

COMMENTS OF INTELLECTUAL PROPERTY INTERESTS CONSTITUENCY

Re “Second Draft Applicant Guidebook” for New gTLDs

April 13, 2009

The Intellectual Property Constituency of ICANN’s Generic Names Supporting Organization (GNSO) appreciates this opportunity to comment on the “Second Draft Applicant Guidebook” materials released by ICANN with regard to the launch of new generic Top Level Domains (gTLDs).¹

Introductory remarks

The introduction of new gTLDs is of paramount interest to the IPC. We have been actively involved at all stages of the process and have made numerous detailed submissions in the past, some of which will be referred to in this comment. We hope these comments will be carefully reviewed, and we look forward to a specific response from ICANN staff to our questions and suggestions below.

The IPC submitted detailed comments on the first Draft Applicant Guidebook in December 2008. During its March meeting in Mexico City, the ICANN Board, in response to the comments of the IPC and other organizations, directed the formation of an Implementation Recommendation Team (IRT) to address intellectual property-related concerns in the new gTLD process. The IRT has been formed by the IPC, as directed by the Board, and is actively working on these intellectual property issues and plans to issue its draft report on April 24, 2009 as directed. IPC commends the ICANN Board for recognizing the necessity to resolve these issues before the new gTLDs are launched..

The IRT will address many of the issues raised by the IPC in its December 2008 comments. As such most of the comments submitted today regard other issues, some of which may overlap with some of the concerns within the IRT's bailiwick. These comments are based on our December 2008 submission and any responses thereto reflected in DAG v.2.

In our earlier submission, IPC highlighted two observations regarding economic matters that had not been taken into account in developing the initial draft of the DAG. We wish to reiterate these concerns at the outset of this submission, because there has been no substantive change in the situation since last December. The independent study on economic questions relating to the domain name marketplace, called for by the Board in October 2006, still has not been commissioned, as far as we know, much less completed, published, and discussed by the community. The two papers by an economic consultant released during the Mexico City meeting do not purport to be that study, nor are they a substitute for it. Second, there is no

¹ Throughout this comment, we will refer to the Second Version of the Draft Applicant Guidebook (posted at <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf>) as the “DAG v. 2,” and will follow the pagination and section numbers provided in the various modules of that document.

evidence that ICANN has modified its plans to take into account the drastically changed global economic situation since the Board approved in principle, at the Paris meeting in June 2008, the proposal for a launch of new gTLDs. Although “demand and economic analysis” has been identified by ICANN as one of four “overarching issues” on which “more work is needed,” no clear plan has been presented about what that work will be and how it will be carried out. Candidly, this does not bode well for a successful launch of new gTLDs.

Specific Comments and Questions

There remain a number of additional **points of process** where the IPC believes the application process and understanding of the implications of the new gTLD program will be improved if ICANN is able to provide further detail as soon as possible. These include:

- Publication of a revised, more detailed schedule of events/milestones prior to application opening. Certainty over the pre-launch timetable would be to the advantage of many. A timeline that is regularly updated showing all the steps in the process such as when the next revised Draft Applicant Guidebook is due, when comment periods open and close, what events the ICANN team have planned, key events in the Communication Campaign, would be useful.
- Publication of a timeline showing each of the phases post-submission: for example, indicating when the Objection Period opens and closes and how that relates to Initial Evaluation. This would be a useful aid to planning and could also help identify problem areas. While it is clear the Objection Period will open at the end of the Application Period there still isn't a set time frame for filing objections. For example will third parties have 90 days after the publication of the applicant strings to object?
- Publication of the ICANN policy for evaluators, other contractors and DRSP's, making it clear 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; and providing a means for applicants to learn who will be evaluating their application and to challenge them for cause shown. ICANN is still in the process of finding evaluators and is accepting applications until June 11, 2009 see, <http://www.icann.org/en/announcements/announcement-2-02apr09-en.htm>. Many critical policy questions regarding evaluators, including whether they will be identified to applicants and how challenges for bias would be brought and handled, are yet to be determined. Time is running short to resolve these and still maintain the timetable that ICANN contemplates for the new gTLD rollout.
- Requiring contractors and DRSP providers to ICANN to engage in dialogue with constituent parts of ICANN with relevant expertise and to hold open meetings with the community where they outline draft procedures and receive feedback. Further it appears that ICANN is conceding the procedure for comparative evaluation to each distinct evaluation provider. "For example, the provider may wish to consider the process it will use to evaluate applications, and how that process will scale depending on the number of applications involved. The

provider should also consider how the number of applications may impact evaluation timeframes and costs of evaluations. See, <http://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-02apr09-en.pdf>

- Clarifying how expert panels will be formed, including the Geographical Names Panel. Who will sit on these panels and how will their performance be monitored? Since ICANN is still in the process of accepting Expression of Interest for contractors to become evaluators, it seems that this question has yet to be broached.
- Confirming and publishing a complete table of fees including details of refunds as soon as possible.

In addition, there are some **areas of policy** which, although not as directly related to intellectual property protection, are of concern to the membership of the IPC. These include:

- Clarifying the “Open” vs. “Community-based” question by publishing further examples of types of organizations that would fit in both categories – and then explaining the process of selection if there is string contention between Open and a Community-based applicants. To what extent will “the good of the internet community” be taken into account in such a clash? There are many issues around community provisions that all Constituencies need to understand further. One issue for the IPC is whether a business application (e.g., an application to run a gTLD for the exclusive use of a single company) could ever be categorized as a Community-based application, and if so, under what circumstances? Similarly, under what circumstances could a corporation qualify as an “established institution” with standing to pursue a Community Objection? While ICANN has refined its definitions of open vs. community slightly in DAG v.2, further clarification is needed.
- DAG v.2 is much clearer than its predecessor that auctions will be the “ means of last resort” to resolve string contention. IPC appreciates this candor but reiterates its strong concerns about auctions as a mechanism for awarding new gTLDs (see <http://www.ipconstituency.org/PDFs/IPC%20comments%20on%20auctions%20paper%20090708.PDF> and previous submissions cited there).
- Should ICANN devise a mechanism for a “Challenge of Last Resort” lest an application which threatens the process, the stability of ICANN, or the interests of the Internet community, goes forward without any third party objection? Put another way, what discretion does the ICANN Board reserve to reject an application that has cleared all the steps laid out in the applicant guidebook, and how does the Board plan to exercise that discretion? While ICANN has addressed this issue with regard to Morality and Community based grounds by

proposing an Independent Objector it has not addressed whether there would be a right of appeal to the Board based on legal rights or string confusion. See, <http://www.icann.org/en/topics/new-gtlds/string-contention-18feb09-en>.

- Should an applicant who invests in the process but loses a String Contention be afforded the opportunity of selecting (or proposing) another character string that is not part of a contention set? ICANN has addressed this issue in its February 18, 2009 Resolving String Contention booklet by stating

"Once the final contention sets are established they must be resolved. The first option to do that is through **voluntary agreements** between the applicants concerned. Applicants in contention are encouraged to reach a settlement or agreement that results in resolution of the contention. This may occur at any stage of the process, once ICANN has posted the applications received. Applicants may not resolve string contention by selecting a new string, or replacing the formal applicant by a joint venture. It is understood that joint ventures may result from self-resolution of string contention by applicants. Material changes in applications (that result from say, combinations to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent round.

If not achieved by voluntary means, string contention will be resolved through comparative evaluation or auction, depending on the case at hand. Each contention set will be addressed in its entirety in order to achieve a clear resolution of the string contention."

ICANN's recommendations raise several issues, including the following:

1. It seems unfair that a company which established its technical and financial capability to run a gTLD should be forced to start the application process all over again based on a conflict with another applicant.
 2. ICANN says contention sets can be resolved through voluntary agreements between the applicants. Does this mean co-existence agreements will remove any string contention?
 3. ICANN states applicants may not resolve string contentions by replacing a formal applicant with a joint venture. Yet in the next sentence states "it is understood that joint ventures may result from self-resolution of string contention by applicants. It is not clear why ICANN would not allow two qualified applicants to form a joint venture in order to remove the contention, and considerable confusion remains to be dispelled on this issue.
- While the draft base agreement with new registries requires that ICANN be notified of changes of ownership or control of the registry, it does not otherwise restrict the ability of a successful applicant to "flip" the registry to a buyer unvetted by ICANN, even immediately after delegation. The risks of a

speculative marketplace in gTLD registries (as is already entrenched among second level registrations) are real and need to be anticipated. DAG v.2 does not address this issue (Section 8.4 of the draft registry agreement is unchanged from the previous version on this issue).

Concluding Remarks

IPC appreciates the opportunity to provide its views, looks forward to the response of the ICANN staff, and awaits the opportunity to provide further comments to the third version of the draft applicant guidebook.

Respectfully submitted,

Steve Metalitz, IPC president