

Time Warner Inc. is deeply concerned that ICANN appears poised to move forward with the launch of new gTLDs despite the fact that none of the “overarching issues” identified by ICANN in early 2009 have been adequately addressed in the Draft Applicant Guidebook, version 4 (DAG v. 4). Time Warner has expended significant time and resources in collaborating with other affected constituencies to propose compromises which would help address some of the concerns identified. Consistent with ICANN’s time honored “bottom up comment process”, we have:

- commented in numerous rounds of public comments,
- participated in numerous public meetings, and
- volunteered for the Implementation Recommendation Team which proposed mechanisms to alleviate some concerns regarding rights protection mechanisms.

We were therefore particularly chagrined to learn that, according to ICANN’s top staffer on the gTLD launch, Kurt Pritz, ICANN has engaged in this process as much in the hope of wearing down participants as in an attempt to resolve legitimate concerns. As Mr. Pritz explained to the GNSO Council last month:

“I can publish something and there’s a lot of comment and noise so we iterate what we published and there’s a little less noise, and we iterate that. And over time, you know, we get to a place where there’s either consensus or people are worn out and we launch.”¹

Given ICANN’s admission that it is ultimately indifferent to comments submitted by stakeholders in this process we will note only the following with respect to the documents most recently submitted for comment.²

I. Economic Framework

It is no surprise that ICANN has delayed for years in seeking independent economic analysis of its proposed gTLD launch, because that analysis demonstrates that the proposed launch will not be “beneficial in the public interest,” as ICANN’s bylaws require.³ ICANN’s own economic experts have concluded that (emphasis added):

- “An *open-entry process may not lead to the socially-optimal number of new gTLDs.*” (page 1)

¹ Kurt Pritz, ICANN, on the new gTLD guidebook process (GNSO Council briefing, 6/20/10) (transcript available via <http://brussels38.icann.org/node/12443>)

² These comments apply to the DAG v. 4 as well as other documents relating to the gTLD process which have been posted for comment until July 21, 2010. We are cross posting these comments in the appropriate public comment fora provided.

³ See ByLaws Art. I, Section 2(6), stating as a core value “[i]ntroducing and promoting competition in the registration of domain names *where practicable and beneficial in the public interest*” (emphasis added).

- Further economic case studies are needed to determine “which application and evaluation processes are most likely to lead to the introduction of gTLDs that promote social welfare and economic efficiency.” (page 2)
- ICANN should “*consider the potential for consumer confusion in deciding how quickly to proceed with the introduction of gTLDs.*” (page 61)
- Additional studies and process should be undertaken to “*lessen the likelihood of delegating gTLDs that will have negative net social benefits and to enhance the net social benefits from gTLDs that are designated.*” (pages 61-62)
- And, ICANN should not introduce new gTLDs all at once, rather “It may be wise to *continue ICANN’s practice of introducing new gTLDs in discrete, limited rounds.*” (page 64)

Taken together, these conclusions and recommendations are a clarion call for significant corrections to the course ICANN has adamantly persisted in taking toward the new gTLD launch.

II. Malicious Conduct

Time Warner commented extensively on this issue on November 20, 2009. See <http://forum.icann.org/lists/3gtld-guide/msg00062.html>. We have little to add to those comments, because there has been little further progress on this issue since the initial explanatory memorandum was issued almost ten months ago.

The main problem remains the voluntary nature of many of the key safeguards that ICANN has proposed. To help address concerns over malicious conduct, ICANN should, at a minimum, require the registry operators of new gTLDs to implement basic procedures to help prevent, or to expedite response to, malicious conduct involving registrations that they sponsor.

Time Warner hopes that ICANN’s staff and board will take the matter seriously and make necessary safeguards a mandatory baseline for registries.

III. Rights Protection Mechanisms

A significant field of external costs imposed by ICANN’s proposed roll-out of new gTLDs arises from the vulnerability of this new namespace to abusive registrations. These costs will be borne, not only by the holders of recognized trademarks but also by ordinary Internet users and other consumers who are the ultimate victims when trademarks are abused in a confusing manner that exposes consumers to counterfeit goods and malicious activities like phishing, identity theft, and surreptitious downloads of malware.

ICANN’s dismissive approach to addressing these issues is particularly troubling because of the harms that will inevitably be visited upon consumers, if new gTLDs launch without appropriate rights protection measures in place. Despite calling for experts to negotiate compromises to address these issues, ICANN has allowed the mechanisms proposed by the IRT to be worn away,

much as ICANN evidently hopes that stakeholders will be worn down until they can be ignored entirely.

The relevant provisions in DAG v. 4 on this topic have changed little from the Special Trademark Issues (STI) Review Team recommendations. Time Warner's specific concerns were spelled out in detail in our January 26, 2010 comments on the STI recommendation. See <http://forum.icann.org/lists/sti-report-2009/msg00020.html>. They were further elaborated in our April 1, 2010 comments on the trademark clearinghouse, uniform rapid suspension system, and post-delegation dispute resolution process. See <http://forum.icann.org/lists/urs-15feb10/msg00021.html>; <http://forum.icann.org/lists/tm-clear-15feb10/msg00021.html>; <http://forum.icann.org/lists/ppdrp-15feb10/msg00016.html>. We also share many of the concerns expressed in the comments of the International Trademark Association on the current DAG v. 4. But it is evident that a detailed recap of these concerns would be futile at this point in the process, given how ICANN staff apparently view the new gTLD process.

From Time Warner's perspective, there is not consensus on the rights protection mechanisms contained in DAG v. 4, which if taken together, fall well short of an effective response to the problem of trademark-related external costs in the new gTLD process. ICANN's refusal to strengthen these mechanisms, even so far as to bring them back to the level originally recommended by the IRT, is tantamount to concluding that trademark holders and the public at large should bear these costs. This outcome is not consistent with the public interest that ICANN has pledged to serve, and it makes a mockery of the public comment process ICANN has established to address these issues of overarching importance.

In summary, if ICANN plans to launch a successful gTLD program, it has more work to do before claiming "mission accomplished" and accepting applications.

Respectfully submitted,

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