

**COMMENTS OF THE
SOFTWARE & INFORMATION INDUSTRY ASSOCIATION (SIIA)
on the
“Preliminary Report of Dennis Carlton Regarding Impact of New
gTLDs on Consumer Welfare” (“Consumer Welfare Report”)
Submitted April 17, 2009**

The Software & Information Industry Association (SIIA) submits these comments on the above referenced subject, specifically the report entitled “Preliminary Report of Dennis Carlton Regarding Impact of New gTLDs on Consumer Welfare (“Consumer Welfare Report”). SIIA has read the report carefully based on our expertise over the years in working with economic experts and in the context of the ICANN board directive that ICANN staff prepare a report on the impact of “introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest,” (See ICANN Board Resolution, available at: <http://www.icann.org/en/minutes/minutes-18oct06.htm>.)

It is our strongly held view that:

- The Consumer Welfare Report is not, nor as it was designed, intended to be, the “independent study” that was directed by the ICANN Board in 2006.
- The Consumer Welfare Report does not satisfactorily resolve one of the four key overarching issues that ICANN has determined must be addressed before the rollout of new gTLDs: it is a fundamentally flawed report.
- ICANN must start from scratch with a genuine, independent study as originally directed by the ICANN Board. Only in this way can the key overarching issue be addressed: whether the rollout of new gTLDs will promote competition and serve the public interest, and if so, how to structure the rollout to maximize this benefit.

The Consumer Welfare Report is Not the “Independent Study” Directed by the ICANN Board

At its October 2006 meeting, the ICANN Board resolved that the ICANN “President is directed to commission an independent study by a reputable economic consulting firm or organization to deliver findings on economic questions relating to the domain registration market.” The specific questions sought to gain a better understanding of the domain name market and outlined key elements to determine the competitiveness of that market, such as:

- whether the domain registration market is one market or whether each TLD functions as a separate market,
- whether registrations in different TLDs are substitutable,
- what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,
- what is the effect of the market structure and pricing on new TLD entrants, and
- whether there are other markets with similar issues, and if so how are these issues addressed and by who?

Even the most cursory reading of the Consumer Welfare Report finds that none of these questions were either posed, much less answered. Indeed, Prof. Carlton never intended to answer these questions, and opines that that the study directed by the Board could be “of economic interest, ... [but] not necessary for the evaluation of ICANN’s proposal [to expand the number of gTLDs].”¹

On this basis alone, the Consumer Welfare Report should be rejected by the ICANN Board. The questions asked by the ICANN Board two and one-half years ago have not been answered. The fact that Professor Carlton seems to think they are not worth asking is of little if any significance.

The Consumer Welfare Report Does Not Satisfy One Of Four Key Overarching Issues That Must Be Addressed Before The Rollout Of New gTLD: It Is A Fundamentally Flawed Report

In our comments filed on April 13 regarding Version 2 of the Draft Applicant Guidebook, SIIA welcomed the steps that ICANN staff has taken to identify four overarching issues that reflect, at minimum, essential fundamental questions that must be resolved, through meaningful processes, before any new gTLD’s can be rolled out consistent with ICANN’s mission and the expectations of the global Internet community.² One of these

¹ Consumer Welfare Report, para. 51.

² “New gTLD Draft Applicant Guidebook: Analysis of Public Comment”, issued February 18, available at: <http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>. (Herein after cited as “Staff Analysis”)

is a **Demand/Economic Analysis** of “the effect of increasing the number of gTLDs before proceeding.”³ It is to be noted that this is one of the key principles of the White Paper on which ICANN is predicated.

SIIA wants to emphasize that, at minimum, ICANN Staff should, in future analyses, use the specific wording of the October 2006 Board Resolution when describing the Demand/Economic Analysis as a key overarching issue. The questions identified there are, at minimum, the ones that should be the elements of assessing whether the threshold has been met, and whether the requisite demand and impact of new gTLDs on the market demonstrates that a new TLD rollout would be in the public interest.⁴

Taking into account publicly available methodologies that have been used in many tested contexts in the competition arena,⁵ Prof. Carlton fails to utilize these well established frameworks in reaching his conclusion. Moreover, his analysis lacks any evidence, which could be derived from other spheres, to indicate the anticipated *demand* for any new gTLDs. It is noteworthy that Prof. Carlton admits that, even in his flawed framework, additional studies are required.⁶ The Consumer Welfare Report is

³ Staff analysis, pg. 4.

⁴ The economic questions asked by the ICANN Board in 2006 are those typically asked in a market review, focusing on questions of market definition (whether the domain registration market is one market or whether each TLD functions as a separate market), substitutability between existing services that could constrain market power (whether registrations in different TLDs are substitutable), market features that could enhance market power (what are the effects on consumer and pricing behaviour of the switching costs involved in moving from one TLD to another) and finally entry that could act to constrain market power (what is the effect of the market structure and pricing on new TLD entrants).

At the most basic level, the relevant market is composed of “products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); accord, Horizontal Merger Guidelines Section 1.0 (hypothetical monopolist test). “Thus, the market is defined with regard to demand substitution, which focuses on buyers’ views of which products are acceptable substitutes or alternatives.” Klotz, *Monopoly Power: Use Proof and Relationship to Anticompetitive Effects in Section 2 Cases*, FTC Working Paper (December 1, 2008) at 11 (emphasis added); see also, Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L.J. 129, 132 (2007). In their new *Enforcement Guidelines* the Canadians take a similar view: “Ideally, direct evidence of buyer switching (i.e., changes in quantities purchased) in response to relative price changes can demonstrate substitutability for the purposes of market definition. The main relevant quantitative technique is measurement of own- and cross-price elasticities of demand and, where necessary, comparison of these to computed critical elasticities.” Canadian Updated Enforcement Guidelines, Draft for public consultation, January 2009 at 8. A market survey is probably necessary (but expensive).

⁵ See, e.g., [Horizontal Merger Guidelines](#) (04/02/1992, revised 04/08/1997).

⁶ “An empirical analysis of the effect of entry of new gTLDs, such as .info and .biz, on output and pricing would likely contribute to our understanding of the effects of entry on consumer welfare. The data necessary to perform such a study are not maintained by ICANN.” Consumer Welfare Report, para. 23.

replete with factual errors, as well, none more stark than the discussion on how existing trademark protections address concerns of brand owners.⁷

ICANN Must Start From Scratch With A Genuine, Independent Study As Originally Directed By The ICANN Board In Order to Resolve the Key Overarching Issue Of Whether the Introduction of new GTLDs Would Be In The Public Interest.

SIIA strongly urges ICANN staff to start from scratch and work to have an independent study prepared and evaluated through public processes that address the specific issues identified by the ICANN Board Resolution of October 2006. In our view, this independent study should:

- Utilize well-recognized methodologies found in competition law, such as the Horizontal Merger Guidelines noted above, that can be a solid objective basis for answering the economic questions posed by the ICANN Board.⁸
- Utilize to the greatest extent possible established market survey mechanisms that assess the *demand* for new gTLDs.
- In assessing both the impact and demand, the independent study needs to take into account the relative economic merits of a broad new gTLD rollout compared to *the benefits of recognizing only new TLDs in IDN formats (beginning with IDN ccTLDs)*.

Until this independent study is undertaken and evaluated through public processes, the rollout of new gTLDs should be indefinitely postponed.

SIIA appreciates this opportunity to comment on the Consumer Welfare Report. We remain committed to the ICANN process and look forward to participating in this particular matter.

⁷ Prof. Carlton asserts that the Anti-Cybersquatting Consumer Protection Act allows a brand owner “to use and/or prevent domain names such as GeneralMotors.com *and similarly, register .GeneralMotors as a gTLD.*” (emphasis added). This is factually incorrect, as the ACPA only provides remedies for second-level domain names, such as GeneralMotors.com and does not apply to gTLDs.

⁸ In this regard, SIIA notes with great interest the draft report (dated April 3) prepared by Michael Kende, a Partner of Anlysysis Mason, “Assessment of ICANN Preliminary Reports on Competition and Pricing”, that includes many constructive suggestions in this regard.