



July 2, 2009

VIA EMAIL

Mr. Peter Dengate Thrush
Chairman of the Board of Directors
Mr. Rod Beckstrom
President and CEO
ICANN
4676 Admiralty Way, Suite 330
Marina del Ray, CA 90292

Re: Comments of Microsoft Corporation on the Final Report of the
Implementation Recommendation Team

Dear Mr. Dengate Thrush and Mr. Beckstrom:

Microsoft Corporation ("Microsoft") welcomes this opportunity to provide its comments to ICANN on the Final Report of the Implementation Recommendation Team ("IRT").

Microsoft is a worldwide leader in the IT industry, with a mission to enable people and businesses throughout the world to realize their full potential. Since the company was founded in 1975, it has worked to achieve this mission by creating technology that transforms the way people work, play, and communicate. Microsoft is also an owner and champion of intellectual property rights. It maintains sizable trademark and domain name portfolios and takes pride in the worldwide recognition of multiple of its trademarks. Further, Microsoft's businesses rely heavily on the Internet and the current system of top level domains, and Microsoft is an ICANN-accredited registrar. Microsoft has provided comments to ICANN on the first two versions of the new gTLD Draft Applicant Guidebook, and its head of trademarks and co-signatory to this letter is an IRT member. Accordingly, Microsoft is well positioned to provide these comments on the Final Report of the IRT.

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At the outset, Microsoft wishes to provide its comments on the Final Report IRT in the context of its previously stated objections¹ to ICANN's stated intention to introduce an unlimited number of new ASCII gTLDs. Microsoft continues to believe that the introduction of potentially hundreds of new ASCII gTLDs is far more likely to threaten the security and stability of the Internet as a commercial platform than to ensure it. This introduction will expand the environment and opportunities for online fraud, an environment and opportunities that will most certainly be seized upon by criminals and their enterprises.

Executive Summary. Microsoft fully supports the recommended solutions set forth by the IRT in its Final Report. The ICANN Board of Directors should direct staff to include the recommended solutions in the next version of the DAG and to begin the work necessary to implement these recommended solutions. Because these recommendations have not previously been adopted, it would be appropriate to review the implementation of them approximately 18 to 24 months after the first new gTLDs launch to determine if the recommendations are effective in addressing the problems of trademark abuse and misuse and what, if any, adjustments may be suitable.

Discussion

Microsoft applauds both the ICANN Board of Directors' authorization of the IRT to develop and propose solutions to trademark protection issues in connection with the introduction of new gTLDs and the Board's decision to allocate the resources necessary for the IRT to meet in person for this important work. Microsoft substantiated its offer in its comments on the first version of the DAG to support the pursuit of scaleable, cost-effective, and efficient rights protection mechanisms through the participation of Russell Pangborn, Microsoft's head of trademarks and co-signatory to this letter, as an IRT member.

It is unfortunate that the IRT did not have the opportunity to present its recommendations to the Board during the Sydney meeting, despite several offers to do so. ICANN staff attributed the absence of such a briefing to the Board's expectation of gaining an understanding of the IRT's recommendations through its attendance at several IRT presentations during the Sydney meeting. Now that the Board has had an opportunity to gain that understanding, Microsoft urges the Board of Directors to direct staff to include the recommended solutions in the next version of the DAG and to begin the work necessary to implement the IRT's recommended solutions.

Microsoft provides below brief comments regarding each of the recommended solutions proposed in the IRT's Final Report.

¹ See Microsoft's December 15, 2008 comments on the first version of the DAG (accessible at <http://forum.icann.org/lists/gtld-guide/pdf/efwOPvsd4.pdf>) and its April 13, 2009 comments on the second version of the DAG (accessible at <http://forum.icann.org/lists/2gtld-guide/pdf/W2wbHF5l.pdf>).

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IP Clearinghouse. This centralized database should reduce the costs and administrative burdens associated with protecting trademarks in new gTLDs for trademark owners, registries, and registrars. Trademark owners should no longer find themselves having the same trademark data validated over and over and over. Registries should no longer find it necessary to design special systems and processes and to train personnel to administer rights protection mechanism. Registrars should also no longer find it necessary to design special systems and processes and to train personnel to facilitate their customers' participation in special systems. In addition, the IP Clearinghouse will facilitate the administration of the Uniform Rapid Suspension System, the Globally Protected Marks List, the IP Claims process and the Standardized Sunrise process, all recommended by the IRT.

Globally Protected Marks List ("GPML"). The GPML, which is based on solutions recommended by Microsoft and other trademarks owners in their comments on the first version of the DAG, strikes an appropriate balance between protection of those marks that are globally protected and the ability of third parties to use domain names that are identical or confusingly similar to marks on the GPML. Because eligibility for inclusion on the GPML is based on the number of countries in which the mark is registered, which must cut across all five regions, and the number of registrations, the GPML is neither a "famous marks list" nor a "well known marks list" and, accordingly, avoids the issues and concerns that have historically been associated with such a list. At the top level, applied-for strings will be analyzed for confusing similarity against marks on the GPML, which affords to the marks on the GPM the same protection afforded by ICANN to itself and its registry contracted parties. The IRT's recommendation that applicants of strings found to be confusingly similar have available to them an opportunity for reconsideration recognizes that such applicants may have a right or legitimate interest in using such string. Moreover, the potential initial block at the top level avoids the possibility of a trademark owner having to initiate numerous objections against the same or very similar strings. At the second level, the initial block against only those strings identical to marks on the GPML will eliminate the need for defensive registrations and facilitate the best utilization of the registry space, while preserving the opportunity for third-party legitimate use of the string.

The Pre-Launch IP Claims and Standard Sunrise Processes. The IP Claims process, which is an alternative to the Standardized Sunrise Process, balances the trademark rights of owners of marks not on the GPML against third-parties that may have rights or legitimate interests in using a string that is identical to a registered mark contained in the IP Clearinghouse. The IP Claims process achieves this balance by providing notice, not a block or an automatic registration, to a trademark owner that a third party seeks to register a second-level domain name identical to the trademark and a notice to the potential domain name registrant of the validated trademark right. The representations and warranties that the potential registrant must make to proceed with registration are simple and are closely modeled on representations and warranties contained in most domain name registration agreements regarding the registration information provided and the intended use of the name. The Standard Sunrise Process, which also provides recommendations about the grounds on which challenges must be permitted, should decrease the reduce the costs and administrative burdens on registries, registrars, and

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trademark owners associated with designing, implementing and facilitating multiple slightly different iterations of Sunrise pre-launch registration processes. The limitation of both processes to the pre-launch phase underscores the balance of the protection of trademark rights against the rights of third parties to make legitimate use of strings that correspond to trademarks.

Uniform Rapid Suspension System (“URS”). The URS is a fast, efficient, and fair mechanism for addressing the most blatant instances of cybersquatting. The URS will allow trademark owners to take action to have a blatantly infringing domain name frozen without having to spend the thousands of dollars necessary to use the UDRP and the tens of thousands of dollars necessary to pursue judicial remedies under national law. The URS will not, however, allow trademark owners to gain possession of the subject domain name; those that wish to do so must use the UDRP and the judicial remedies available under national law. Registrants will be protected from abuse of the process through the narrow scope of the process, the ability to file an Answer at any time, and the IRT’s decision to include in the process a provision that would prevent trademark owners that file three abusive complaints from using the process for one year.

Post-Delegation Dispute Mechanism (“PDDM”). It is inevitable that the introduction of hundreds of new gTLDs and new Registry Operators will result in abuse of trademark rights by Registry Operators. The PDDM is properly balanced to protect the interests of consumers and trademark owners from abuse by Registry Operators and to protect Registry Operators from abuse by trademark owners. The limitation of the PDDM’s scope to specific situations -- the Registry Operator’s manner of operation or use of the TLD is inconsistent with representations and warranties made by the Registry Operator in the Registry Agreement or the Registry Operator has a bad faith intent to profit from the systemic registration of infringing domain names in the TLD -- further underscores this balance. Finally, the IRT’s recommendation that complainants that file complaints “without merit” are suspended or banned, as appropriate, from using the PDDM provides additional protection to Registry Operators from abuse of the process by trademark owners.

Whois. The collection of Whois data at the registry level (“thick Whois”) will be essential for the protection of consumers and trademark owners in an environment of potentially hundreds of new gTLDs. Microsoft was pleased by ICANN’s recent release of a revised version of the DAG that includes such a requirement in the new Registry Agreement.

Algorithm. The expansion of the string confusion analysis in the Initial Examination process to include similarity in sound and meaning will improve the accuracy of the assessment and, based on the tests conducted by IRT members, should increase the number of strings that clear the Initial Examination process.

Post-Launch Implementation Review. The IRT’s recommendations have not previously been implemented as a package in any form. Accordingly, it would be appropriate to review the implementation of them approximately 18 to 24 months after the first new gTLDs launch to determine if the recommendations are effective in addressing the problems of trademark abuse and misuse and what, if any, adjustments may be suitable. This review should

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also encompass those points of concern that have been identified in the public comments (e.g., whether the URS is being abused by trademark owners, is the IRT's recommended sanction for trademark owner abuse of the URS sufficient).

* * *

In conclusion, Microsoft continues to object to ICANN's planned introduction of an unlimited number of new ASCII gTLDs. The introduction will not result in true competition among them, but will introduce unparalleled opportunities for fraud and abuse, is likely to destabilize the Internet as a commercial platform, and the current plan will impose tremendous financial burdens and resource allocation requirements on virtually the entire non-contracting party, non-gTLD applicant business community. If ICANN does proceed with such an introduction, Microsoft urges ICANN to adopt and implement the recommendations for trademark protection set forth by the IRT in its Final Report.

Thank you for your consideration. If you have questions or wish to discuss any of the points raised herein, please contact Russell Pangborn (russpang@microsoft.com) or Peter Becker (peterbe@microsoft.com).

Respectfully submitted,

Microsoft Corporation



Russell Pangborn

Associate General Counsel - Trademarks



Peter Becker

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