



Litigation and Intellectual Property

BBC / BBC Worldwide Limited comments on the EOI proposal

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Comments on the Aspects of an Expression of Interest and Pre-Registration Model ("EOI Model")

The British Broadcasting Corporation (BBC) is the United Kingdom's Public Service television and radio broadcaster established by Royal Charter and publicly funded by a licence fee. BBC Worldwide Limited is a wholly owned company within the BBC group, responsible for the commercial exploitation of the BBC's output in order to generate revenue for the BBC. The BBC and BBC Worldwide have previously made submissions on various iterations of the draft Applicant Guidebook, the IRT Report and on the STI Recommendations.

Overall, the BBC reaches 93% of the UK public each week with information, education and entertainment provided via TV, radio and online platforms. It is also a global broadcaster, as Europe's largest exporter of TV programmes and the provider of trusted, independent and impartial international news to a weekly audience of around 250 million households, with over 17 million unique users online.¹ The BBC has been at the forefront of the digital revolution. Ever since its launch in the 1990s as a text- and news-led service, bbc.co.uk has been confirmed as an important reason given by people in the UK for connecting to the internet in the first place.² The BBC has also pioneered online audio and video services: BBC iPlayer, allowing audiences to catch up with the last seven days of BBC TV and radio, launched on Christmas Day 2007 and total views by UK audiences have now passed 500 million.³ Innovation continues. The latest independent forecasts suggest that the BBC-proposed consortium, Project Canvas, will have internet-connected TV devices offering iPlayer and other on-demand services to 3.4m UK homes by 2014.⁴

General Comments

The BBC and BBC Worldwide appreciate the opportunity to submit these comments in connection with the EOI Model, about which we have a number of concerns regarding both the EOI Model itself and the process by which consultation about its introduction has been conducted to date. We are aware that our concerns are shared with a number of other parties who have already made the same or similar comments to those set out below.

This response should be considered in the context of previous BBC communications to ICANN and ongoing dialogue with ICANN representatives. Given the importance of this issue, we have no doubt that ICANN will accept the need to continue to explore – and publicly

¹ BBC Annual Report 2008/09

² For example, One survey revealed that 9% of internet users agree that "the existence of the BBC's website www.bbc.co.uk was one of the main reasons why I first accessed the Internet" (TNS, December 2007)

³ BBC Server Data, 2009

⁴ Enders Analysis, 2009; Project Canvas is subject to an ongoing regulatory approvals process (a "non-service approval") by the BBC Trust.

consult on its gTLD proposals. While the BBC will continue to make every effort to respond to all relevant ICANN consultations on an ongoing basis, we would urge ICANN to ensure that consultations in future adopt the best practices widely deployed by internationally respected public and quasi-public bodies (for a UK example, see for example HM Government's guidelines on consultations).

As a starting point, as we have previously stated, we remain unconvinced about the extent of demand for new gTLDs and feel the case for their introduction remains unclear and lacking in evidence.

In particular, we believe ICANN must provide additional data and explanation as to how the gTLD proposals will create economic value for all on the internet by expanding the domain name aggregate resource. It does not seem clear at all that the proposals will necessarily create new value and indeed they may contribute to the inefficiency of the system. Prima facie, it seems that the value of internet domain names and brands resides in their visibility and reputation. There is no obvious way to legitimately tap into the value of a domain name unless it is already visible and reputable. If it is, there appears to be a substantial incentive for its owner to protect it, and little incentive to create a different one, even if new opportunities became available. (NB The concept of incumbency is not transferable to this instance, as owners of reputable and well-known internet brands are only incumbent on their own brand, not on market segments that could be "liberalised" in any way.) It could be assumed that as a rule, very few new categories of operators can benefit from a gTLD extension in terms of visibility and reputation. Exceptions to this rule may concern non industrial entities, such as geographical, cultural or urban communities. It is therefore very hard to see how the increase in domain names will per se increase competition unless it is accompanied by effective anti-hoarding and abuse remedies. These may be beyond ICANN's competence and power.

In summary, we remain deeply concerned at the threat to brand integrity and attendant financial implications for brand owners, and the significant risk of consumer detriment. We outline some specific concerns below but will of course continue to respond to any further data and arguments ICANN provides. The BBC will continue to engage in the wider issues around ICANN's gTLD implementation and seek to provide constructive input into the possible opportunities and threats they create. However, we cannot imagine that ICANN would wish to take further steps towards its implementation of an expansion in gTLDs until the crucial brand holder protection issues are resolved.

EOI Proposal

- The introduction of the EOI Model will in effect bring forward the time by which potential applicants need to make decisions regarding applications for new gTLDs, and to ensure funding arrangements are in place for the same. We consider this sidesteps appropriate consultation processes with relevant communities regarding the new gTLDs, making the proposal, in effect, a *fait accompli*.
- The stated objective of introducing an EOI Model to collect data (p6 on, EOI Model paper) appears to us to be inconsistent with an EOI model which is to be mandatory in order to apply for gTLDs in the first round. Data collected in the EOI process cannot be used to inform in any substantive way the gTLD proposal since by then applicants will have committed themselves to a specific gTLD.
- We do not agree with ICANN that a perception that it is moving forward too quickly without having resolved overarching issues can be addressed by "messaging to convey the need to get it right before launching" (p9, EOI Model paper). We believe that an introduction of an EOI Model is premature in a context where ICANN has not yet resolved a number of extremely important overarching issues in relation to the introduction of new gTLDs, including economic demand, malicious conduct and trade mark protection. While ICANN has committed to resolve some of the outstanding issues prior to the introduction of the EOI Model (including vertical integration and the IDN-3 character issue, (see pp2, 12 and 16, EOI Model paper), we are very

concerned that there appears to be no commitment to resolving concerns about economic demand (the basis on which ICANN has sought to justify the introduction of the entire gTLD proposal), malicious conduct or trade mark protection prior to launch of the EOI Proposal.

- For brand owners, trade mark protection issues are not peripheral or incidental to decisions about whether to apply for gTLDs or what to apply for. Brand protection goes to the heart of brand owners' domain name strategies and policies. The form in which brand protection is provided in the new gTLD regime will be critical to brand owners' strategies in relation to the new gTLDs. It is therefore illegitimate and unjust to require applicants to make a mandatory early election – at a cost of \$55,000 - for individual gTLDs without knowledge of the legal regime in which such gTLDs will operate.
- We are extremely concerned about the risk identified by ICANN of the possibility that entities may buy and transfer application “slots” at the EOI stage prior to the opening of the formal gTLD application process (p8, EOI Model paper). We disagree that the fact that gTLDs can be transferred after delegation generates much the same result, since the EOI process requires a much lower (albeit still significant) financial investment than the gTLD application fee (roughly 25%). The prospect that well-funded domain speculators – who also tend to be “ICANN insiders” - could “grab” high-value slots for onward sale reproduces the existing problem faced by internet users generally, namely that well-funded domain monetizers register tens or even hundreds of thousands of high-value .com names to sell on to the highest bidder or to monetize through pay-per-click sites. (And it is the BBC and BBC Worldwide's contention that if this practice were stopped, there would be significantly more .com names available, substantially removing any need to introduce unlimited numbers of additional TLDs). The prospect of an unregulated market for the sale of gTLD “slots” confirms our concerns about the entire gTLD proposal.
- We disagree with ICANN's statement that those who do not participate in the EOI and the first gTLD application round will “in no way be precluded” from participating in future rounds (p12, EOI Model paper). We consider there is a serious risk that well-funded domain speculators / ICANN insiders will “grab” the most lucrative domain names in the first round, thereby excluding later comers from the most valuable names.
- We are concerned that there is, according to ICANN, some chance that the duplication of tasks between EOI and the opening of the application process proper may give rise to a requirement for additional fees (p9, EOI Model paper). The gTLD process will place an onerous financial burden on brand owners at a time of global financial crisis. The notion that costs might rise further as a result of the introduction of a (mandatory) EOI Model is wholly unacceptable.
- It is also inappropriate that ICANN proposes to retain a proportion (albeit a small proportion, 5-10%) of the mandatory cost of submitting an EOI, given that refunds are to be made in circumstances where ICANN has failed to complete a process in accordance with its own self-imposed deadline (p12, EOI Model paper).
- If an EOI process is introduced, we urge ICANN to publish the applied-for strings, in order to ensure as open and transparent a process as possible.

Consultation process:

- The initial consultation period was very short and poorly publicised.
- Despite this poorly conducted initial consultation, we note that ICANN states that the proposed EOI Model “is a direct result of community recommendations for such an undertaking” (ICANN statement, 18 December 2009), a statement which fails to recognise that many stakeholders did not have adequate opportunity to participate. It

appears to us that ICANN has effectively made up its mind that the EOI Model will now be introduced, and that this current phase of the consultation process is – in relation to the key question of whether or not to introduce an EOI Model at all – merely a gesture towards public consultation.

- We note with concern ICANN's statement (made 18 December 2009) that the EOI Model published on 18 December "is not an operationally complete plan" and yet a decision will be taken on whether to proceed and if so under what model, on the basis of public comments in relation to this proposed model. Yet again, parties affected by the proposed new gTLDs are being asked to confirm their commitment or state their objections to a proposal the full scale and implications of which have not yet been resolved.
- If, as seems inevitable, the EOI Proposal is introduced in its current form, so that it is mandatory to lodge an expression of interest in order to apply for a gTLD in the first round, we consider that shortcomings in the consultation process will inevitably give an advantage to "ICANN insiders" who will have a head start in the gTLD application process. We appreciate that ICANN intends to launch a communications initiative prior to launch of the EOI Proposal; however, previous ICANN public consultations have not inspired confidence in this regard given that they are poorly publicised and very short time frames given.
- We note that ICANN has expressed concern about a perception that the new EOI Model will divert resources from progressing the gTLD proposal itself. While we are not in a position to comment on whether or not this is the case, it is the case that entities (such as the BBC and BBC Worldwide) wishing to engage in the consultation process are having to divert resources to comment on the EOI Model, at a time when the gTLD proposal itself is already consuming significant resources. While we would not wish to be excluded from the consultation process, we do consider that ICANN needs to recognise how burdensome each of its consultation processes are, particularly given the volume of documentation produced, the technical nature of the language employed, the adoption of multiple acronyms in the documents, and the tight deadlines imposed for responses.

Conclusion:

The BBC and BBC Worldwide strongly urge ICANN not to adopt any EOI Model at this stage, until fundamental issues concerning the gTLD proposal are resolved. We reserve our position as to whether an EOI process would be beneficial once those outstanding issues are resolved.



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