

Comments of the IPC on the
Applicant Support New Generic Top-Level Domain Program
July 29, 2011

The Intellectual Property Constituency (“IPC”) is a constituency of the GNSO and represents the full range of trademark and other intellectual property interests relating to the DNS. IPC members are international, regional and national intellectual property organizations from around the world, corporate entities with intellectual property interests (often as owners of intellectual property), and individuals with an interest in intellectual property matters.

The IPC extends its sincere thanks and appreciation to the Joint Applicant Support Working Group (JAS WG) for their extensive time and effort in developing recommendations for the ICANN Board on a new gTLD applicant support program. The IPC is pleased to provide its preliminary comments and will limit its observations to the aspects of the Second Milestone Report (the Report) that are most related to intellectual property.

Need for Further Consultation on Eligibility Criteria

The JAS WG recommends eligibility criteria that specify which new gTLD applicants may be eligible to receive support, and under which circumstances the support can be granted. While the IPC believes the JAS WG has made a good start in considering these issues and establishing some benchmarks, we believe further consultation with stakeholders is necessary to ensure the criteria are equitable, consistent with the principles of the new gTLD program, and promote the public interest.

In particular, we note the JAS WG recommends that a new gTLD application that is “explicitly based, and related to, a trademark (i.e. a ‘dot brand’ TLD)” is not eligible for support, regardless of the nature of the applicant’s needs, circumstances, or any other aspect of the particular application.¹ The IPC is not aware of the JAS WG’s rationale for this provision. The background section of the Report, titled: “Notes on the application's public interest qualifications” does not clarify the WG’s reasoning as it contains only a general statement that the support program should not be used as a substitute for conventional business risk.²

The proposed prohibition on support for trademark-based strings might mean that an otherwise worthy applicant would be denied support merely because they owned a trademark related to the applied-for string. This does not appear congruent with the concept of supporting new gTLDs that serve the public interest through:

- Support by and/or for distinct cultural, linguistic and ethnic communities
- Service in an under-served language, the presence of which on the Internet has been limited

¹ See Second Milestone Report, provision 3.2 on page 7. <http://www.icann.org/en/topics/new-gtlds/jas-second-milestone-report-09may11-en.pdf>

² See *Id.* at page 9.

- Operation in an emerging market or nation in a manner that provides genuine local social benefit
- Sponsored by non-profit, civil society and non-governmental organizations in a manner consistent with the organizations' social service mission(s)
- Operated by local entrepreneur, providing demonstrable social benefit in those geographic areas where market constraints make normal business operations more difficult

For example, a new gTLD string related to a trademark that is “operated in an emerging market or nation in a manner that provides genuine local social benefit,” should not be excluded from support on this sole basis.

Other trademark related strings may reflect the name of a local non-profit community organization and will be used “in a manner consistent with the organizations' social service mission(s)” or may be “operated by local entrepreneur, providing demonstrable social benefit in those geographic areas where market constraints make normal business operations more difficult.”

Some trademarks, such as collective marks, constitute intellectual property that is owned by a group or association, and whose members use the trademark to associate themselves with the group. These trademarks are often used to support and promote “distinct cultural, linguistic and ethnic communities,” and we see no basis to deny these applicants support on the mere fact the applied-for string relates to a trademark owned by the group.

The proposed prohibition on all trademark related strings also appears inconsistent with principles of ICANN’s new gTLD program, such as non-discrimination and the goals of promoting consumer trust and choice in the DNS. Accordingly, we believe trademark related strings should be eligible for support, if the applicant can meet the established financial needs requirement and the other eligibility criteria. This will help to ensure fairness and consistency with the ICANN Board Resolution passed in Nairobi that calls for an “inclusive” new gTLD program. In no case do we believe that an otherwise worthy applicant should be excluded from support on the basis that their applied-for string relates to a trademark.

The IPC’s position is consistent with advice the GAC provided to the ICANN Board of Directors in Mexico City, when the GAC expressed concerns about the proposed “single fee structure and its deterrent effect on the prospective proposals for new domains emanating from innovative SME or developing countries, as well as those serving non-commercial purposes.”

Support for Objection costs

In conclusion, the IPC believes consideration should be given to providing support for those members of the public from developing economies that may have to object to a new gTLD string that infringes their legal rights, but do not have the economic resources to do so. In these cases, ICANN should provide support to assist with the costs and resources associated with objecting to an infringing new gTLD application.

Thank you for considering our views on these important issues.

Submitted,