

In favor of New Top Level Domains and EOIs

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A Pivotal Year

2010 is likely to be remembered as a pivotal year on the Internet. It will be a year in which new technologies, such as real time social networking, cloud computing, and new mobile form factors redefine what we think of as Information.

The impact of these technologies is dismissed by some. But 400 million active Facebook users, 90 million twitter users, and 50 million iPhone customers are good indications that something really revolutionary going on.

Today's Internet user can access the Internet from a phone, a tablet or a laptop. And that Internet is no longer a series of disconnected websites – it's an intricate web of social and cultural references, with embedded logins such as Facebook Connect, Discus, and Twitter OAuth inside of other web pages.

In this new world, however, one thing is unchanged: the need to stand out from the crowd, to be memorable, to be identifiable. For these needs, nothing serves like a good, memorable domain name. Today, unfortunately, even as more and more businesses turn to the web to re-invent themselves, and individuals begin to develop strong web personalities, it difficult and expensive to find an acceptable domain name.

Choice in domain names has barely evolved since 1995. For the last 15 years, Internet users have had very little choice in domain names – so little in fact, that a name like "candy.com" sold for 5 million dollars in the depths of the single largest recession since the Second World War.

Because of this shortage, companies have been forced to adopt names like "Zoomr" and "Zynga". Combinations such as "Delicio.us" and "Bit.ly," called "domain hacks," have been dreamt up to work around the lack of choice among current top-level domains.

An Accidental Oligopoly

The word ".com" is not particularly appealing, or meaningful. Nor are the words ".info" or ".biz". But because of the stunted development of the domain name system, these are three of the most popular endings for names on the Internet. All three are run by private companies, who enjoy (for the moment) a collective monopoly on domain names, and a collective hold on domain name registrants. These companies cannot be blamed of enjoying the fruits of their positions. Neither can it be blamed on those interests, such as big-business trademark holders, who work to stop new top-level domains to protect their commercial positions. These behaviors are understandable

and predictable. Instead, the lack of choice that frustrates Internet businesses and individuals is the consequence of an ICANN process that is unable to enact policy in the face of determined opposition of a special interest.

When domain names are finally set free, it's likely that the market value of ".com" and ".info" and ".biz" names will fall as equally good names such as ".corp" ".help" and ".web" will compete. While this may be detrimental to incumbent registries, it will be good for the public, and good for businesses.

Protecting Trademarks in a world with 1,000 TLDs

Current U.S. Trademark law dates back to 1946, when Congress passed the Latham Act. The law has not caught up to a world with 20 gTLDs and 242 ccTLDs, let alone an international web of billions of web pages and messages where marks may be included in Facebook names, tweets, and new top-level domains. The culprit, however, is not Internet innovation, but rather the slow pace of the law. This dynamic is seen in many Internet arenas, for instance digital music and movies.

Brands and their trademark lawyers justifiably want to prevent others from profiting from their brands or marks, or infringing on their names. ICANN has made huge efforts to accommodate this concern in the new top-level domain rollout – in particular, by endorsing a proposed Uniform Rapid Suspension, Trademark Clearing House and other mechanisms to quickly and cost-effectively eliminate trademark infringement.

These mechanisms, which were created by representatives of the trademark interests within ICANN, are substantially more protective of trademark rights even than existing law. Despite these good major steps toward meeting trademark concerns, the International Trademark Association (INTA), the main organization representing trademark interests, continues to take a position that new top-level domains should be stopped cold.

Opposition to Expressions of Interest

Even the proposed Expressions of Interest (EOI) procedure, which has substantial benefits to trademark holders, is opposed by INTA, showing their unalterable opposition. The opposition comes not from the proposal itself, which provides trademark holders with extra time to prepare opposition to potentially infringing TLDs, but because INTA opposes top-level domains in general, and is against any step toward their introduction.

It's worth noting that not all trademark and intellectual property attorneys are against EOIs. The EOI Working Group included several IP experts who were helpful in advancing trademark concerns and crafting a compromise.

In addition to INTA's die-hard opposition, several other arguments have been advanced against Expressions of Interest.

Anti Argument #1: A fee of \$55,000 is unfair.

The first argument against the proposed EOI program is that the fee of \$55,000 is unfairly expensive, particularly for smaller, disadvantaged applicants.

We find it hard to argue that a fee of \$55,000 is too high, when the actual fee, as proposed by ICANN over one year ago is \$185,000. Furthermore, the EOI fee, under ICANN's draft proposal, would be applied to the eventual full fee, meaning that at the time of actual application another \$130,000 would be due to ICANN. Therefore there is no additional cost to registries.

Furthermore, actual smaller registries have pleaded time and again to get the process started. Their argument is not that the process is too expensive (although many would like it to be cheaper), but rather that delay in the process is costing them money every month they have to wait, and that lack of clarity over timelines is hurting them with investors. The potential registries for .CYM (Wales), .SCOT (Scotland), .GAL (Galicia), .SIC (Siklerland), who would under any classification be qualified as small and disadvantaged, are unanimous that their primary concern is to see new TLDs introduced as soon as possible. See, instance, the video recorded by the .EUS registry for Basque Culture at <http://www.newtlds.tv/?p=304>.

The-fee-is-too-high argument also ignores that the fee is refundable if the new TLD round does not go through, or in general, at the discretion of ICANN.

Finally, we must remember that there will be, almost certainly, multiple rounds. By not participating in the first round, the most a smaller, disadvantaged TLD would stand to lose time. In a few years, application fees are likely to be substantially lower in a few years, as is standard in technological progress.

As a "privileged" teenager in the 1970's, one of us had one of the first programmable calculators, the Texas Instruments TI-51. Even in 1975, the price was several hundred dollars. Fifteen years later, however, the same thing was available for \$10.

And so it will be with TLDs. In the first round, only a few cities, New York, Paris and Berlin will have their own Top Level Domains. In 2015, Rochester, Lille and Konigsberg will have theirs as well.

Anti Argument #2: This is an "Inside Job"

The second argument brought out against EOIs is that it privileges "ICANN insiders". In talking to many ICANN participants, it is clear that some actually believe this.

Personally, over the last year, we have met with hundreds of people – ranging from world leaders such as Al Gore and Ed Koch, to groups such as

the Sierra Club, Surfrider, the city of Berlin, the city of Frankfurt, leaders in the motion picture business and many, many others.

Our company has talked to the *Wall Street Journal*, the *London Times*, the *New York Post*, the *Washington Post*, BBC, the *Berliner Zeitung* and many, many other media outlets and blogs.

We have met with dozens of major brands, all of which have some interest in applying, should the round go through, but all of which have legal departments that oppose new top-level domains, or at best adopt a stance of opposing them in order to wring even more concessions from those who wish to see the Internet advance.

The only question we are asked is: "Is this thing real?" No-one is unfamiliar with new TLDs, but are thoroughly confused by the ICANN process. By moving dates, then moving off a timetable altogether, ICANN is starting to appear like the boy who cried wolf. The risk is when the round finally gets done, nobody will take it seriously. Furthermore, the lack of clarity of process virtually assures that only "ICANN insiders" will be able to accurately understand when, if, and how the process is happening.

If ICANN is seriously concerned about "ICANN insiders" getting a head start, they would create an easily understandable process with clear, predictable timetables and deadlines.

Personally, I want the most people possible to participate in the new EOI process. I think the more participants, the better. Competition, although it may be an obstacle for us, will benefit the Internet. For real competition to flourish, there is one solution: pick a date, stick to it, and publicize it as widely as possible.

Anti Argument #3: We don't want to show our hand

Some of the opponents to the EOI process are disturbed that the data from the EOI process would be made public, and that this in some way would hurt them competitively.

While this might be true in some cases, these are the risks of business. Furthermore, the application and evaluation process previously described by ICANN in the Draft Applicant Guidebook are so lengthy and complicated that it beggars the imagination to suppose that an additional disclosure of several months will make much of a difference. ICANN's mandate is to be transparent and open unless there are serious reasons not to. This competitive concern does not rise to that level. It benefits ICANN and the Internet community in general to have full disclosure over what is likely to happen ahead of time.

Why Expressions of Interest Will Help the ICANN and the Internet

The first and most serious point in favor of EOIs has to do with root scaling, or the ability of the Internet's root servers to handle lots of new TLDs. When ICANN knows how many applications they will receive (which the draft EOI process would assure), the expense and time needed to prepare will be quantifiable and can be planned for. Without EOIs, it's all guesswork, with the unfortunate results (revealed at the ICANN meeting in Seoul, October 2009) that root server operators have as of this date made no preparations for new TLDs.

EOIs will provide a tremendous amount of information that will benefit trademark holders (potentially infringing applications); governments (new TLDs that might violate their conceptions of morality and public order); ICANN (to plan for resources); and TLD applicants (understanding the competitive landscape and making arrangements with competitors).

The third point is to identify who is behind the new TLD bids. For example, it may not be not be beneficial to the Internet if a single extremely well capitalized company applied for thousands of top-level domains. Also certain names like ".kids" and ".bank" may warrant additional scrutiny. Getting this data out in the open early will expose any problems.

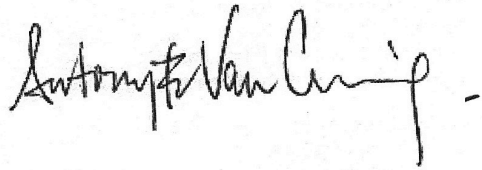
Why we should look forward to the future

Change is painful and disruptive, but also irresistible. With new top-level domains will come new choice for consumers, lower prices in the secondary market, and real opportunities for groups and communities to organize themselves around a common name.

Although some big-brand trademark lawyers fear the new order, we suspect they will find the new tools such as URS very beneficial in protecting their interests. We predict that typo-squatting will decrease across the board as .com is no longer the default destination (there is little or no type-in traffic in ccTLDs and existing non-.com names). Security will increase as DNSSEC and Ipv6 are rolled out to the new namespace. Better, uniform contracts with ICANN will also allow cleaner enforcement and better citizenry from all participants.

In summary, new TLDs are a great step forward in benefiting users of the Internet. They will increase choice and competition. They will lower prices in the primary and secondary domain name markets. They will contain important provisions for intellectual property holders that are missing from existing TLDs. They will break up what has become an oligopoly of registry providers. Most important, they will give previously unknown companies and individuals the chance to be seen and heard, on a par with existing, richer, established domain holders.

Sincerely,

A handwritten signature in black ink that reads "Antony Van Couvering". The signature is written in a cursive style with a long horizontal stroke at the end.

Antony Van Couvering

A handwritten signature in black ink that reads "Frederick Krueger". The signature is written in a cursive style with a long horizontal stroke at the end.

Frederick Krueger