it when abuse occurs.

These elements of the GAC Advice should come as no surprise to applicants. Nothing in these six key safeguards is either unprecedented or beyond reasonable anticipation. A number of new gTLD applicants have indicated in their applications that they would implement similar safeguards, and some of these have taken the additional step of committing themselves contractually through a Public Interest Commitment specification. For example, a number of

applicants have committed to set terms of service (or Acceptable Use Policies) similar to those required by the GAC Advice; have pledged to provide complaint channels for third parties to bring violations of these terms (or AUPs) to the attention of registries; and have reserved the right to suspend or delete registrations used for prohibited abusive purposes. Similarly, there is considerable overlap between the obligations that will be taken on by contracted parties (registrars) under the Proposed 2013 Registrar Accreditation Agreement and those that would be required of contracted parties (new gTLD registries) under the GAC Advice. Meaningful implementation of these safeguards should not impose any undue burden on registries.

Furthermore, many in the community had long called for similar safeguards to be incorporated into at least some new gTLD registry practices and procedures. COA has publicly advocated for more than a year that new gTLDs targeted to industry sectors dependent on copyright protection – and thus potentially attractive to those involved in counterfeiting and piracy – should be required to adopt enhanced safeguards. See http://www.onlineaccountability.net/pdf/2012_Mar06_EnhancedSafeguards.PDF, issued March 6, 2102. Several of these proposed enhanced safeguards overlap with the six identified by GAC. COA’s proposed enhanced safeguards were shared with all the applicants for such new gTLDs soon after the applications were revealed; have been discussed in depth with many of them; and have been at least partially incorporated in the initial applications, and/or the subsequent PIC specifications, of a number of these applicants. Since the goal of the COA enhanced safeguards is to reduce the risk of abusive activities – piracy and counterfeiting – that are illegal in virtually every country participating in the GAC, it was certainly predictable that at least some of these enhanced safeguards would appear in GAC Advice. As COA noted in announcing them, the enhanced safeguards “could also help provide a template, with appropriate modifications, for other gTLDs targeted to groups or industry sectors that are especially vulnerable to online fraud or abuse.” Id. In sum, any assertion that the Advice backing these safeguards came as a surprise to applicants lacks credibility.

While the GAC Advice is that the six general safeguards should be required of all new gTLD registries, COA stresses that they are especially vital for TLDs that present heightened risks of abuse that harms consumers or the rights of others. This certainly includes, among others, new gTLDs targeted at sectors dependent on copyright protection, including those listed under “Intellectual Property” in Category 1 (page 9 of the GAC communique). These sectors have already persistently experienced very high and damaging volumes of systematic infringement associated with domain names in the legacy gTLDs. It should be mandatory that operators of new gTLDs targeted to these sectors take reasonable and meaningful steps – such as those outlined in the six general safeguards – to anticipate and manage the risk that these new spaces will be attractive to pirates and counterfeiters seeking to reach their target markets. In short, even if ICANN decides not to accept the advice to require the first six safeguards for all new gTLDs, it should definitely embrace this advice to the extent that it applies to the “sensitive” gTLD strings listed in Category 1 of Annex I (pages 9-10 of the GAC communique from Beijing).

3. The “Additional Safeguards” Identified by GAC for “Sensitive Strings” Should Also be Required

We also urge ICANN to accept the GAC Advice that five additional safeguards, listed on pages 8-9 of the GAC communique, should be required of new gTLDs using the more sensitive strings listed under Category 1. The additional safeguards include some important new provisions, most notably the call (in additional safeguard number 4) for registries to commit to working with “the relevant regulatory, or industry self-regulatory, bodies [to] develop[] a strategy to mitigate as much as possible the risks of fraudulent and other illegal activities. With respect to the copyright-dependent sectors represented in the “Intellectual Property” list of strings on page 9, such as .book, .game, .music, and .movie, this means that registries should at least provide seats for relevant industry groups at the table where policies to mitigate the risks of infringement are developed and their implementation overseen. A number of applicants for these strings have already committed to establishing industry advisory panels to provide this input. Such a mechanism helps to increase the likelihood that a registry’s stated commitment to prevent and remedy abusive use of registrations will be realized in practice, and that any problematic applications of these policies are anticipated and dealt with.

4. Some Safeguards May Be Impractical or Inappropriate for Single Registrant .Brand Registries

For one important category of new gTLD registries, implementation of some of the safeguards recommended by GAC may be completely unnecessary. Many applications are for strings identical to the applicant’s commercial brand, and provide that only the brand owner will be allowed to register second level domains in the new gTLD. For such single registrant .brand applications, it makes little sense to require the registry operator to conduct accuracy checks on Whois data (as required in the GAC’s general safeguard #1), or to report on Whois inaccuracies (GAC general safeguard #3). Other safeguards recommended by GAC for all new gTLDs may also be irrelevant for .brand registries in which there is but a single registrant.

COA urges ICANN to open an immediate dialogue with GAC to clarify how it wishes for its Advice to be applied to single registrant .brand registries. To the extent this results in some modification of the Advice, it could simplify the additional contractual commitments that the operators of such registries would be required to take on.

5. ICANN Should Accept GAC Advice Regarding Restricted Registration Policies.

COA strongly agrees with the GAC Advice endorsing the possibility of restrictive registration policies for the sensitive strings mentioned under category 1 of the GAC Advice. Indeed, some of the safeguards the GAC calls for could only effectively be implemented through the use of such restrictions.³ In this regard, we find somewhat ambiguous the reference on page 10 to a “general rule that the gTLD domain name space is operated in an open manner.” While this might refer back to the third introductory bullet on page 7 of the communique, when read in

³ See in particular the Advice that, for some categories of sensitive strings, registrations should be limited to entities that can document proper regulatory credentials (items numbered 6, 7 and 8 on page 10 of the GAC communique). Since this aspect of the GAC Advice does not appear to apply to the sensitive strings listed on page 9 under “Intellectual Property,” which is COA’s primary concern, we offer no further comment on them here.

context that bullet simply mandates that all safeguards be “operated in an open manner,” not the TLDs themselves. In any case, we are aware of no “rule” adopted by ICANN or otherwise that requires or even gives preference to gTLD registries that have open registration policies. We do not read the GAC Advice to suggest otherwise.

6. Applicant Commitments to Implement the Safeguards May Be Best Achieved Through the PIC Specification Process.

As noted by the GAC, to the extent that any new gTLD application becomes subject, through ICANN acceptance of the GAC Advice in whole or part, to new safeguard obligations, it is critical that these obligations form part of the contract between the successful applicant and ICANN, so that ICANN may conduct “contractual oversight” of, and ultimately may enforce, these commitments. See Advice, page 7. Two routes for achieving this goal should be considered. First, ICANN could revise the base registry agreement with all new gTLD registries to accommodate the new safeguards. Alternatively, ICANN could require that all affected successful applicants execute Public Interest Commitment statements, pursuant to paragraph 3 of Specification 11 of the current draft base agreement, setting forth the specific enforceable commitments that the applicant would make to implement the newly required safeguards.⁴

While the first route would have the benefit of greater uniformity among registry agreements (with some downstream benefits in terms of simplifying compliance efforts), the second route would have other and perhaps more compelling advantages. For instance, it would allow applicants to tailor the means of implementation to best accommodate their particular circumstances or business models. The second route might also result in less delay of ultimate delegation, since only applicants that are ultimately successful in the evaluation, objection, and pre-delegation testing phases of the process would need to devote the time and resources to crafting PIC specifications. Of course, if the second route were chosen, there would need to be a process for ICANN review of, and public comment concerning, proposed specifications drafted by applicants for insertion into the registry agreement, in order to ensure that these self-customized commitments did, in fact, fulfill the requirements outlined by the GAC.

Thank you for considering the views of COA.

Respectfully submitted,

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⁴ It has been argued by some that ICANN would need to “re-open” the PIC specification process in order for applicants to incorporate commitments regarding the GAC-advised safeguards in their contracts. But under paragraph 3 of Specification 11, there is no indication of any time limit on when such a specification can be made, so long as it is inserted into the registry agreement before execution.