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VIA EMAIL ONLY (5gtld-guide@icann.org)

Mr. Rod Beckstrom, President and CEO and  
Mr. Peter Dengate Thrush, Chairman of the Board of Directors  
Internet Corporation for Assigned Names and Numbers (ICANN)  
4676 Admiralty Way, Suite 330  
Marina del Ray, California 90292

**Re: Request for Comments on Proposed Final  
New gTLD Applicant Guidebook**

Dear Messrs. Beckstrom and Dengate Thrush:

Verizon submits the following comments on ICANN's proposed final version of the new gTLD Applicant Guidebook ("DAG"). These comments are in addition to those previously submitted by Verizon. We are again disappointed to see that the many concerns and suggestions voiced in response to all prior versions of the DAG have not been adopted in this proposed final DAG. Verizon is also disappointed (especially given this is purported to be a final document) to have been provided with so little time to analyze the DAG and provide comments. We stress again that we do not believe that there has been significant progress on the four overarching issues raised by ICANN during the first comment period. In past comments we flagged the absence of a true and comprehensive economic analysis, including the cost to brand owners and users from the rollout of new gTLDs. The first economic report ICANN released recommended that ICANN introduce new gTLDs in "discrete, limited rounds." That report failed to predict the cost to both consumers and trademark owners. The second economic report is not the truly independent peer-reviewed study that was asked for by ICANN stakeholders and governments. It appears to be another commissioned advocacy report from Compass Lexecon, the same entity who authored the first report. This report did not look at the issues that NTIA instructed ICANN to study -- See: [http://www.ntia.doc.gov/comments/2008/ICANN\\_081218.pdf](http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf) -- including defining the registration market as one market or several, looking at the costs for businesses to switch from one gTLD to another.

We are disappointed to see that the report has little empirical data of any kind. The data that is included only proves that the prior gTLDs introduced to date have not achieved any measure of success and there is no support to indicate new gTLDs will fare any differently. Most importantly, the report does not analyze whether the RPMs proposed in the DAG are "adequate trademark protections" and in fact concedes, on p. 39, that:

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“But if new gTLDs fail to have adequate trademark protections or if an innovative new gTLD were introduced that attracted large numbers of registrants either because it competed strongly with .com or because it reached a niche market segment that was previously underserved, then infringement rates and/or cybersquatting costs could rise significantly.”

However, the report makes no effort to even attempt to calculate existing much less future costs to trademark owners.

INTA offered to work with ICANN and the Compass Lexecon group to contribute to the cost analysis for brand owners, but this offer was apparently rebuffed. A study (as opposed to a report) would have looked at costs imposed by past defensive filings, costs from bringing UDRP cases, costs from engaging in defensive sunrise registrations, actual litigation costs under the ACPA and other proceedings, the costs imposed by domain name tasting, monitoring costs with data available from large providers like MarkMonitor, and data businesses have about how much traffic is being diverted away from their websites, to name but few sources. The report seems to imply that cybersquatting is only a problem for the largest brands but ignores the data available showing small and medium brands are also targeted. The inability of these companies' to enforce their brand(s) against hundreds of smaller infringements is a matter of financial resources but does not mean there is not equally significant harm to small and medium businesses too. Verizon renews the call for ICANN to complete a full independent and data driven study.

We are also disappointed to see that ICANN continues to propose a set of “Rights Protection Mechanisms” that are significantly watered down from recommendations of the IRT. Instead, the remedies proposed which will wind up substantially raising costs for brand owners in hundreds of new TLDs at the second level/extension. These remedies consist of pages upon pages of processes which are overly burdensome, expensive and unwieldy. They provide no real benefit or savings on top of existing trademark remedies, such as the UDRP or civil remedies available under the ACPA. At a minimum, all trademark protection remedies must (1) be effective as a remedy, (2) reasonably expedited, (3) stringent enough to avoid gaming, (4) based on actual costs (which avoids further monetization and extraction of unnecessary fees from trademark holders), (5) provide for increased certainty, and (6) result in making the trademark owner whole. Bad actors throughout the ICANN distribution chain will undoubtedly flock to register and use domain names of well known and respected brands in the new gTLDs as they do today in the existing domain name space.

#### Uniform Rapid Suspension Mechanism

As Verizon indicated in its prior filings, the URS was intended to be both a low cost (and as its name clearly indicates) *rapid* mechanism for addressing cybersquatting. However, even in this final DAG, the URS is not rapid and is not significantly different from using the UDRP. The proposed URS creates uncertainty for brand owners. In the case of a default, a registrant can seek a de novo review up to 2 years after suspension.

The high burden of proof is unnecessary and overly burdensome for brand owners, having to make a case by “clear and convincing evidence.” Verizon has strongly urged, along with many others, that the URS provide trademark owners with the ability not only to temporarily suspend a domain name but to have the option to transfer valuable domain names back into their portfolios. The proposed suspension only process forces trademark owners into perpetual monitoring and enforcement obligations as the frozen domain name eventually lapses, falls into the pool and is likely picked up by another cybersquatter.

All these examples show that the URS fails its intended purpose of being an expedited, fair and effective remedy. Trademark owners will rationally choose the certainty and full remedies afforded by the UDRP over this flawed process.

#### Trademark Clearinghouse

The Trademark Clearinghouse is not a real “remedy” for trademark owners. It is a database that foists additional charges onto the trademark community to extend the IP claims and sunrise processes to new gTLDs. Most registries will continue the established practice of offering pre-launch “sunrise processes,” which unfortunately, only work to extract additional fees for defensive registrations most brand owners have no affirmative reason to want or need. There is no provision to put in place a price cap to help limit sunrise period fees. Despite repeated objections from the trademark community, only identical and existing marks can be registered with the Trademark Clearinghouse. Of course, the vast majority of cybersquatted domain names involve variations on or misspellings of current and future well known trademarks. The Trademark Claims service is also of limited value because it is optional, so few registries will have the incentive to offer this service if it is not mandatory. The Clearinghouse, in sum, will be an additional cost to trademark owners with limited usefulness.

#### Post-Delegation Dispute Resolution Procedure (PDDRP) and Registry Restrictions Dispute Resolution Procedure (RRDRP)

The PDDRP is largely a toothless remedy. The PDDRP requires a complainant to establish by “clear and convincing evidence” through “affirmative conduct” that through registry’s “affirmative conduct” that its gTLD string is identical or confusingly similar to a trademark owner’s mark causing “impermissible likelihood of confusion,” “unjustifiably impairing the character of the mark” and taking unfair advantage of the distinct character of the trademark. This standard of proof is higher than the standard required in most civil cases. It is unlikely that complainants using this process, without access to the discovery available in full blown litigation, will be able to meet this evidentiary burden.

In addition to the unrealistically high “clear and convincing” standard, the complainant must not only establish bad faith but “*specific* bad faith intent” by a registry operator to profit from the sale of a domain name. This standard appears to imply that a registry operating with general bad faith intent to profit is free to carry on its illicit activities. It is unclear how a complainant could

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establish “specific bad faith.” Moreover, a complainant must establish a *substantial* pattern or practice of *specific* bad faith by the registry operator to profit from the trademark infringing domain names.

By limiting the process to “affirmative conduct,” ICANN also discourages best practices by its registries, including those who intentionally design their operations and activities to engage in bad faith activities through passive mechanisms. In fact, by affirmatively stating that even when the registry is on specific notice of trademark infringements, they are not liable, this sends a message that ICANN will tolerate certain illicit activities by its registries if structured the right way. Although we understand the wish to avoid any duty to affirmatively monitor, the definition of “affirmative conduct,” should be broad enough to include both knowing and intentional bad faith conduct on the part of registries and registrars whether “affirmative” or otherwise.

In the case of the RRD RP, if a complainant wins, only a refund of their fees is possible but neither monetary damages nor sanctions are available. ICANN is also not required to take any steps to investigate or sanction a registry for compliance purposes even if they meet all these impossibly high standards.

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In view of the foregoing, ICANN must still make critical changes to the DAG and address all overarching issues before any proposed rollout of new gTLDs.

Very truly yours,

A handwritten signature in cursive script that reads "Sarah B. Deutsch" followed by a date "12/10/10".

Sarah B. Deutsch