



Re: Proposal for the incorporation of Specification 13 to the ICANN Registry Agreement to Contractually Reflect Certain Limited Aspects of “.BRAND” gTLDs

January 9, 2014

FairWinds Partners urges the incorporation of the proposed Specification 13 into the ICANN Registry Agreement for .BRAND gTLD applications. The proposed Specification 13 results from extensive engagement and collaborative work between ICANN and the representatives of .BRAND applications. The modifications proposed in Specification 13, though narrow in scope, demonstrate ICANN's sensitivity and accountability to the needs of a major subset of the new gTLD applicant pool. Furthermore, by recognizing and fostering a new model for gTLDs, absent from the existing space, the proposal encourages diversity within the Domain Name System, one of the stated goals of the New gTLD Program.

We believe that the incorporation of Specification 13 into the Registry Agreement for .BRAND gTLD applications stands to benefit applicants and consumers alike. By addressing some of brand owners' collective concerns with the new gTLD Registry Agreement,ⁱ the incorporation of Specification 13 will allow .BRAND applicants to move through the contracting process and transition to delegation with greater speed and ease.ⁱⁱ Further, the implementation of Specification 13 will allow .BRAND applicants to operate their gTLDs in a manner that more closely aligns with the use cases proposed in their answers to Question 18 of their new gTLD applications, paving the way for more comprehensive use of gTLDs by brands.ⁱⁱⁱ Given the broad consumer bases and digital presences of many of the brands that applied for new gTLDs, and the benefits the .BRAND gTLD model presents in terms of online security and consumer trust, this could speed consumer adoption of new gTLDs, to the benefit of all applicants and Internet users.

Without detracting from our support for the proposed Specification 13, we propose two minor modifications to the language for ICANN's consideration.

First, in the event that ICANN determines that a gTLD no longer qualifies as a .BRAND, we request that the Registry Operator be given 90 days from the receipt of notice by ICANN to fully meet the requirements of a .BRAND gTLD provided that, within 30 days, it indicates its intent to remain a .BRAND gTLD and that it is working in good faith to undertake any necessary remedial measures. This would account for the fact that certain remediation initiatives may take more than 30 days to be fully implemented by the Registry Operator.

Second, we encourage the inclusion of Affiliates in Sections 5.1(i)d and 5.1(i)f, to reflect the fact that many brands applied for gTLDs through subsidiaries that do not necessarily use the relevant trademark in the ordinary course of their business or that may have been formed specifically for the purpose of the New gTLD Application Program.

We thank ICANN for considering these recommendations, as well as for its continued engagement with brand representatives and its efforts in putting forward this Proposal for a Specification 13.

ⁱ Notably, while 206 Registry Agreements have been executed to date, only sixteen are for .BRAND gTLDs, which, in totality, account for nearly half of the unique strings applied for in the 2012 application round, suggesting that the existing Registry Agreement presents particular impediments to .BRAND Applicants.

ⁱⁱ Given the trademark rights tied up in a .BRAND TLD, the transition language put forward in the current Article 4.5 of the Registry Agreement is a nonstarter for many .BRAND applicants seeking to execute the Registry Agreement that would be alleviated through Specification 13, Section 3. Additionally, since all of the requirements for being granted an exemption to Specification 9 of the Registry Agreement are encapsulated in the .BRAND definition, Specification 13, Section 1 avoids unnecessary delays and redundancies by automatically granting .BRAND applicants an exemption to the Registry Operator Code of Conduct.

ⁱⁱⁱ The .BRAND applications prepared by FairWinds specifically indicate the Registry Operator's intent to request an exemption from Specification 9 of the Registry Agreement and to operate the registry in such a way that conforms with the corresponding requirements. Additionally, promoting heightened security and guaranteed authenticity in consumers' online experiences are among the most commonly cited goals of .BRAND gTLD applications; providing brands with the opportunity to partner with one or more trusted registrar partners, Specification 13, Section 2, supports these goals, by allowing the Registry Operators of .BRAND TLDs to service their gTLDs with registrars with the strongest track record in terms of security and in combatting trademark infringement.

Appendix

Whether it is appropriate to classify certain gTLDs as “.BRAND gTLDs”

The classification of certain gTLDs as .BRAND gTLDs is an appropriate and logical designation. .BRAND gTLDs represent a category of strings that are readily identifiable and that propose a new and distinct registry model. Additionally, we believe the protections outlined in the proposed Specification 13 are specific to and appropriate for the unique nature of .BRAND gTLDs.

As .BRAND gTLDs, by definition, correspond to registered trademarks, the Registry Operator of a .BRAND gTLD necessarily possesses preexisting legal rights over the term to which the gTLD refers. The correspondence between a .BRAND gTLD and a registered trademark, in most cases the name of a corporate brand or a major product or service line, also means that the Registry Operator has particular commercial interests in the string that are different in nature and require greater protection than those vested in a generic string.

Further, .BRAND gTLDs propose a unique business model, wherein second-level registrations will not be sold to the public at large; instead, registrations are limited to the Registry Operator and its Affiliates or Trademark Licensees. The nonexistence of third party registrants within .BRAND gTLDs eliminates the need for the registrant protections implicit in Specification 9 and Article 4.5 of the Registry Agreement.

Whether the definition of “.BRAND gTLD” is sufficiently narrow to capture only what is commonly recognized as a corporate brand

The proposed Specification 13 text puts forward criteria that consider a prospective .BRAND gTLD’s correspondence to an active, registered trademark and the commercial use thereof, as well as the existence of a registry model that limits registrations within the gTLD to the Registry Operator and its Affiliates and Trademark Licensees. We believe that these criteria are clear and thorough and will effectively capture only recognized corporate brands.

Whether there may be unintended consequences associated with the implementation of draft Specification 13

We do not anticipate any negative consequences will follow from implementing the proposed Specification 13 language.

We believe that the adoption of Specification 13 will yield positive outcomes for all new gTLD applicants, as well as Internet users. By alleviating some of the collective concerns of .BRAND applicants, Specification 13 will allow these applicants to proceed through contracting more quickly, and launch their gTLDs in closer alignment with their proposed use cases. Supporting brands in using their gTLDs sooner and more comprehensively will encourage overall public recognition of new gTLDs. Consumers, too, stand to benefit from the existence of .BRAND gTLDs, which guarantee security and authenticity, promote trust, and contribute to ease of online navigation. As such, we believe that there could be significant negative effects of not proceeding with the implementation of Specification 13.



Whether it is appropriate to permit a Registry Operator for a .BRAND gTLD to limit its registrar use to one or more preferred ICANN-accredited registrar(s)

It is appropriate and logical to permit a .BRAND Registry Operator to employ one or more preferred ICANN-accredited registrar(s) for its gTLD. Within the .BRAND model, the Registry Operator, along with its Affiliates and Trademark Licensees, will be the sole registrant. In the existing Domain Name System, the registrant retains the right to select which eligible registrar it will employ for domain name registrations. .BRAND applicants have, by and large, historically employed a single or select list of trusted registrar partners for registrations in the existing gTLD space. It is illogical, cumbersome, and commercially unviable to require that registrations by such a controlled and restricted pool of registrants be, potentially, distributed across the full range of ICANN-accredited registrars.

Whether a two year “cooling off” period prior to re-delegation of the .Brand gTLD upon expiration or termination of the Registry Agreement is appropriate (subject to the limitations provided in the draft Specification)

We believe that the proposal for a limited cooling-off period is appropriate and logical for .BRAND gTLDs. A two-year cooling off period upon termination of the Registry Agreement for a .BRAND gTLD limits consumer confusion, while protecting the rights of third parties that might also have interests in the string and wish to operate the corresponding gTLD downstream.