

DEMAND MEDIA COMMENTS ON SECOND VERSION OF DRAFT APPLICANT GUIDEBOOK

Introduction

Thank you for this opportunity to comment on the second Draft Applicant Guidebook (DAG). We appreciate the extensive and careful work done by ICANN analyzing comments on the first draft, and we welcome the many changes made as a result of those comments.

The DAG remains an effective procurement document. It will result in the fair, predictable and efficient allocation of TLDs to new operators. It will result in TLDs that are technically and financially sound and conformant to Internet standards. We believe the new TLD process will bring innovation and competition to the DNS in a responsible and controlled manner.

We have specific comments on the following areas of the guidebook:

- Withdrawals and Refunds (1.5.5)
- Measures Against Abuse (Evaluation question 43)
- Registry Data Escrow (Evaluation question 45)
- String Confusion Objection (3.4.1)
- Legal Rights Objection (3.4.2)
- Community Objection (3.4.4)
- Comparative Evaluation Criteria (4.2.3)
- Use of Registrars (gTLD Agreement section 2.8)
- Transparency of Pricing for Registry Services (gTLD Agreement section 2.9)

Withdrawals and Refunds (1.5.5)

This new section allows applicants to withdraw at one of three stages of review and receive a refund of up to \$135K of their Evaluation Fee. This is consistent with the cost recovery rationale for the Evaluation Fee. There is an implication in this new section that applicants can withdraw during auction and receive a refund. If that is not the case it would be useful to have that made explicit.

We offer the following statement simply as a matter of economic logic. There is a correlation between refund policy and volume of applications. The higher the refund amount, and the earlier it is offered, the more applications will be submitted because there is less risk on applicants. With more applications there will be more contention.

Measures Against Abuse (Evaluation question 43 in Attachment to Module 2)

This section addresses the overarching Issue of trademark Rights Protection Mechanisms (RPMs). New products, technologies and innovations (such as the VCR, copy machines and radio) sometimes stretch and challenge the status quo for intellectual property protection. These historic changes to the status quo never fundamentally changed the way intellectual property law is applied. Updated laws and methods, particularly in the Internet age, have upheld the principle of post usage enforcement rather than pre-usage approval.

We are submitting a separate and detailed paper on RPMs, however we would like to note the following here:

1. Any approach to RPM that relies on the uniform treatment of SLDs in all TLDs will not work. The SLD 'mcdonalds' must necessarily be treated differently in the .HAMBURGER, .FAMILY and .WENDYS TLDs;
2. Mechanisms such as Lists and mandated and uniform Sunrise rules are not used in other areas of commerce involving intellectual property rights; and,
3. Pre-usage approval mechanisms will harm TLDs by hindering their ability to service legitimate registrants.

There are far more fruitful paths to RPM, namely: (i) creation of a centralization Sunrise Authentication database; (ii) mandated but Registry-selected Sunrise Registration policies; and (iii) implementation of a quick, fair and inexpensive Takedown process for cases of clear and egregious trademark infringement. We encourage the community to read our separately submitted paper '***TLD Rights Protection Mechanisms***'.

Registry Data Escrow (Evaluation question 45)

The Guidebook seeks comment on the idea that applicants who propose thick data escrow might receive a higher score in their Initial Evaluation. The Guidebook elaborates that this thick data is not intended for display. Hence by implication, this measure is not intended as an intellectual property rights protection mechanism (RPM). However, other parties have proposed registry thick data display as a mandated RPM. We are opposed to mandated thick data collection or display at the registry level for the following reasons:

- The new registrar data escrow requirements make it unnecessary at the registry level;
- It incents registrars (for competitive reasons) to mask data they send to registries;
- There is additional risk that customer data will be available to spammers, phishers and other abusive parties;
- It was not required in previous TLD rounds; and

- The registry will not receive the information behind proxy services in any case (so parties who want access to the data will have to go to the registrar).

String Confusion Objection (3.4.1)

In our view, the practical objective of this section is to prevent the co-existence in the DNS of TLDs like COM and COM, CAR and CARS, GOOGLE and GOOOGLE. We think the current wording is successful in this regard. Its key principle is *“likely to deceive or cause confusion”*. The section goes on to elaborate - *“Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion”*.

In our experience consumers are rarely deceived or confused by synonyms, translations or like-sounding words. .CAR & .AUTO, .ARROW & .AERO, and .COMMUNITY, .COMMERCE, & .COM, can and should reside together in the DNS at the top level, as they do at the second level. As TLDs they should compete for registrants. In fact, we see this as one of the key objectives of the new process, namely enhanced competition for registrants. If CAR and AUTO were confusingly similar there would be precedents and rules already dealing with this situation at the second level in existing TLDs. Since there are no such rules the community apparently has not seen such ‘confusion’.

Very few words are exactly synonymous – which is why these words typically co-exist in the vocabulary. Similarly we don’t think .TRAVEL and .VOYAGE confuse or deceive. They look and sound different to the reasonable internet user. If we allow synonyms or translations to fall within the charter of confusing similarity we will allow a single registry to block large portions of potential name space.

We would like to see guidance to the DRSP that builds on language in this section and ensures a very high threshold of proof for deception or confusion. Specifically we would like to see a burden of proof that a majority of internet users are already confused or deceived by such string collision at the second level in existing TLDs such as COM.

Legal Rights Objection (3.4.2)

This section is extremely important, as it defines the standard under which a rights holder can successfully object to a string. As with most matters in the Guidebook there must be a good balance. We think a rights holder like Microsoft should have strong rights to a string like .MICROSOFT, and we think the section provides these rights. On the other hand we think someone who has a trademark in ‘BLOG’, as we do in Benelux, should not have special objection rights to a .BLOG TLD.

Even more so, we think parties who have obtained “dot SOMETHING” trademarks in connection with domain name registration (where “something” is a generic word) cannot meet several of the objection standards in section 3.4.2, including *‘recognition in the relevant sector of the public’*. Someone who does not currently operate a TLD in .SOMETHING cannot, in our view, successfully argue there is public

perception of their mark as a TLD. We encourage ICANN to keep this section at its current level of balance.

Community Objection (3.4.4)

As we will discuss when we address section 4.2.3 (below), we believe the current Community scoring (specifically the 'String Nexus' criteria) may allow a legitimate community such as the Boy Scouts to successfully claim a generic TLD such as .CAMPING. We will later explain why this is a bad idea, but should section 4.2.3 remain as it is, there needs to be modification to section 3.4.4 to allow all parties with an interest in that generic word to object (rather than just the specific Community type proposed by the applicant).

Let's take the case of .CAMPING. The process gives the Boy Scouts Community application preferred rights to this TLD over any Open applicant (albeit with very tight rules about who can register second level names and what can be registered -- essentially only Boy Scouts could own and use .CAMPING names). In the current 3.4.4 there is no possibility for another party to Object to the Boy Scouts application. As there is no 'camping community' (just millions of people who like to do it and thousands of companies who facilitate it), the Objector does not have the ability to show '*a defined community*'. In effect, there is a different standard between claiming Community and Objecting to Community when String Nexus scores are below '4'.

If section 4.2.3 remains unchanged (and we urge ICANN to change it -- see next section) section 3.4.4 should be amended to allow anyone to object to a Community application if the Community application is for a generic string (especially if the Community applicant scores '2' for String Nexus in a Comparative Evaluation). In such a case, the Objector must show that awarding Community status would prevent access by a broader group of potential users who might want to use the generic string.

Comparative Evaluation Criteria (4.2.3)

By obtaining scores of '4' on all other criteria (this is very achievable for legitimate communities) a Community bid can succeed with a '2' score on the String Nexus criterion. A '2' score on String Nexus is currently defined as '*relevant to the community but also has other well know associations*'. This means the Boy Scouts can defeat any Open bids for .CAMPING, the Car Manufacturers Association can defeat any Open bids for .CAR, and the Southern Baptists can beat any Open bids for .PRAY. All of these hypothetical TLDs are '*relevant to the Community*' for the example Communities provided.

This 'loophole' of Nexus is not consistent with the GNSO's intent for Community, is harmful to the effectiveness of TLD competition, and will damage or restrict rights of other internet users who might want access to a SLD in a generic TLD. In addition, it may hurt legitimate Communities because by making the Nexus threshold low the DAG has in turn placed a high threshold on other criteria, such as Dedicated Registration Policies.

We think the DAG will more successfully address “Community” applications if the Nexus criterion is tightened and the other criteria are loosened. The ***‘Summary and Analysis of First Draft Application Guidebook Public Comments’*** seems to agree with this when it says: *There is merit in considering uniqueness in the Nexus between string and community as a main factor for achieving a high score. To be an unambiguous identifier, the “ideal” string would have no other associations than to the community in question’ (page 103).*

Specifically, we recommend Nexus have a Pass/Fail scoring (as is already the case for several factors in the Initial Evaluation). Our proposed scoring is:

1 = Unique or very strong correlation between the string and the identity of the applying community with very limited or no other common usage or meanings expressed or implied by the string outside the applying community

0 = Fails to achieve a score of 1

A score of ‘1’ can be readily achieved by legitimate communities by adding prefix or suffix qualifiers to a desired, generic string. If the Boy Scouts really want to capture the camping concept in their TLD their applied string can be .SCOUTCAMPING. This will score a ‘1’ on the Nexus we have proposed. Similarly, the Car Manufacturers can score a ‘1’ for .CARMANUFACTURER. With tight Nexus the other Community criteria (e.g. Dedicated Registration Policies) may be loosened thereby giving Communities more flexibility in their business models and operations.

A further word here on the relationship between ‘.BRAND’ applications (e.g. ‘a .SUN’ application from Sun Microsystems) and Community. .BRAND applicants (or indeed any applicants) do not need Community to apply restrictive rules to the SLDs in their TLD. If an applicant wants to place restrictive rules (e.g. only registrants who purchase a digital certificate can own a SLD, or only people running for or in political office can own a SLD,) they are free to impose such rules. So, if Sun Microsystems applies for and wins .SUN it can propose restrictive rules such as *‘only employees of Sun Microsystems Corporation can own an SLD’*. Community is not a required or appropriate vehicle to achieve this goal. This is not to say that Sun Microsystems cannot apply for a Community TLD. However, to achieve String Nexus it should not be successful with ‘SUN’ as there is not a ‘SUN’ Community, in our view. There probably is, however, a .SUNEMPLOYEES Community. That string would be a better candidate for a Community of Sun Microsystems Employees.

We urge ICANN to not overreach the GNSO intent for Community by including brand TLDs or TLDs with low String Nexus. If the Nexus bar remains low (as it is now) applicants will be encouraged to game the process by ‘community-shopping’ to improve their chances of winning a generic string. The fact that the resulting TLDs will be economically limited (due to their registration rules) will not be enough to discourage this gaming. As a best case scenario, ICANN will experience a large number of Community applications that fail Comparative Evaluation – with accompanying cost and controversy. As a worst

case scenario, generic words that are attractive to a very broad range of Internet users will be captured for use by one limited group.

Also, if history is a guide (see .pro and .name for example), the Communities who obtain generic words will continuously lobby ICANN to relax the constraints imposed on them. Future ICANN Board and staff members with potentially different views and circumstances may award such relaxation of constraints. We urge ICANN to create a *clear* and *high* bar for String Nexus, to signal to all potential applicants that the "Community" path is for true communities only; not for opportunistic applicants to grab generic words and bypass the normal process which incents cooperation among competing applicants.

Use of Registrars (gTLD Agreement section 2.8)

While we agree the legal separation of registry and registrar is useful for a variety of contractual and operational reasons, we cannot see the benefits of limiting cross-ownership of registries and registrars. There continues to be a lack of rationale as to why the DAG limits manufacturers (in this sense we are calling Registries manufacturers) from selling their product directly to the public.

In the new Agreement the manufacturer (the registry) cannot sell more than 100,000 units directly to the public (via a registrar that the registry owns). After this threshold is reached the manufacturer must rely on other parties to sell their product. These other parties may be competitors, may be uninterested in the success of the manufacturer's product, or may be simply poor at marketing the product.

We do not see a difference between domain names and other products to justify this significant market variation. For example, the manufacturers of cars, dvds, toilet paper and software choose can to sell their product directly to consumers, or through resellers, or via a combination of both. In practice many manufacturers choose to do both. If a manufacturer treats a reseller poorly, say by undercutting prices, the reseller will typically abandon the product. Resellers who bring value to a product are typically treated well.

This is how almost all other products are managed in the marketplace (and also with TLDs in the case of some ccTLDs). There is not a persuasive rationale why new, competitive domain names should be treated differently. Arguments that new TLDs are monopolies and therefore must be regulated in this manner are unconvincing, do not stand up to common sense scrutiny, and are refuted by the *'Analysis of Price Caps'* report prepared by Professor Carlton. If a potential registrant (the consumer) wants the SLD 'verycoolshoes' they can buy it in one of potentially dozens of new TLDs. Given that these registries can price the product as they choose, and the potential registrant will select the one that best meets his value objectives, how would the registrant be harmed buying from a registrar that is owned by the registry? There seems to be a stronger counter-argument that a registry owned registrar will be the most motivated to provide registrants with high quality and reliable service (as they have the strongest vested interest in the success of the TLD).

Mandating registry/ registrar limits in new TLDs seems more of a 'fall-back' to the decade old .COM settlement than an effective a mechanism for protecting consumer interests and promoting competition. Limiting registrars is another example of artificially constraining competition and will have the same negative effects on consumers as other forms of competitive constraint.

The current version of the Agreement does not explain the term 'Affiliates'. In our view 'Affiliate' should be defined in the common and traditional sense of an ownership percentage. We think 'Affiliate' defined as an ownership stake >50% would be consistent with the objectives of this section.

Transparency of Pricing for Registry Services (gTLD Agreement section 2.9)

The first version of the DAG contained no provision for advance notice of possible Registry price increase. In the first public comment period various parties expressed concern that a registry could sell an Initial Registration at one price (say \$5.00) and then significantly raise the renewal price charged to that registrant (say to \$100.00). The concern expressed was that the registrant builds value in the name which the registry could then exploit through unanticipated Renewal prices. In the ***'Summary and Analysis of First Draft Application Guidebook Public Comments'*** the ***'Proposed Position for this version of the Guidebook'*** section (page 150 – also summarized at page 5) states: *"Reasonable notice should be provided before any pricing changes are made on domain renewals"*. The Analysis did not propose a notice period on Initial Registrations. Nevertheless, the current version of the Draft Applicant Guide book requires six months advance notice on both Renewals and Initial Registrations. The inclusion of Initial Registrations may be an error, but we will nevertheless address both Initial Registrations and Renewals in our comments.

The need for notice periods on Renewals is not clear cut. In his paper, Professor Carlton argues against them. He argues that every supplier has *'captive buyers in the short run'* and that domain registries (like car manufacturers) have a vested interest in not exploiting customers due to the detriment this would cause to their brands. He argues that registries who engage in this behavior will be punished by the competitive marketplace. We see the logic in Professor Carlton's analysis, and he is a far more qualified economic commentator than ourselves. His views are reinforced by behavior in many existing registries that do not have price controls (such as .ASIA and .MOBI). On the other hand, we see the concerns expressed about Renewal pricing in the public comments. On balance we are prepared to accept a mandated notice period for Renewals because we think this is how the market will work in practice – registries will give their customers adequate warning about Renewal price increases.

There was little or no public comment advocating a warning period for Initial Registrations. This is probably because the logic of the 'captive customer' (the customer pays one price at Initial Registration, builds the value of a name, and then pays a higher price at Renewal) does not apply to Initial Registration. A registry that raises prices for Initial Registrations is not harming anyone. If the registry decides the price of Initial Registrations for .COOL names will go from \$5.00 to \$10.00 (next week) no-one is harmed. Certainly not the consumer who purchased a .COOL name previously for \$5.00. A future

buyer who does not like the new \$10.00 price will simply choose not to purchase a .COOL name or will go to a cheaper product like .REALLYCOOL.

The bottom line is we think a mandated warning period for Initial Registrations is unnecessary and potentially harmful regulation, and is not supported by public comment. The potential harm is to the Registry itself and by extension, to potential registrants. With mandated warning on Initial Registrations a registry that under-prices its product will face a long period of unprofitability before it can correct its mistake. We do not think it serves the interest of stability if registries are locked into unprofitable pricing decisions. A possible result of such regulation will be some registries starting their pricing higher than they consider optimal, to avoid the risk of under-pricing. There is no consumer interest rationale in requiring advance price notice for Initial Registrations. We recommend section 2.9 be amended so the 6 month period only applies to Renewals and Transfers.