

**COMMENTS OF THE
SOFTWARE & INFORMATION INDUSTRY ASSOCIATION (SIIA)
on the
Draft “New gTLDs Applicant Guidebook”
submitted
December 15, 2008**

The Software & Information Industry Association (SIIA) appreciates this opportunity to submit comments in the above referenced subject, the Draft “New Applicant Guidebook” materials released by ICANN with regard to the launch of new generic Top Level Domains (gTLDs).¹

We appreciate ICANN recognizing the need to extend the deadline for submission of views, taking into account the recent discussion that time during ICANN meetings (i.e., the recent Cairo meeting) should not toll comment periods.² SIIA also commends ICANN for committing to issue a revised DAG and holding a separate public comment period on that revised draft, as reported by ICANN’s President last month.³ By any measure, the current DAG does not address many of the important issues related to new gTLD’s, and lacks sufficient detail for thorough comments on others. SIIA looks forward to participating in the separate public comment period on the revised DAG.

¹ Throughout this comment, main Draft “New Applicant Guidebook” (posted at <http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>) as the “DAG,” Page and section number references are to the various modules of that document.

² Nonetheless, we are concerned that the time frame in which an issue that is so critical to the success of the Domain Name System has been limited. SIIA also notes that the proposed draft agreement for managers of the new gTLD’s, should they be adopted, is not final and has not yet been approved by ICANN’s Board of Directors. It is essential that the review of the DAG and the agreements be done in a coherent, consistent manner.

³ See http://cai.icann.org/files/meetings/cairo2008/D4_Presidents_Rpt_3Nov08.pdf, slide 4 (indicating that there will be two 45-day comment periods on the draft guidebook).

As the principal trade association of the software and digital information industry, the more than 500 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet.⁴ SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies.

Our members are leaders in building the global online marketplace and promoting the digital economy, providing content and infrastructure that users around the world depend on. They rely on a robust, secure and predictable environment, which includes a reliable Domain Name System (DNS) and associated tools that permit the DNS to operate with confidence.

SIIA, its member companies, and its staff have been involved in ICANN since its inception in 1998. SIIA has strongly supported the role of ICANN over those years, and we have continuously worked to enhance the capacity of ICANN to carry out its responsibilities.⁵

Introduction of New gTLD's: General Observations

The introduction of new gTLDs has been and remains a vital interest to software and digital content industries. We carefully look at the introduction both from the vantage of being leaders in on-line commerce (providers of technology, content and services that empower the Internet) as well as our views as stakeholders in whether the fundamental principles of ICANN's mission (reflected in the JPA and White Paper) are promoted.

As a practical matter, the introduction of new gTLD's raises enormous potential costs and risks to those for-profit and non-profit entities that have invested heavily in doing business over the Internet. Taking into account the experience of the prior introduction of new gTLD's, our industries' experience is that significant resources have had to be devoted, perhaps even exponentially, for each single new TLD that has been introduced. This is due to the legal, technical and business operational impact imposed on our industries which require significant adjustment in monitoring, technology\product development and pro-active work to keep pace with the demands created by each new TLD and the associated registrations.

⁴ Our website can be found at www.sii.net.

⁵ Those responsibilities are outlined in the Joint Project Agreement (JPA) and, just as significantly, are identified in the "DNS White Paper"⁵, the statement of policy on the privatization of the Internet Domain Name System (DNS) issued in June 1998.

The possibility that new gTLD's will be introduced at this time of global economic uncertainty raises the stakes and risks for those who have committed to do business over the Internet. On the one hand, internal cost pressures flowing from the current environment means that if past estimates of the costs are a guide, then entities that rely on the DNS will have either to take resources from strategic goals (like product and service development, or marketing and customer support) to manage through the ramp up and implementation of any and all of the new gTLD's, or underfund adequate transition efforts. On the other, registrars and registries who will take up the operations of the new gTLD's will, themselves, face enormous pressure to cut corners and put added pressure on enforcement of their agreements, all to the detriment of achieving a key principle for ICANN, the stability of the DNS.

The global economic downturn also casts serious doubt on whether another of the key principles underlying ICANN can be effectively achieved through new gTLD's, one that underlies the consideration of new gTLD's: promoting competition in the registration of domain names. SIIA observes that a coherent, scientific basis for determining that there is a lack of competition in the registration of domain names, or that expansion of gTLD's at this time would promote this principle, is lacking.

It is essential that any new gTLD should create a new and differentiated space and satisfy needs that cannot reasonably be met through the existing gTLDs based on selection criteria that will bring about TLDs for which there is legitimate demand from communities that have not been well served by the current TLDs. Such criteria, to serve the purpose of promoting greater competition and benefit the public interest, should work to prevent a proliferation of TLDs that are likely to simply lie fallow, or to depend for their viability upon unproductive defensive registrations. We respectfully submit that the DAG does not assess the need for any new gTLDs that offer a clearly differentiated domain name space with mechanisms in place to ensure compliance with purposes of a chartered or sponsored TLD.

The DAG also lacks the articulation of any steps or policies that would avoid a repetition of the impact of the prior new TLD launches, in which on-line businesses and entities were too often required to expend considerable resources in otherwise unproductive efforts to defend their brands, name rights and promote confidence by users and consumers in open or unrestricted TLDs. The DAG does not include any meaningful analysis of how competition was increased with new gTLDs, and how the Internet community as a whole benefitted from these prior expansions (and how those did not meet an objectively determined need).

Instead, as our submission outlines below, we are deeply concerned that under the new gTLD process embodied in the DAG, online businesses and entities may be faced with a far more extensive challenge to their intellectual property rights, their brands, and business operations, which they must combat using tools (such as defensive registration or anti-fraud strategies) that simply will not scale in an environment of hundreds of new gTLDs.

The principle of competition that underlies ICANN's mission recognizes that the introduction of new TLDs may offer opportunities for innovation, competition, and public benefit. For example, we are aware of discussions that there may be unmet demand among Internet users whose languages are incompatible with the ASCII script used by all gTLDs to date. Our review of the new gTLD framework outlined in the DAG leads SIIA to conclude that these opportunities will be far outweighed by unproductive uses of the DNS that present significant threats to legitimate businesses and entities that have invested heavily in the Internet. This is beneficial neither to the Internet community at large, nor to consumers or users, much less to the businesses and entities that will have to invest heavily to combat these new threats and bear the brunt of this expansion.

Key Time to Focus on Priorities

Two years ago, the ICANN Board directed its President to commission an independent study of the "economic questions relating to the domain registration market," including such basic issues as whether this constitutes one or many markets and whether registrations in different TLDs are substitutable.⁶ It is to be noted, with deep concern, that this study has never been commissioned.⁷ The DAG represents a major new initiative by ICANN, one with enormous implications for ICANN's budget, the economic viability of existing registrars and registries, and the businesses and entities that depend on a stable, predictable Internet. We respectfully submit that the DAG lacks a requisite basis for this major undertaking.

During this period of global economic uncertainty, when it is essential to maintain the stability of the DNS, SIIA strongly recommends that ICANN focus its attention on the priorities at hand. In particular, there is much work left to do to implement the milestones of the Mid-Term review, as reflected in the substantial number of comments that the U.S. Department of Commerce received last February, in response to its notice of inquiry. As SIIA noted at the time,⁸ "taking into account its commitments in the JPA, the implementation of the principles of the DNS White Paper, and the emerging challenges to maintaining a predictable and secure DNS, the road ahead should examine, before the current JPA terminates in September 2009, how the partnership

⁶ See ICANN Board Resolution, available at: <http://www.icann.org/en/minutes/minutes-18oct06.htm>

⁷ The October 2006 Board resolution is cited as one basis for the CRAI report on vertical separation of registrars and registries. However, that report, focusing on only one aspect of the domain name registration marketplace, falls far short of the comprehensive study called for by the board. <http://forum.icann.org/lists/crai-report/msg00013.html>

⁸ Comments of the Software & Information Industry Association (SIIA), in response to the Notice of Inquiry: "The Continued Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System: Midterm Review of the Joint Project Agreement" By DEPARTMENT OF COMMERCE National Telecommunications and Information Administration (Docket No. 071023616-7617-0), available at: http://www.siiia.net/govt/docs/pub/ICANNcomments_20080214.pdf.

between ICANN and the US Government should continue so as to improve ICANN's governance and work and to meet the challenges ahead." The work required does not merely involve promoting greater confidence in the management of the gTLD process ("it is our view that the process of evaluating new TLD's and the resulting expansion has not promoted confidence, but rather confusion on the part of key stakeholders. ... our industry's ... experience does not convince us that ICANN has institutionalized its consideration of new TLD's in a manner that takes into account the stability/security and governance impacts of quickly adding dozens of new TLDs"), but other critical areas such as transparency and accountability, implementation of the multi-stakeholder model, contractor compliance/enforcement, and security and stability. If ICANN undertakes an expansion of gTLD's at this point, it is difficult to see how the continued work identified in the Mid-term review can be accomplished adequately, much less at a high standard.

Key Concerns with the Dag

Among the key issues that need to be fully addressed as the next iteration of the DAG is considered, along with the draft agreements, are the following:

A. Prevention of Adverse Business Impacts at the TLD Level. The DAG posits a new mechanism, the Legal Rights Objection (LRO) procedure. It appears that the LRO will generally be the sole means that a brand owner has at its disposal within the ICANN process to prevent the recognition of a new gTLD that infringes, dilutes, or otherwise harms or weakens its mark, and/or that will threaten to cause confusion detrimental to the mark owner's customers and the public at large. Given the seriousness of this concern, SIIA strongly urges that this mechanism requires much deeper elaboration before any objective, meaningful assessment can be made as to whether it is sufficient and promotes confidence and security among stakeholders. For example, it must be made clear at the outset that a party filing an LRO objection is not barred from challenging in court ICANN's decision regarding the application that is objected to.⁹ The number and expertise of panelists needs to be enhanced (SIIA urges a three-member panel). The lack of any appeal panel raises concerns about the reliability and coherency of the LRO decision-making process. The transparency of the LRO panel decision-making a process needs more detail and input from experts.

B. Pre-launch Mechanisms to Prevent Abusive Registrations. The DAG lacks a meaningful framework, much less even any criteria, for designing and implementing mechanisms to prevent abusive registrations in the new gTLDs. SIIA believes this is a critical area that cannot be left to the whims of TLD applicants. It is incumbent on

⁹ The DAG states on page 3-1 that an objector "accepts the gTLD dispute resolution process" suggests otherwise.

ICANN to do more to ensure that these mechanisms are effective, accessible, low-cost and efficient for business and entities to use to protect their brands, names and reputations.

C. Stronger Protections against Abusive Registrations Post-Launch. A key step to promoting confidence and stability is to establish meaningful, efficient mechanisms to facilitate expeditious detection, investigation and resolution of intellectual property infringements that occur at the second level in new TLDs after they are launched. (If not at the second level, then the equivalent level where registrations are commonly made in the particular TLD's model). Unfortunately, provisions in the base contract regarding display of registrant contact information (via the Whois database) are wholly inadequate.¹⁰ Additionally, new TLD applicants should be given greater incentives to provide additional mechanisms for combating abusive second level registrations post-launch, such as enhanced and expedited procedures for rapid takedown of registrations employed to infringe intellectual property rights (or to engage in other illegal behaviors); registry policies to enforce registrar compliance with applicable policies, including those relating to Whois data accuracy (including adaptation of ccTLD policies that facilitate cancellation of registrations backed by false contact data); commitments for vigorous enforcement of registry terms of service against registrants who violate them.

SIIA strongly urges that the ICANN evaluation process favor proposals for thick registries over thin registries. This will allow for great transparency and accountability through more robust registry Whois services.

D. Greater Confidence is Needed in the Process and Policy

As noted above, during the Mid-Term Review period, a lack of confidence was evident in prior processes of expansion of gTLD's. As the views of stakeholders are considered, and further work is done in response, ICANN should demonstrate that it has incorporated the lessons of the prior gTLD expansions into its operations and basis for evaluating its implementation of the JPA. At minimum, these should include:

1. Fulfill the earlier commitment to engage in an independent study of the "economic questions relating to the domain registration market," including such basic

¹⁰ Specification 4 to the base contract (see <http://www.icann.org/en/topics/new-gtlds/data-pub-24oct08-en.pdf>, provides that new gTLD operators will make only very limited data on registrations publicly available via Whois. It is apparently assumed that all the new gTLDs would be operated as so-called "thin registries." In all likelihood, the opposite should be assumed: that the new gTLDs will, based on the prior experience of new gTLDs, operate as thick registries. Thus, a full set of Whois data publicly available on each registration in the new gTLDs should be required, so that copyright and trademark owners (as well as law enforcement, consumers, and members of the public) will have ready access to this information. See, e.g., <http://www.icann.org/en/tlds/agreements/biz/appendix-05-08dec06.htm> .

issues as whether this constitutes one or many markets and whether registrations in different TLDs are substitutable. The study must also take into account the dramatic change in the global economic environment to assess whether the expansion of gTLD's could have a *detrimental* effect on the confidence, competitiveness and stability of the DNS.

2. Develop and maintain a detailed schedule of events/milestones prior to application opening: with the short time period (seven or eight months) remaining before the application period begins, confidence in the process requires certainty over the pre-launch timetable. This should include a timeline that is regularly updated with all the steps in the process such as when the second Draft Applicant Guidebook is due, when comment periods open and close, what events the ICANN team has planned, and key events in the communication campaign. It should also include a timeline showing each of the post-submission steps.

3. It is essential that the transparency of the evaluation process be enhanced, as this was a problem identified in prior expansions. As a start, ICANN should produce a clear statement that no person or organization supplying consultancy services to ICANN during any part of the process can be involved in an application in any way. There must be an established mechanism for applicants to discern the evaluators of their application and be able to challenge them for cause shown.

4. ICANN should establish a dialogue that includes the contractors and DRSP providers as well as constituent parts of ICANN with relevant expertise so that the former, through open meetings with the community, can outline and explain draft procedures and receive feedback. Additionally, the role of public comment in the work of evaluators (including at the comparative evaluation phase) and of dispute resolution providers needs to be spelled out.

In addition, there are some areas of policy which are of concern to businesses and entities that have invested heavily in the Internet to provide innovative products and services. These include:

5 Document and explain, by way of further examples, the types of organizations that would fit in the categories of "open" and "community-based." It is incumbent on ICANN to explain the process of selection if there is 'string content' between "open" and "community-based" applicants. It is without understatement to say that there are many issues around community provisions that all constituencies and stakeholders need to understand further. For example, could a business application (e.g., an application to run a gTLD for the exclusive use of a single company) ever be categorized as a Community-based application; if so, under what circumstances? Under what circumstances could a corporation qualify as an "established institution" with standing to pursue a Community Objection?

6. Document and explain key aspects of "String Contention." Will semantic confusion (i.e., confusingly similar meanings) be a factor that the String Similarity Examiners take into consideration? Or would this only occur at the objection phase?

For instance, would .corp trigger string contention with .biz? The DAG indicates that “auctions are one means of last resort”¹¹ to resolve string contention. However, SIIA notes that no other means are discussed. SIIA has serious reservations about auctions as a mechanism for awarding new gTLDs.

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SIIA appreciates the opportunity to submit its views and suggestions on the DAG. Our industry remains strongly committed and supports the role of ICANN in the technical management of the DNS. We look forward to continuing to work on this important initiative once staff have reviewed the comments and made public revised documents.

¹¹ Section 4.3.