Demand Media Comments on Version 3 of the Draft Applicant Guidebook for new gTLDs

As I sit and write these comments to DAG 3, I'm reminded of the classic *Whitesnake* song from the 1980's, "Here I go again." At this time last year, as we submitted comments to DAGv1, we truly believed we would experience the launch of new gTLDs by December, 2009. Unfortunately, as we all know, this is not the case and many of us find ourselves once again commenting on yet another version of the DAG with the prospect of DAGv4 staring us in the face.

So, although we recognize that details are important and many people, no one more so than ICANN staff, are earnestly working on solutions to particular issues with new gTLDs and the applicant guidebook, we do believe the time for a final guidebook is near.

1. **Comments on DAG, Version 3:**

Regarding the DAG itself, we believe it is in good shape and lays out reasonable rules under which all gTLDs applicant can operate. A tremendous amount of hard work has been performed by ICANN staff over the past 2 years and as a result a solid and well thought-out guidebook has been produced. It doesn't seem as if there is much remaining debate surrounding most of the DAG's provisions. ICANN recognizes this by indicating in its cover letter that "some portions of DAG have matured to a point where there shouldn't be further changes." These are cited as Evaluation Criteria (Module 2), Dispute Resolution Standards & Procedures (Module 3), and Contention Resolution Procedures (Module 4). This is positive and we are largely in agreement with those modules. Where there is debate and disagreement, reasonable final decisions are attainable, even on seemingly "controversial" issues like registry-registrar separation.

Comments on specific sections of the DAG:

Module 3 Section 3.4.4 Community Objection and Module 4, Section 4.2.3 Community Priority: We believe ICANN has made appropriate adjustments to the definitions and scoring so only true, discrete communities can use the designation and/or objection.

Module 5, Transition to Delegation: This section describes technical and operational tests applicants must pass before an approved TLD is placed in the root. There is a lot of new material in this module, but it seems reasonable to us.

gTLD Agreement Section 2.8, Use of Registrars: ICANN deleted earlier DAG text that allowed a registry to own a registrar that sells up to 100K names in the TLD. ICANN is now presenting options for community discussion ranging from no registry/registrar ownership restrictions to a complete restriction under which registries cannot have an ownership in a registrar and vice versa. Demand Media presented on this issue in Seoul and we won't repeat all of our arguments in these comments. Suffice it to say, we still have yet to hear reasonable or logical arguments against cross ownership. In our view, the opposing arguments are driven by the desire of incumbent registries to maintain their protected market positions and not by a true interest in consumer welfare and business efficiencies. We agree with the well-respected economists hired by ICANN who concluded that absent extraordinary circumstances of market power, there is not a good basis to prevent a registry from owning a registrar that is accredited in the registry's TLD.

There has been a large amount of confusion on this issue of registry-registrar separation. Quite simply, we believe a registrar should be able on sell the names of an affiliated registry....just as nearly any other business can choose to "directly" distribute their own product. We believe a registry should have the ability to own one of the registrars so it has guaranteed effective distribution for a fledgling TLD – just as PIR, Afilias and Neustar had from 2001 to 2006. Having said that, it's important to note that we are NOT advocating changes to the following: legal (structural) separation of registries and registrars; guaranteed access to a registry by any registrar who wishes to offer its names; and non-discriminatory treatment of all such participating registrars.

Module 5, Article 7: ICANN has included a new provision here regarding amendments to registry contracts. In exchange for perpetual contracts, ICANN has typically required registries to agree to two mechanisms by which amendments can be made to registry contracts without the concurrence of the registry --- either through "consensus policies" or through amendment by staff and if not disagreed to by a majority of registries. If the registries do disagree, the ICANN board can overturn this registry "veto" by a 2/3 vote of the Board. DAG v3 creates broad new power for ICANN to unilaterally change registry contracts. In particular, ICANN can increase fees paid by registries if 2/3 of the Board believe such a fee increase is *"justified by a financial need of ICANN".* We believe this is amorphous, unfair, and brings harmful uncertainty to business planning and operations.

2. **Overarching Issues:**

The four "overarching issues" of concern regarding new gTLDs remain "open" to a certain degree (although we would argue that "malicious conduct" has been effectively dealt with). Two of the "overarching issues" are within the four corners of the DAG (trademark and malicious conduct issues) and two aren't in the DAG, as they aren't related to gTLD selection and operation (these are timing implications of introducing new TLDs and DNSSEC to the root zone file at the "same time" and further economic analysis of new gTLDs.)

We will briefly address the four overarching issues:

A. Trademarks

We understand the trademark rights protection mechanism (RPM) portion of the DAG has not been finalized, although several new RPMs are included in the DAG and we believe others (Trademark Clearinghouse and URS) will be added after the GNSO provides additional input as requested by the ICANN Board.

In general, it is quite obvious that ICANN, trademark owners and potential TLD applicants like us genuinely care about the effective protection of trademarks in the domain name system. All groups have been extensively involved in developing new "rights protection mechanisms. As we've stated very publicly in various comments and fora, we believe the trademark concerns are manageable; particularly considering the competitive benefits of new gTLDs. We believe trademark concerns can and are being addressed in a fair and efficient manner that doesn't stifle innovation, choice and a robust domain industry. After much process, the point has now been

reached where final decisions on trademark protections can and must be made, including DAG provisions related to the Trademark clearinghouse and the Uniform Rapid Suspension. Trademark concerns must not be used as an excuse to stop gTLDs and the next wave of Internet progress.

Post Delegation Dispute Resolution Procedure: One RPM that is currently in DAGv3 that necessitates comment here as well is the troubling new language and procedures for a "post delegation dispute resolution procedure" or "PDDRP" by which trademark holders or other "aggrieved" parties can seek redress against a registry they allege is violating their intellectual property rights and/or is violating its agreement with ICANN. This new provision is quite different from what the IRT recommended to ICANN. The way in which this RPM is currently crafted could unduly jeopardize the viability of a legitimate registry and in the process, could harm legitimate registrants as well. We are concerned about this proposed RPM taking contractual compliance outside the purview of ICANN and creating "rights" and "remedies" that are beyond those offered in law or as part of an ICANN-registry contract.

We do not believe there will be the need for PDDRP at the top level because it is highly unlikely, for example, that a .APPLE fruit registry will lie to ICANN about its purpose during the application process and risk all of its investment by operating the registry in a manner that exploits the trademarks of Apple, the electronics company. On the second level, if the goal is to stop "rogue" registries from harvesting names, engaging in serial cybersquatting, etc., then the language must be clear that the registry has to actively participate in such conduct and are they not vicariously liable for the actions of independent third parties.

B. Malicious Conduct

We believe the DAG contains new, effective mechanisms to protect against "malicious conduct." New gTLD registries will be obliged to reduce opportunities for behaviors such as phishing, pharming and, as discussed in our RPM comments, trademark abuse. DAGv3 contains requirements for new gTLDs, such as a demonstrated plan for DNSSEC deployment; centralization of zone-file access; documented registry level abuse contacts and procedures; participation in an expedited registry security request process; a draft framework for high security zones verification and more. For example, Question 35 of the Technical Questions for new gTLD applicants is aimed at domains used for phishing, child pornography, botnets, etc., and registries will need to explain processes to identify and take down those names.

There has been a tremendous amount of input on these requirements from ICANN community members like the Anti-Phishing Working Group, the Registry Internet Safety Group and the Security and Stability Advisory Committee. We agree with ICANN staff that together these and other measure will "greatly help to mitigate the risk of malicious conduct arising from new gTLDs."

C. Economic Demand

We continue to be perplexed by the call for additional economic studies concerning the need for, and impact of, new gTLDs. Why are requests for such studies being made *after* both the GNSO and ICANN board voted to proceed with new gTLDs and the GAC expressed support for new gTLDs? We all know that the gTLD policy process has been ongoing for a long time and we

believe that the call for further "studies" is merely a delaying tactic for the entrenched interests who oppose open competition among gTLDs. We cannot fault the GAC and ICANN for responding to these "constituent" concerns, but we now urge ICANN to reconsider the source and timing of these concerns.

Having made this timing observation, we concur with ICANN that various studies have been conducted that point to the many benefits of competition among gTLDs. Furthermore, the current market demonstrates consumer demand for new gTLDs and the history of competition demonstrates that an "open" market will bring consumers meaningful choices, lower prices, and better service along with new and innovative applications for the DNS.

The evidence of consumer demand for new gTLDs is all around us. For example, the recently-introduced ccTLD .ME, which is marketed as a gTLD, has experienced an overwhelmingly positive response. Recently, Facebook had 73 million users sign up for "vanity urls" such as facebook/jonesfamily within 45 days of making this option available. It is quite clear that consumers are clamoring for new distinctive and marketable spaces on the Internet. Furthermore, seventy percent or more of individuals and businesses cannot and do not get their first "name of choice" when selecting a domain name. This has substantial impact on a company's ability to brand and market itself and is a common frustration for consumers. Because consumers cannot obtain short, meaningful names in the primary (registry) market, they either make due with a substandard name obtained in the primary market or they pay thousands of dollars (or more) on the secondary market for a previously owned domain names.

Despite this evidence of clear of "demand" and the benefit to consumers of new gTLDs, business leaders also know that predicting or "proving" demand is an inexact science. Henry Ford once said, "If I asked my customer what they wanted, they'd have said a faster horse." Was there consumer demand for the Internet in the first place?

Concluding Remarks:

After several years of ICANN policy-making process and very public discussion, a good, fair and practical DAG has been developed and by and large agreed to. We believe the DAG should be finalized and overarching concerns should be put to rest. Much like any law, treaty or regulation, there will be some issues worked out once a new program or rules are actually used. We should not delay gTLDs indefinitely to meet an unrealistic desire to get everything perfect prior to launch. A tremendous amount of good and useful work has been done to date. Now is the time to make decisions and move to an operable Applicant Guidebook and launch new gTLDs so the next wave of Internet innovation can benefit the hundred of millions of Internet users around the globe.

Sincerely,

Jeffrey Eckhaus
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Demand Media