Comments of NeuStar, Inc.

On the Draft Applicant Guidebook for new gTLDs v. 4
July 21, 2010

NeuStar, Inc. ("Neustar") appreciates the opportunity to provide comment on the Draft Applicant Guidebook for new Generic Top-level Domains (gTLDs) (the "Guidebook"). We would like to first thank the ICANN staff for the hard work that went into the development of the Draft Applicant Guidebook v. 4 ("DAG v.4"). We understand and appreciate all the hard work, time and efforts that have gone into getting the DAG into a position which we believe to be close to final. We believe that with a few more tweaks, the New gTLD Program will be ready to commence later this year or early 2011.

I. Base Agreement

Neustar would like to echo the comments given by the gTLD Registries Stakeholder Group ("RySG") in the Brussels ICANN Public Forum. More specifically, Neustar appreciates the work of ICANN staff in setting up the legal working group to address certain issues the RySG had with the then-current Base gTLD Registry Agreement. Neustar believes that most of the issues we had with ICANN's unilateral right to amend the agreement and the Post Delegation Dispute Resolution Process ("PDDRP") were solved through the hard work of ICANN's General Counsel's office, legal representatives of the various existing registry operators as well as other members of the community.

Although the New gTLD Agreement has come a long way since the first version published at the end of 2008, we do believe there are some additional issues that need to be addressed. These can be found in the RySG comments to DAG v.4 published separately. A number of these issues have been around for the last several drafts, although they were not reflected in the comments analysis, nor were they addressed by staff. We encourage the ICANN General Counsel's office to work these issues with the Legal Working Group as that group worked extremely well together and we believe offers the best opportunity to close out the remaining issues in a way that not only serves ICANN's legitimate interests, but also provides the appropriate protections for New gTLD Registries in the future.

II. Post Delegation Dispute Resolution Process

As stated above, Neustar deeply appreciates the work done by the ICANN staff in coordination with the Legal Working Group on the PDDRP. More specifically, we believe that ICANN staff responded appropriately to the concerns expressed previously by the World Intellectual Property Organization ("WIPO") that "Limiting the substantive criteria to *affirmative conduct* would seriously undermine the PDDRP's effectiveness." In its correspondence to ICANN on March 26, 2010, WIPO recommended that the PDDRP "also encompass instances of willful blindness."

WIPO and other intellectual property owners repeated these concerns to the GAC, ICANN Board and others during the ICANN Meeting in Brussels. However, WIPO's proposed amendments to the PDDRP related to willful blindness are not only contrary to the well-established laws of the jurisdictions that have addressed this issue including the United States and Belgium but are also an expansion of international law. Neustar agrees with some of the discussions that took place within the GAC regarding ICANN's role in the creation of new International law. Just as members of the GAC do not believe ICANN should not define new standards of international law with respect to "morality and public order", we believe that ICANN should not create new international law on contributory trademark infringement. ICANN staff recognized this in the last version of the guidebook with respect to the post-delegation dispute resolution process, and this must remain unchanged.

Neustar's Vice President of Law & Policy, Jeff Neuman, drafted an article for CircleID, which can be found at: http://www.circleid.com/posts/say_no_to_wipos_proposal_to_amend_the_pddrp_to_create_new_law/. Neustar endorses these comments and incorporates them into its comments. A copy of that article is attached as Exhibit 1 to this letter. In addition, Neustar notes that there is no evidence to support WIPO's assertion that existing law would support applying a willful blindness standard to internet domain name registries. In the United States this would be a complete reversal of legal authorities. WIPO and other intellectual property owners have argued that the law may change in the future and therefore ICANN should consider adding a willful blindness standard to the PDDRP. However, ICANN should not be creating dispute processes (or even contractual requirements) based on how intellectual property owners would like to see the law in the future, but should base any dispute proceedings on well-settled international legal principals. Until such time that the law supports WIPO's interpretation of what they would like the law to be, it is not for ICANN to pre-empt the state of existing law by incorporating this notion of willful blindness into the PDDRP.

III. Vertical Integration

A. Vertical Integration Working Group

Neustar has been an active participant in the Vertical Integration Working Group ("VIWG") established pursuant to the Policy Development Process (PDP) invoked by the Generic Names Supporting Organization (GNSO). As that process is ongoing, Neustar reserves the right to comment on the output of the VIWG at such time that the VIWG issues its Initial Report.

In the meantime, Neustar would like to reiterate certain concepts that it believes the ICANN Board should keep in mind if the GNSO community is unable to achieve consensus behind one proposal to deal with the issue of vertical integration / cross ownership. Since its founding, Neustar has been committed to the principles of neutrality and serving our customers, not competing with them. We believe the current policy of vertical separation has proven to be highly successful for the existing "traditional" domain name market. Based on that model, Neustar has long opposed vertical integration of registry and registrar functionality and cross-

ownership within a TLD, including providers of back-end registry services. Neustar could live with a reasonable interpretation of the current Board resolution mandating strict separation for new TLDs (See comments below). However, Neustar recognizes in certain limited cases the strict vertical separation rules may require some flexibility. In the spirit of reaching a consensus position, Neustar believes that the current principles set forth in the so-called JN2 proposal to the VIWG should be adopted by the ICANN Board.

The JN2 Proposal is intended to restrict Registry Operators and their affiliates from distributing names within the TLD for which Registry Operator or its affiliate serves as the Registry Operator. That said, it recognizes that any proposal that outright prohibits a class of entities from applying to be a Registry Operator is not in line with ICANN's mandate of promoting competition set forth in the Bylaws. Therefore it allows registrars (and their affiliates) to be Registry Operators provided they agree to not distribute names within a TLD for which they or their affiliates serve as the Registry Operator. The JN2 contains definitions of affiliation which includes both ownership (> 15%) and control (direct or indirect) and allows exceptions for single registrant TLDs, community TLDs and Orphan TLDs. For the first 18 months, restrictions apply towards back-end registry service providers (RSPs) that control policies, pricing or selection of registrars and resellers affiliated with the Registry Operator or RSP. After such time, they may petition ICANN for a relaxation of those restrictions depending on a number of factors. A copy of the JN2 Proposal is attached hereto as Exhibit 2.

B. Comments on DAG v. 4 Section 2.9 (Use of Registrars)

In the event that the VIWG is unable to come to consensus, and the ICANN Board considers using the language currently contained in Section 2.9 of the New gTLD Agreement Proposed Draft v. 4, Neustar makes the following comments:

i. De Minimum exception needs to be at least 5%

Neustar appreciates the note by ICANN staff in Section 2.9 that restates the sense of the Board that:

> *1) the draft proposed stricter limitations on cross ownership represents a "default position" and they continue to encourage the GNSO to develop a stakeholder based policy on these issues; 2) a very strict interpretation of the resolutions might create unintended consequences; 3) staff should produce language in the agreement matching a "de minimus" acceptable approach (2% language) while remaining generally consistent with the resolutions; . . .*

However, we believe that a 2% cross-ownership limitation is not "de-minimus" enough in that the language will have the unintended consequence of eliminating any United States public company from serving as an ICANN-Accredited Registry Operator. More specifically, companies with publicly traded securities experience frequent changes in ownership and cannot

track 1-2% ownership (particularly ownership in street name[1]) on an ongoing basis. Although we agree that a bar on registrar/registry cross-ownership is warranted, we believe that a 5% threshold is more appropriate for this purpose. A 5% threshold would be consistent with federal securities reporting requirements (see Rule 13d-1 under the Securities Exchange Act of 1934) and would provide a clear, public method for ICANN and the affected companies to verify ownership. In addition, we believe that any cross-ownership standard should permit companies to rely on ownership statements filed with the U.S. Securities and Exchange Commission, unless they know or have reason to believe that such statements are inaccurate or incomplete.

ii. ICANN Definition of "Beneficial Ownership" is incomplete and subject to gaming

Neustar welcomes the definitions added by ICANN staff in proposed Section 2.9 of the New gTLD Agreement. For the most part, the definitions of "Affiliate" and "control" are modeled after definitions currently found under the applicable rules and regulations promulgated by the United States Securities and Exchange Commission ("SEC"). However, Neustar notes that ICANN staff, in defining "Beneficial Ownership" omitted some critical elements of the definition. Without these critical elements, currently found in Rule 13-d of the General Rules and Regulations Promulgated under the Securities and Exchange Act of 1934 (a copy of which is attached as Exhibit 3), we believe the rules established by ICANN will be gamed by ICANN-Accredited Registrars willing to strike side deals with friends, family, acquaintances , etc. through trusts, proxies, powers of attorney, pooling arrangements or any other contracts, arrangements, or devices intended to provide the registrar with direct or indirect control. Through our discussions within the VIWG, we have already been made aware of at least one applicant that intends to take advantage of the loopholes created by the incomplete definition. If ICANN intends to keep the current restrictions in the New gTLD Agreement v. 4, which if the changes recommended in (b)(i) above are made, we strongly urge ICANN to take this opportunity to more fully define "beneficial ownership" to include the other indicia of indirect control.

IV. Requirement for a Financial Instrument

Neustar supports the requirement that was added initially in DAG v. 3 for requiring a financial instrument as a contingency in the case of a catastrophic failure of a registry. We also have reviewed the criteria set forth in the attachment to Module 2 of DAG v. 4 and believe ICANN has done a comprehensive job in situations where an Applicant is both the Registry Operator as well as the registry services back-end provider. In such a case, a financial instrument is appropriate since there is no third party to continue registry operations and therefore it is foreseeable that ICANN could incur significant costs in transitioning to a new Registry Operator/Registry Services Provider.

[1] The vast majority of the stockholders hold their shares in "street name." "Street name" holders are those stockholders who hold their shares through a broker or bank custodian. Under this form of ownership, the shares are technically "owned" by the broker, bank or other intermediary, so that only the broker or bank knows the identity of the stockholder who is the true beneficial holder.

However, the current language does not adequately address the situation in which the Registry Operator does not operate the Registry Services itself. In many instances Applicants will outsource the services identified by ICANN as critical, to a back-end Registry Services Provider. In such instances the failure of the Applicant may not result in a loss of critical services. Such failure could, for example, be addressed by the back-end Registry Services Provider agreeing to continue to provide critical services in the event of an Applicant failure. This approach ensures the continued operation of the registry without the need for a financial instrument.

Neustar notes that ICANN has already addressed the failure of the back-end Registry Service Provider elsewhere in the DAG and New gTLD Registry Agreement by requiring contingency planning and the submission of a transition plan.

Exhibit 1
Say No to WIPO's Proposal to Amend the PDDRP to Create New Law

May 05, 2010 10:58 AM EST

Print Comment
By **Jeff Neuman**

This comment is being presented in my personal capacity and does not necessarily represent the views of my employer (Neustar, Inc.) and its subsidiaries or affiliates.

A number of comments to ICANN's proposed Post Delegation Dispute Resolution Process for new gTLD Registry Operators support a proposal by the World Intellectual Property Organization (WIPO) to hold a registry operator accountable for trademark infringement that occurs within a TLD if it "knowingly permitted, or could not have reasonably been unaware of" infringing domain names within the TLD. This is sometimes referred to as "Willful Blindness" and is used by trademark owners to hold third parties liable for contributory trademark infringement. Support for this proposal came from the International Trademark Association, the Intellectual Property Constituency of ICANN, the International Olympic Committee and other trademark owners and associations.

However, I believe this proposal represents a clear and present danger not only to domain name registry operators, but also to legitimate domain name registrants within a TLD who stand to have registrations canceled by a third party dispute provider (such as WIPO) if a domain name registry loses its TLD under the PDDRP. Simply put, WIPO's proposal would not only contradict well established United States law, but would greatly expand the legal rights and remedies of trademark owners far beyond what exists today.

In the United States, with respect to whether or not domain name registries and registrars can be liable for contributory trademark infringement is well settled. The 1999 case of Lockheed Martin v. Network Solutions controls. In that case, the United States Court of Appeals for the Ninth Circuit found that Network Solutions was not liable to Lockheed Martin for contributory infringement as a matter of law because it was acting merely as a domain name registrar in registering domain names. More specifically, it found that in order for a service provider to be liable under the doctrine of contributory infringement, the service provider must exercise sufficient control over the infringing conduct itself. See also Tiffany v. Ebay decided on April 1, 2010. If a trademark owner cannot establish that a service provider has sufficient control over the infringing conduct, then whether or not the service provider knew, should have known or turned a blind eye towards the infringing conduct, is irrelevant.

How does this apply to gTLD Registry Operators? Typically, a domain name registry operator only has contracts with domain name registrars who in turn have contracts with registrants (either directly or indirectly through domain name resellers). Registry Operators do not have

direct contracts with registrants, which is also sometimes referred to as "no privity of contract". Domain name registry operators merely acting as domain name registries have no direct relationship with domain name registrants and certainly have no control over any content on a domain name registrant's website, email, etc. If the Lockheed Martin case found that domain name registrars had no control over registrants conduct, then certainly domain name registry operators, which are yet another step removed, have even less control over a registrant's conduct. Therefore, if a service provider, like a domain name registry, does not have control over the conduct of a registrant, then in applying the Lockheed Martin test, it would not be liable for any conduct (including infringement) of one or more domain name registrants within a top-level domain. This would be the case regardless of whether or not the domain name registry knew, should have known, or even turned a "blind-eye" towards the infringement in its top-level domain.

How does this relate to the Post Delegation Dispute Resolution Process and WIPO's proposal? WIPO's proposal, if adopted by ICANN, would hold registry operators accountable for domain name infringement within a top-level domain if it knew, should have known, or was willfully blind to such infringement regardless of whether or not the registry had the ability to control the conduct of a registrant. Despite the fact that under US law such a standard could not be used as a basis of liability for a domain name registry, WIPO and other trademark owners would like to see ICANN adopt a "willful blindness" standard.

Stated another way, existing United States law does NOT support willful blindness as the sole basis for direct or contributory infringement for domain name registries and registrars that merely act as domain name registries and registrars. WIPO, INTA and trademark attorneys should not be able to use the proposed Post Delegation Dispute Resolution Process as a means to advance their own desires about what trademark law should be, but rather should only by trying to shape the Post Delegation Dispute Resolution Process into a mechanism that reflects actual rights that exist under trademark law. ICANN should not sponsor efforts where advocates of certain positions are trying to CREATE NEW LAW. Until such time that there is well established law to support WIPO's proposal on willful blindness, ICANN cannot consider WIPO's proposal to amend the PDDRP.

If a domain name registry itself (or through an affiliated entity) does have such control over the conduct of a registrant because it is doing more than registering domain names (i.e., it is the registrant of the infringing domain names or in some other way is profiting off of infringing domain name (above and beyond collecting registration fees)), then I believe the PDDRP can and should be used. This is precisely why ICANN correctly included language in the PDDRP requiring **affirmative conduct** by a registry operator to profit off of systemic infringement to hold a registry accountable, and did not include a willful blindness standard. In such a case, I do not believe that a registry should be immune from liability simply because it is the registry.

If you agree with me, your voice needs to be heard by ICANN. Although there is no open comment period on this, if you file one below, I will make sure it gets to the appropriate people within ICANN before it is too late.

Exhibit 2

JN2 Proposal to Vertical Integration Working Group

1. Definitions

   i. "Affiliate" shall mean a specified person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.

   ii. "Control" (including the terms "controlling", "controlled by" and "under common control with") shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise. As used in this definition, the term "control" means the possession of beneficial ownership of more than fifteen percent (15%) of the equity interests or more than fifteen (15%) of the interests entitled to vote for the election of, or serve as, the board of directors or similar managing authority of the entity.

2. Registry Operator or its Affiliate may serve as an ICANN-Accredited Registrar in any top-level domain other than the TLD for which Registry Operator or its Affiliate serves as the Registry Operator.

3. Except as set forth in Section 4 below, Registry Operator may not be Affiliates with an ICANN-Accredited Registrar distributing names in the TLD.

4. For the first 18 months of the New TLD program, ICANN only may approve a greater than 15% interest (or control) in three cases:

   i. Single Registrant TLD -- use must be limited to registrant entity, its employees, and its agents -- no other third parties

   ii. Community Applicant – Registry Operator or its Affiliates must only maintain up to 30,000 domain name registrations in the TLD.

   iii. Orphan Registry Operator -- Registry Operator must make good faith showing that it attempted and failed to get traction in registrar marketplace, and Registry Operator or its Affiliates must only maintain up to 30,000 names without demonstration that it again made good faith efforts to attempt -- and failed -- to get traction in the registrar marketplace. In order to maintain this exception, the Orphan Registry Operator must demonstrate on an annual basis that it made good faith efforts to attempt – and failed – to get traction in the registrar marketplace. No change of control shall be allowed of an Orphan TLD absent ICANN

approval. In the event ICANN approves change of control by an ICANN-Accredited Registrar, they lose orphan TLD status.

ICANN may consult with relevant competition authority at its discretion when reviewing any of these requests for approval. In so doing, ICANN should use a "public interest" standard.

5. After the first 18 months, ICANN may amend the criteria for its approval of a greater interest only with consensus approval of the community. ICANN also may consult with relevant competition authorities at its discretion or at the request of the applicant when reviewing a specific request for approval.

6. Use of Registrars/Discrimination -- Registry Operator must use only ICANN-accredited registrars in registering domain names, provided that Registry Operator shall have the flexibility to determine eligibility criteria for Registrars in its TLD; such criteria shall be applied equally to all ICANN-Accredited Registrars; such criteria are reasonably related to the purpose of the TLD; and the Registry Operator may not discriminate among the registrars it selects.

7. Back-end Registry Operators -- these requirements to be added to the Registry Operator Agreement

    i. Back-end registry service providers are bound by the same rules as the Registry Operators if they (a) are Affiliates with Registry Operator, or (b) otherwise control the pricing, policies, or selection of registrars for that TLD.

    ii. Back-end registry service providers that are not Affiliates with Registry Operator or don't otherwise control the pricing, policies, or registrar selection may be affiliated with an ICANN-Accredited Registrar only if the affiliated registrar operations are kept separate from the operations of the registry service provider; the affiliated registrar does not receive preferential treatment in pricing or any other way; strict controls are in place to prevent registry data and other confidential information from being shared with affiliated registrar; annual independent audits are required; and a sanctions program is established.

8. Registrar Resellers -- these requirements to be added to the Registry Operator Agreement:

    i. Restriction on Registry Operators or its Affiliates from serving as or controlling an ICANN-accredited registrar extends to registrar resellers for the first 18 months of a Registry Operator's existence. If an exception has been granted under Section 3, then those exceptions shall equally apply to this restriction.

    ii. After 18 months, Registry Operators may distribute domains as a registrar "reseller" as long as the ICANN-Accredited registrar that it distributes through is not affiliated with Registry Operator; the operations of the affiliated registrar

reseller are kept separate from the operations of the Registry Operator; the affiliated registrar reseller does not receive preferential treatment in pricing or any other way; strict controls are in place to prevent registry data and other confidential information from being shared with affiliated registrar reseller; annual independent audits are required; and a sanctions program is established.

Exhibit 3

General Rules and Regulations
promulgated
under the
Securities Exchange Act of 1934

Rule 13d-3 -- Determination of Beneficial Ownership

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a. For the purposes of sections 13(d) and 13(g) of the Act a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:

    1. Voting power which includes the power to vote, or to direct the voting of, such security; and/or,

    2. Investment power which includes the power to dispose, or to direct the disposition of, such security.

b. Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

c. All securities of the same class beneficially owned by a person, regardless of the form which such beneficial ownership takes, shall be aggregated in calculating the number of shares beneficially owned by such person.

d. Notwithstanding the provisions of paragraphs (a) and (c) of this rule:

    1.

        i. A person shall be deemed to be the beneficial owner of a security, subject to the provisions of paragraph (b) of this rule, if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) within sixty days, including but not limited to any right to acquire:

            A. through the exercise of any option, warrant or right;

            B. through the conversion of a security;

C. pursuant to the power to revoke a trust, discretionary account, or similar arrangement; or

D. pursuant to the automatic termination of a trust, discretionary account or similar arrangement; provided, however, any person who acquires a security or power specified in paragraphs (d)(1)(i)(A), (B) or (C), of this section, with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition shall be deemed to be the beneficial owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to such options, warrants, rights or conversion privileges shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such person but shall not be deemed to be outstanding for the purpose of computing the percentage of the class by any other person.

ii. Paragraph (d)(1)(i) of this section remains applicable for the purpose of determining the obligation to file with respect to the underlying security even though the option, warrant, right or convertible security is of a class of equity security, as defined in Rule 13d-1(i), and may therefore give rise to a separate obligation to file.

2. A member of a national securities exchange shall not be deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities and, pursuant to the rules of such exchange, may direct the vote of such securities, without instruction, on other than contested matters or matters that may affect substantially the rights or privileges of the holders of the securities to be voted, but is otherwise precluded by the rules of such exchange from voting without instruction.

3. A person who in the ordinary course of his business is a pledgee of securities under a written pledge agreement shall not be deemed to be the beneficial owner of such pledged securities until the pledgee AE1 has taken all formal steps necessary which are required to declare a default and determines that the power to vote or to direct the vote or to dispose or to direct the disposition of such pledged securities will be exercised, provided, that:

i. The pledgee agreement is bona fide and was not entered into with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with any transaction having such purpose or effect, including any transaction subject to Rule 13d-3(b);

ii. The pledgee is a person specified in Rule 13d-1(b)(1)(ii), including persons meeting the conditions set forth in paragraph (G) thereof; and

iii. The pledgee agreement, prior to default, does not grant to the pledgee;

A. The power to vote or to direct the vote of the pledged securities; or

B. The power to dispose or direct the disposition of the pledged securities, other than the grant of such power(s) pursuant to a pledge agreement under which credit is extended subject to regulation T and in which the pledgee is a broker or dealer registered under section 15 of the act.

4. A person engaged in business as an underwriter of securities who acquires securities through his participation in good faith in a firm commitment underwriting registered under the Securities Act of 1933 shall not be deemed to be the beneficial owner of such securities until the expiration of forty days after the date of such acquisition.