

## Comments of Coalition for Online Accountability (COA)

July 20, 2009

The Coalition for Online Accountability (COA) thanks ICANN for this opportunity to comment on the two reports of Dr. Dennis Carlton, posted June 6 under the title “New gTLDs – Final Reports on Competition and Pricing.” See <http://www.icann.org/en/public-comment/#compri>.

COA consists of nine leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); the Business Software Alliance (BSA); 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.<sup>1</sup>

The ostensible justification for the entire new gTLD launch is that it will “promote competition in the domain name marketplace while ensuring Internet security and stability,” a goal described as one of ICANN’s “foundational principles.” <http://www.icann.org/en/topics/new-gtld-program.htm>. It is alarming that, years after launching this process, ICANN still has not provided a credible, empirically sound demonstration that opening an unlimited number of new gTLDs will be likely to advance this goal, nor even a study that directly addresses how best to maximize the likelihood of advancing that goal.

The reports posted June 6 do not fit that bill. They are clearly the work of someone with no first-hand knowledge of the domain name marketplace, and apparently without access to much of the needed empirical data to evaluate how it would be affected by the roll-out of hundreds or thousands of new gTLDs. Dr. Carlton continues to present the choices before ICANN as either opening the floodgates to an unlimited number of new gTLDs, or banning them altogether. This is a caricature of the issues with which ICANN must grapple. What is needed instead is a detailed and nuanced portrait.

Of all the “overarching issues” identified by ICANN as needing to be resolved before the new gTLD launch can take place, this one is most clearly a threshold issue. It cannot possibly be resolved through dueling papers authored by distinguished economists (much less through the medium of a paper commissioned by ICANN from a single source). As the economists who presented to the Sydney ICANN meeting emphasized repeatedly, sweeping generalizations and abstract axioms are to be approached with great skepticism: it is the particular facts of a particular marketplace that ought to underlie the decisions that ICANN makes.<sup>2</sup> The Carlton

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<sup>1</sup>COA is a member of the Intellectual Property Constituency of ICANN’s Generic Names Supporting Organization (GNSO). However, these comments are not submitted on behalf of IPC.

<sup>2</sup> As Prof. Salop stated: “Simplistic rules make mistakes. Okay? And so economists have a general bias against blanket prohibitions. If the facts matter, then a blanket prohibition, a blanket rule regardless of the circumstances is likely to make mistakes... It’s better to have standards that depend on the facts.” <http://syd.icann.org/files/meetings/sydney2009/transcript-vertical-integration-22jun09-en.txt>.

papers do little to provide the basis for a conclusion that the scope and the pace of the new gTLD rollout has been crafted in a way best calculated to maximize the potential benefits while minimizing the quite substantial costs.

For the other three overarching issues, ICANN has identified, more or less explicitly, a way forward to resolving them. For this fourth overarching issue, it is quite apparent that ICANN has not yet identified a way forward to resolution, other than sticking by the conclusions of its consultant, Dr. Carlton, and paying him to refute the contrary views of other economists.

COA offers two suggestions for how ICANN might move forward on this threshold issue. The first is to repeat what we, and many other commenters, have repeatedly advised for many months: commission the economic study called for by the ICANN Board in 2006, but never carried out by the staff. See <http://www.icann.org/en/minutes/minutes-18oct06.htm>.

Dr. Carlton brushes the 2006 study aside as irrelevant to the new gTLD environment. Even if the study were to demonstrate that .com has market power, he asserts, that is no reason not to allow an unlimited number of new gTLD entrants now, because “new products and services are primary generators of increases in consumer welfare and restrictions on entry will impede innovation.” See <http://www.icann.org/en/topics/new-gtlds/carlton-re-kende-assessment-05jun09-en.pdf>, para. 7. This blanket statement does not account for the fact that ICANN has twice already allowed new entrants into the gTLD registry marketplace. If, in fact, these new gTLD rounds did not result in “increases in consumer welfare and ... innovation,” and if they did little to increase competition and maximize consumer choice, surely that would have some relevance to how to fashion the scope and pace of a third new gTLD round, or even whether to undertake it at all. The study called for in 2006 would shed light on these questions.

On ICANN’s current course, it is choosing to stay ignorant on topics of surpassing relevance; or, more precisely, to accept without question the views of interested parties on why the previous rounds failed to increase competition and consumer choice. Those interested parties – those who seek to profit by introducing new gTLDs and providing registry and registrar services to support them – may be right when they argue that the previous rounds failed because they were too small, too restricted, or too closely controlled by ICANN. Or, they may be dead wrong in these interpretations. The study the Board ordered in 2006 would help to test these hypotheses. ICANN should immediately conduct that study and undertake those tests, rather than plunging ahead on blind faith that the solution most conducive to the economic interests of current or prospective registry or registrar operators is the right one for the world’s consumers and Internet users.

Our second suggestion builds on how ICANN has chosen to move forward on the other three overarching issues. In each case, with a greater or lesser degree of formality, ICANN has assembled a group of subject matter experts to advise it, and the community, on how to structure any new gTLD rollout in a way that maximizes benefits and minimizes costs. While each of these groups has been required to assume that a new gTLD launch will occur, none of them has been restricted from suggesting ways to shape the scope or pace of the rollout to achieve the beneficial outcomes while reducing the risks of detrimental ones.

It certainly should be possible to use this template to chart a way forward on the fourth overarching issue as well. ICANN should convene an expert group, including not only economists but also people with broad and long-standing experience in the real-world dynamics of the domain name marketplace. This group would be charged with producing recommendations on the pace and scope of the new gTLD rollout that it believes would maximize the positive impact of the initiative on increased competition and consumer choice, while minimizing the risks of consumer confusion and reduced confidence in the domain name system as a whole. For example, the group could consider whether meeting pent-up consumer demand for TLDs in non-ASCII scripts (IDN TLDs) should be the top priority, with the availability of new TLDs in Latin scripts deferred until the rollout of IDN TLDs has been successfully completed.

COA believes, as noted in its previous submissions, that the recommendations of the Implementation Recommendation Team chartered by ICANN on one overarching issue have the potential to make a significant constructive impact on the questions that it was directed to study. We have confidence that the expert group constituted to examine “root zone scaling” issues, and the more amorphous grouping of subject matter experts that have been asked (or have volunteered) to examine the “malicious conduct” issues, have the potential to make similarly constructive contributions in their respective fields of expertise. There is no reason to think that the same approach could not be similarly useful in the area of competition and consumer choice. COA urges ICANN to consider this approach as a key element of the way forward on this threshold issue to a successful and constructive rollout of new gTLDs. Thank you for considering our views.

Respectfully submitted,

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