GNSO new TLDs Committee

Part B: Final Report

Introduction of New Generic Top-Level Domains

Table of Contents

Author: ICANN – Liz Williams (liz.williams@icann.org)

PART ONE -- POLICY DEVELOPMENT PROCESS

1. This section provides detailed information about the progress of the policy development process and the documentation produced throughout the series of teleconferences and face-to-face consultations that have taken place during 2006 and 2007. All of the meetings were open to observers and many different stakeholders attended the meetings taking an active part in the discussion. In addition, all meetings were open to remote participation by teleconference and through the use of the Shinkuro (www.shinkuro.com) file-sharing technology for some meetings. Participation data is provided in Part Two below.

2. The first step of the policy development process was the release of the *Issues Report* on 5 December 2005. The *Report* sets out an early collation of issues that the GNSO wished to take into account in developing the Terms of Reference for future rounds. For example, the selection criteria used in previous application rounds for new top-level domains were used to guide the development of Term of Reference Two in this PDP. An evaluation of the selection criteria and methods used in the re-bidding of the .org and .net registry contracts was also conducted. The *Issues Report* contained Staff Recommendations about potential terms of reference and, in the majority, those Recommendations were adopted by the GNSO Council. The *Report* is found at http://gnso.icann.org/issues/new-gtlds/gnso-issues-rpt-gtlds-05dec05.pdf.

3. A Public Comment Period was launched on 6 December 2005 to solicit input from the ICANN community about the proposed Terms of Reference (found at http://www.icann.org/announcements/announcement-06dec05.htm). The Public Comment Period ran until 31 January 2006. For this PDP public comment periods have been used in different ways than in the past. In general, public comment calls have been far more

targeted and highly structured to get responses on particular areas of concern to the Committee. This was a successful initiative enabling information to be collected in a consistent way that improved the quality of subsequent *Reports*. The archive of comments can be found at http://forum.icann.org/lists/new-gtlds-pdp-comments/).

4. In addition to a Public Comment Period, a *Call for Expert Papers* was announced on 3 January 2006 (found at http://icann.org/announcements/announcement-03jan06.htm). The request for input was advertised widely in the international press and yielded eleven responses from a diverse range of stakeholders. The authors of the papers were invited to present their papers and participate in a question and answer session at the 23 - 25 February 2006 Washington meeting. A full listing of all the inputs, including the *Expert Papers*, can be found at http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm.

5. The ICANN Board has been regularly updated on the progress of and taken a keen interest in the work of the new TLDs Committee. For example, the Board meeting of 10 January 2006 shows discussion within the Board about its involvement in new TLDs policy development process (found at http://www.icann.org/minutes/minutes-10jan06.htm)

6. A draft *Initial Report* was released on 19 February 2006 (found at http://icann.org/topics/gnso-initial-rpt-new-gtlds-19feb06.pdf) and a request for public comments was announced at the same time that was open between 20 February 2006 and 13 March 2006. The archives for those comments are found at http://forum.icann.org/lists/new-gtlds-pdp-initial-report/. The draft *Initial Report* was used to facilitate discussion at subsequent Committee meetings and to give some guide to the broader community about the Committee's progress in its early stages.

7. The GNSO's new TLDs Committee held a three day meeting in Washington DC between 23 and 25 February 2006. The meeting notes can be found on the GNSO's Committee archive at (http://forum.icann.org/lists/gtld-council/msg00030.html). A central element of the discussion focused on re-visiting ICANN's Mission and Core Values to ensure that the deliberations on the Terms of Reference were tightly constrained. The substantive discussion over the three-day meeting also included discussion on whether to introduce new top-level domains (http://forum.icann.org/lists/gtld-council/msg00027.html) and potential selection criteria which could be used in a new round of top-level domain applications (http://forum.icann.org/lists/gtld-council/msg00026.html).

8. Analysis of the lessons learned from previous TLD rounds was included in the broader discussions held in Washington DC (http://forum.icann.org/lists/gtld-council/msg00030.html). In addition to discussing general selection criteria, detailed discussion of technical requirements also took place (http://forum.icann.org/lists/gtld-council/msg00028.html). Following the Washington meetings, it was clear that further information about technical criteria was necessary to inform the Committee's work. On 15 March 2006 a formal call was made for additional information on technical criteria (found at http://gnso.icann.org/issues/new-gtlds/tech-criteria-15mar06.htm). No responses were received to that specific call but, in the resulting recommendations, particular attention has been paid to addressing relevant technical standards across the full range of registry operations, including those that relate to Internationalised Domain Names.

9. In response to the Committee's work and to discussions at the March 2006 Wellington meeting, the Board indicated its intention to facilitate the

implementation of new top-level domains (found at http://www.icann.org/minutes/minutes-31mar06.htm.)

10. The new TLDs Committee met in Brussels between 11 and 13 May 2006 to discuss, in further detail, the work that had been undertaken on refining the selection criteria and allocation methods. In addition, a full day was spent on discussing policies for contractual conditions with a special presentation from ICANN's Deputy General Counsel. The Committee has archived, on 18 May 2006, records of the Brussels discussion and output from the meeting can be found at http://forum.icann.org/lists/gtld-council/msg00133.html

11. At the Brussels meeting, a revised work plan was devised (found at http://forum.icann.org/lists/gtld-council/msg00130.html) which include a high level commitment to producing an *Initial Report* in time for discussion at ICANN's June 2006 Marrakech meeting.

12. A draft *Initial Report* was released on 15 June 2006 (found at http://gnso.icann.org/issues/new-gtlds/issues-report-15jun06.pdf) and further discussion took place on the Committee's mailing list prior to the Marrakech meeting.

13. The ICANN Board meeting of 30 June 2006 showed, again, the Board's interest in facilitating the policy development process on new top-level domains, particularly in encouraging ongoing discussions with the GAC. (found at http://www.icann.org/minutes/resolutions-30jun06.htm). After inputs from the Marrakech meeting a final version of the *Initial Report* was released on 28 July 2006 (found at http://gnso.icann.org/drafts/newgtlds-issues-report-01-28jul06.htm).

14. The Committee conducted another set of face-to-face consultations in Amsterdam between 29 and 31 August 2006 to further refine the Committee's findings and to develop a set of draft *Recommendations.* Prior to the Amsterdam meeting, a comprehensive public comment period was conducted. These public comments (found at http://forum.icann.org/lists/gtld-council/msg00189.html) were used as working materials for the Committee to consider, in addition to Constituency Statements, the previous set of Expert Papers and comprehensive commentary for a wide variety of observers to the meetings.

15. The Committee met with the GAC on two occasions during the course of the consultations – in Wellington and again in Marrakech – where progress on the Committee's work was shared with GAC members.

16. The most important aspects of the discussion were further clarification about:

    a. string differentiation (http://forum.icann.org/lists/gtld-council/msg00190.html);
    b. proposed requirements to provide an operational plan (http://forum.icann.org/lists/gtld-council/msg00191.html)
    c. treatment of application fees (http://forum.icann.org/lists/gtld-council/msg00194.html)
    d. allocation methods (http://forum.icann.org/lists/gtld-council/msg00202.html); and
    e. string checking (http://forum.icann.org/lists/gtld-council/msg00203.html)

17. Considering all the materials derived from the face-to-face meetings, discussions on email lists, expert materials and expert papers, on 14

September 2006 a set of draft *Recommendations* was released by the Committee for broader consideration (found at http://gnso.icann.org/issues/new-gtlds/recom-summary-14sep06.htm).

18. Between 14 September and 5 October 2006 email discussion took place that improved and clarified the language of the *Recommendations* and ensured that Constituencies had sufficient time to rework their recommendations where necessary.

19. On 5 October 2006, the Committee conducted a two hour teleconference to discuss the draft *Recommendations* (the MP3 recording can be found at http://forum.icann.org/lists/gtld-council/msg00224.html)/. The purpose of the meeting was to confirm that the *Recommendations* reflected the intentions of the Committee and to conduct further work on refining elements of the *Recommendations,* particularly with respect to the selection criteria and allocation methods to resolve contention between string applications.

20. On 11 October 2006, the GNSO Committee Chairman and GNSO Chair, Dr Bruce Tonkin, sent formal correspondence to the Chair of the Governmental Advisory Committee and the Chair of GAC Working Group I, requesting the GAC's assistance with the public policy impacts of the introduction of new TLDs (found at http://gnso.icann.org/mailing-lists/archives/council/msg02891.html).
21. Based on the substantive nature of the Committee's email traffic on the draft *Recommendations,* a further update was released to the Committee on 18 October 2006 (found at http://forum.icann.org/lists/gtld-council/msg00234.html) for consideration whilst the drafting of the *Final Report* takes place.
22. The Committee met again at ICANN's Sao Paulo meeting in December 2006 and continued their work with the release of an updated version of

the *Final Report* (found at http://gnso.icann.org/drafts/GNSO-PDP-Dec05-FR13-FEB07.htm).

23. From February 2007 until May 2007 a series of working groups continued with separate streams of work. The Internationalised Domain Names Working Group (IDN-WG) released its *Final Report* on 22 March 2007 (found online here http://gnso.icann.org/drafts/idn-wg-fr-22mar07.htm). The Reserved Names Working Group (RN-WG) released its first report on 16 March 2007 (found online here http://gnso.icann.org/drafts/rn-wg-fr19mar07.pdf) and its *Final Report* on 23 May 2007 (found online here http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm). The Protecting the Rights of Others Working Group (PRO-WG) completed its *Final Report* on 1 June 2007 (found online here http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf).

-- PARTICIPATION TABLE

Washington DC	Wellington, NZ	Wellington, NZ	Brussels			Telecon	Amsterdam			Telecon		Sao Paulo	MdR	Lisbon	Telecon
24/25 Feb 06	Mar-23	Mar-24	May-11	May-12	May-13		Aug-29	Aug-30	Aug-31			Dec-03	22/25 Feb 07	Mar-23	Jun-07
x	x	x	x	x	x	aa	x	x	x	x	x	x	Mike R	x	
absent	x	x	x	x	x		x	x	x	x	ae	x	x	x	x
Grant Forsyth RP	x + Grant F.		RP	RP		x	na	RP	na	aa	x	RP	RP	RP	x
Mark McFadden															
RP	x	x	na	na	na	aa	x	x	x	aa	ae	x	ae	ae	x
M.Mansourkia	x	x	x	x	x	x	na	na	na	x	x	x	x	x	x
RP	x		na	na	na	x	RP	RP		aa	a	x	ae	x	x
x	absent		x	x	x	aa	na	na	na	aa	KR	x	KristinaRP	x	x
Steve Metalitz	absent		x	x	x	aa	x	x	x	x	x	x	ae	x	x
x	x	x	na	na	na	a	na	na	na	na	a	na	ae	a	a
na	x	x	na	na	na	x	na	na	na		ae	x	RP	x	x
x	absent		x	x	x	a	x	x	x	A	ae	x	x	ae	x
na	x	x	na	na	na	a	na	na	na	aa	a	x	ae	x	x
x	x	x	x	x	x	x	x	x	x	x	ae	x	x	x	x
x	x	x	na	na	na	a	na	na	na	aa	ae	p	az	x	x
na	absent		na	na	na	a	x	x		x	x	x	az	x	
na	x	x	na	na	na	x	na	na	x	x	ae	RP	RP	x	x
x	x	x	x	x	x	x	x	x	x	x	x	x	Ed Chung	x	x
	x	x	na	na	na	a			RP		a	x	Ed.Chung		x
RP	x	x	x	x	x	x	x	x	x	x	a	x	x	x	x
x	x	x	a	a	a		a	a	a	a	a	x	x	x	x
RP	x	x	na	na	na		RP	RP	RP	aa	a	a	jon bing	x	ae

Williams (liz.williams@icann.org)
Introduction of New Top-Level Domains
ary Materials
cument and has no official status.

RP	x		RP	RP	RP		x	x	x	x	x	x	Alan Greenb	x		
x											a					
													x	x		
							x	x	x			x				
x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
x	x	x	x	x	x		x	x	x	x	x	x	x	x	x	x
							x	x	x			x		x		
x ry	x	x										x	x	x	x	
x ipc											x	x	x			
x ry	x	x										x				
xncuc																
RP	x	x	x	x	x					x	x	x	x	x		
	x	x	x	x	x					x		x	x	x		
	x	x	x	x	x							x	x	x	x	
			x	x	x											
			x	x	x											
	x	x												x		
x	x	x												x		
	x	x														

believe in Amsterdam
he came on the phone?

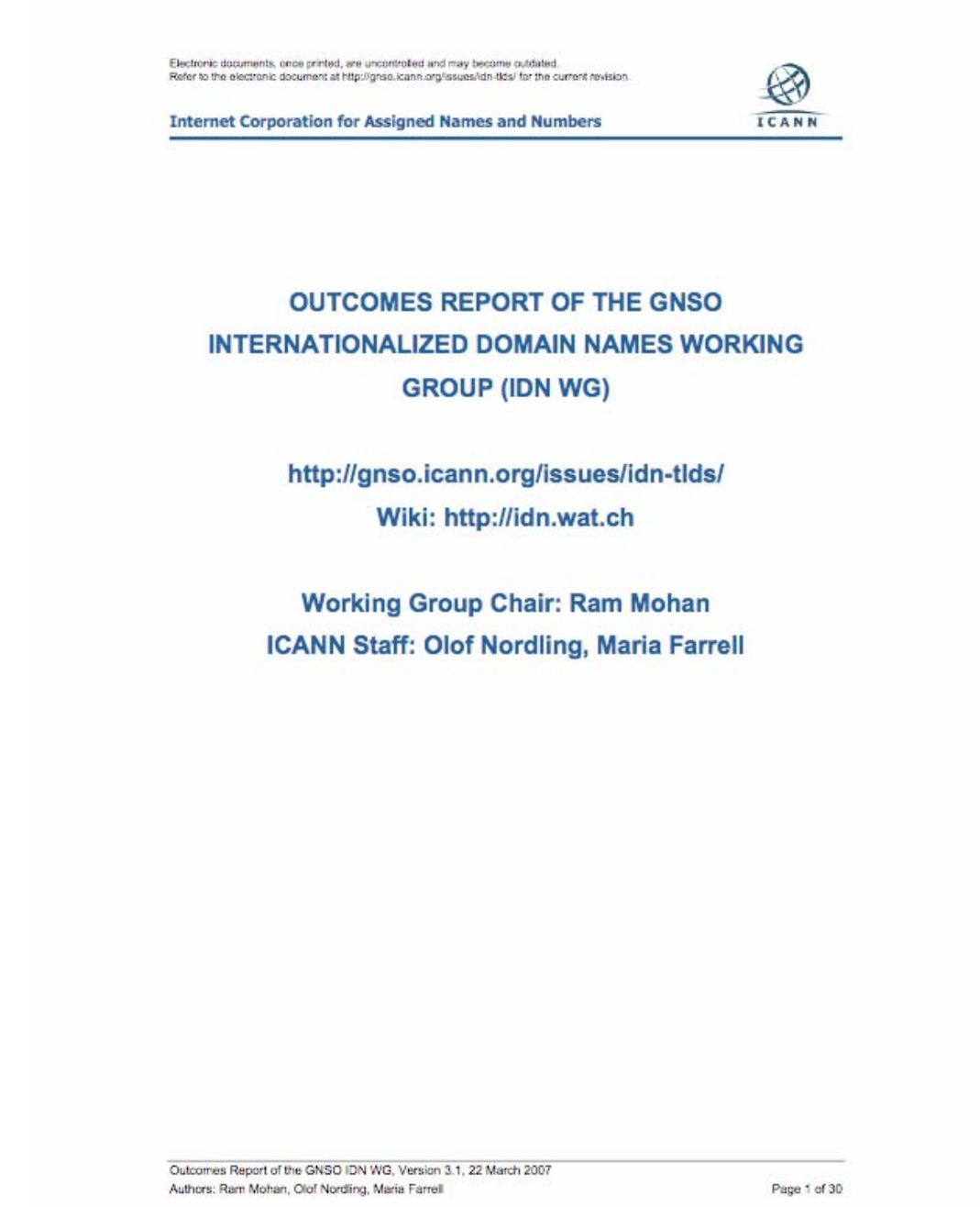
													x	x		
													x	x	x	
												x	x	x	x	
														x	x	
														x		
														x		

Williams (liz.williams@icann.org)
Introduction of New Top-Level Domains
ary Materials
cument and has no official status.

														x	
												x	x	x	x
													x	x	x
x	x	x	x	x		x	x	x	x	x	x	x	x	x	x
x	x	x	x	x	x	x		x	x	x	x	x	x	x	x
										x	x	x	x	x	x
x	x	x	x	x	x	x	x	x	x	x	x	x	Rp	x	x
	x	x					x	x	x	x	x	x	x	x	x
x			x	x	x		x	x	x	x	ae	x	x	x	x
									x			x	x		
							x	x	x	x	x	x	x	x	x
x	x	x								x	a	x		x	x
	x	x							x	x	a		x	x	
													x	x	
	x	x										x	x	x	
												x	x	x	x
												x	x		
													x	x	x

Williams (liz.williams@icann.org)
Introduction of New Top-Level Domains
ary Materials
cument and has no official status.

PART THREE – INTERNATIONALISED DOMAIN NAMES WORKING GROUP REPORT (IDN-WG)



Electronic documents, once printed, are uncontrolled and may become outdated.
Refer to the electronic document at http://gnso.icann.org/issues/idn-tlds/ for the current revision.

Internet Corporation for Assigned Names and Numbers

ICANN

OUTCOMES REPORT OF THE GNSO
INTERNATIONALIZED DOMAIN NAMES WORKING
GROUP (IDN WG)

http://gnso.icann.org/issues/idn-tlds/
Wiki: http://idn.wat.ch

Working Group Chair: Ram Mohan
ICANN Staff: Olof Nordling, Maria Farrell

Outcomes Report of the GNSO IDN WG, Version 3.1, 22 March 2007
Authors: Ram Mohan, Olof Nordling, Maria Farrell
Page 1 of 30

PART FOUR – RESERVED NAMES WORKING GROUP FINAL REPORT

GNSO new TLDs Committee

Reserved Names Working Group
Final Report

23 May 2007

Author: ICANN – Liz Williams (liz.williams@icann.org)
GNSOPDPDec05 -- Introduction of New Top-Level Domains
Reserved Names Working Group Final Report
This is a working document and has no official status.

Author: ICANN – Liz Williams (liz.williams@icann.org)
GNSOPDPDec05 -- Introduction of New Top-Level Domains
Part B: Supplementary Materials
This is a working document and has no official status.

PART FIVE – PROTECTING THE RIGHTS OF OTHERS WORKING GROUP FINAL REPORT

PROTECTING THE RIGHTS OF OTHERS WORKING GROUP (PRO WG) FINAL REPORT

Working Group Chair: Kristina Rosette
ICANN Staff: Liz Williams

17 June 2007

Author: ICANN – Liz Williams (liz.williams@icann.org)
GNSOPDPDec05 -- Introduction of New Top-Level Domains
Part B: Supplementary Materials
This is a working document and has no official status.

PART SIX – GOVERNMENTAL ADVISORY COMMITTEE PUBLIC POLICY PRINCIPLES

GAC PRINCIPLES REGARDING NEW gTLDs

Presented by the Governmental Advisory Committee
March 28, 2007

1. Preamble

1.1 The purpose of this document is to identify a set of general public policy principles related to the introduction, delegation and operation of new generic top level domains (gTLDs). They are intended to inform the ICANN Board of the views of the GAC regarding public policy issues concerning new gTLDs and to respond to the provisions of the World Summit on the Information Society (WSIS) process, in particular "*the need for further development of, and strengthened cooperation among, stakeholders for public policies for generic top-level domains (gTLDs)"*[1] and those related to the management of Internet resources and enunciated in the Geneva and Tunis phases of the WSIS.

1.2 These principles shall not prejudice the application of the principle of national sovereignty. The GAC has previously adopted the general principle that the Internet naming system is a public resource in the sense that its functions must be administered in the public or common interest. The WSIS Declaration of December 2003 also states that "*policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues.*"[2]

1.3 A gTLD is a top level domain which is not based on the ISO 3166 two-letter country code list[3]. For the purposes and scope of this document, new gTLDs are defined as any gTLDs added to the Top Level Domain name space after the date of the adoption of these principles by the GAC.

[1] See paragraph 64 of the WSIS Tunis Agenda, at http://www.itu.int/wsis/docs2/tunis/off/6rev1.html
[2] See paragraph 49.a) of the WSIS Geneva declaration at http://www.itu.int/wsis/docs/geneva/official/dop.html
[3] See: http://www.icann.org/general/glossary.htm#G

1.4 In setting out the following principles, the GAC recalls ICANN's stated core values as set out in its by-laws:

> *a. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
>
> *b. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
>
> *c. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
>
> *d. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
>
> *e. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
>
> *f. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
>
> *g. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
>
> *h. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
>
> *i. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
>
> *j. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
>
> k. *While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

2. Public Policy Aspects related to new gTLDs

When considering the introduction, delegation and operation of new gTLDs, the following public policy principles need to be respected:

Introduction of new gTLDs

2.1 New gTLDs should respect:

a) The provisions of the Universal Declaration of Human Rights[4] which seek to affirm *"fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women".*

b) The sensitivities regarding terms with national, cultural, geographic and religious significance.

2.2 ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.

2.3 The process for introducing new gTLDs must make proper allowance for prior third party rights, in particular trademark rights as well as rights in the names and acronyms of inter-governmental organizations (IGOs).

2.4 In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains no two letter gTLDs should be introduced.

Delegation of new gTLDs

2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

[4] See http://www.un.org/Overview/rights.html

2.6 It is important that the selection process for new gTLDs ensures the security, reliability, global interoperability and stability of the Domain Name System (DNS) and promotes competition, consumer choice, geographical and service-provider diversity.

2.7 Applicant registries for new gTLDs should pledge to:

a) Adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD.

b) Ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance at the second level of any new gTLD.

2.8 Applicants should publicly document any support they claim to enjoy from specific communities.

2.9 Applicants should identify how they will limit the need for defensive registrations and minimise cyber-squatting that can result from bad-faith registrations and other abuses of the registration system

Operation of new gTLDs

2.10 A new gTLD operator/registry should undertake to implement practices that ensure an appropriate level of security and stability both for the TLD itself and for the DNS as a whole, including the development of best practices to ensure the accuracy, integrity and validity of registry information.

2.11 ICANN and a new gTLD operator/registry should establish clear continuity plans for maintaining the resolution of names in the DNS in the event of registry failure. These plans should be established in coordination with any contingency measures adopted for ICANN as a whole.

2.12 ICANN should continue to ensure that registrants and registrars in new gTLDs have access to an independent appeals process in relation to registry decisions related to pricing changes, renewal procedures, service levels, or the unilateral and significant change of contract conditions.

2.13 ICANN should ensure that any material changes to the new gTLD operations, policies or contract obligations be made in an open and transparent manner allowing for adequate public comment.

2.14 The GAC WHOIS principles are relevant to new gTLDs.

3. Implementation of these Public Policy Principles

3.1 The GAC recalls Article XI, section 2, no. 1 h) of the ICANN Bylaws, which state that the ICANN Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues. Insofar, therefore, as these principles provide guidance on GAC views on the implementation of new gTLDs, they are not intended to substitute for the normal requirement for the ICANN Board to notify the GAC of any proposals for new gTLDs which raise public policy issues.

3.2 ICANN should consult the GAC, as appropriate, regarding any questions pertaining to the interpretation of these principles.

3.3 If individual GAC members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them.

3.4 The evaluation procedures and criteria for introduction, delegation and operation of new TLDs should be developed and implemented with the participation of all stakeholders.

N.B. The public policy priorities for GAC members in relation to the introduction of Internationalised Domain Name TLDs (IDN TLDs) will be addressed separately by the GAC.

PART SEVEN – CONSTITUENCY IMPACT STATEMENTS

ICANN GNSO new TLDS report 2007 – impact statement on behalf of the Commercial and Business Users Constituency (BC)

Background

Under ICANN existing guidelines within the Policy Development Process constituencies are asked under section 11c to provide: "an analysis of how the issue would affect each constituency, including any financial impact on the constituency".

There are innumerable uncertainties to the outcome of the PDP for TLDs including:

- the number of TLDs
- the nature of the TLDs
- the ability of ICANN to implement the safeguards discussed by the GNSO
- the number of those safeguards that reach consensus support within the GNSO
- the weight given by the Board to those safeguards.

For this reason the BC impact statement is necessarily written in terms of what the impact may look like given certain implementation scenarios.

A world of healthy competition and good faith
If the outcome is the best possible there will be a beneficial impact on business users from:

- a reduction in the competitive concentration in the Registry sector
- increased choice of domain names
- lower fees for registration and ownership
- increased opportunities for innovative on-line business models.

A world of increased opportunity for abusive competitive practises and fraud
There are a number of recommendations that seek to control abusive competitive practices as well as opportunities for consumer and business fraud such as cyber-squatting, typo-squatting, phishing and other forms of bad faith activity:

- graduated sanctions for contract compliance by Registries and Registrars
- avoiding confusingly similar domain names
- avoiding infringement of third party prior rights especially trade mark rights
- clear, quick and low-cost procedures for dispute resolution and the removal of bad faith registrations
- measures to prevent abuse of personal data or other commercially-valuable data.

If ICANN fails to implement the above recommendations there will be a negative impact on business users from:

- user confusion about site ownership and subsequent reputational damage to well-known businesses
- costs from diminished user confidence in e-commerce
- wasted costs of defensive registrations and online brand monitoring and enforcement
- wasted costs in legal and other actions to prevent avoidable criminal and cyber-squatting activity
- wasted costs and fraudulent losses to businesses and their customers from phishing and malware sites.

In the worst case scenario the negative impact on business users globally both directly and indirectly from reputation and confidence-related loss could be billions of dollars.
END

The Intellectual Property Constituency Impact Statement Regarding the Introduction of New gTLDs

17 June 2007

Author: ICANN – Liz Williams (liz.williams@icann.org)
GNSOPDPDec05 -- Introduction of New Top-Level Domains
Part B: Supplementary Materials
This is a working document and has no official status.

IMPLEMENTATION PRINCIPLES

	PRINCIPLE	IPC IMPACT
A	New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.	To the extent that new gTLDs are introduced, the IPC strongly agrees with this principle, especially with respect to the need for an orderly introduction. However, the IPC still takes issue with the notion that new gTLDs must be introduced. Based on past experience, the addition of new gTLDs will likely result in numerous defensive registrations of otherwise unnecessary domain names by IP owners (which we note include all trademark owners such as Registrars, Registries, ISPs, etc.). Such an introduction not only places a significant burden and cost to IP owners, it results in absolutely no value whatsoever to IP owners, not to mention Internet users in general. In fact, while arguments are made that the introduction of new gTLDs will increase competition and thus lower registration costs for domain name owners, this is not the case. In October of 2007, Verisign will increase the registry fee for registering domain names for .com, .org and .net domain names. To the extent that there has been any rise in the registration of domain names, the IPC submits that this is not as a result of increased demand, but rather represents in large part the practice of defensive registrations or the abusive practices of domain name tasting, parking, kiting and the like. Finally, it is critical that appropriate mechanisms be in place to address conflicts that may arise between any proposed new gTLD and the IP rights of others. The IPC believes that many of these concerns may be minimized by limiting any new gTLDs to those that offer a clearly differentiated domain name space with mechanisms in place to ensure compliance with the purposes of a chartered or sponsored TLD. Market differentiation will create a taxonomic or directory-style domain name structure, ensuring that certainty and confidence are part of the user experience and that

		registrants will find a unique name space where they want to be and in which they can easily be located.
B	Some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root.	As mentioned above, appropriate mechanisms must be in place to address conflicts that may arise between any proposed new gTLD and the IP rights of others.
C	The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity. [Consistent with GAC Principle 2.6]	To begin with, there has been little empirical evidence that the introduction of new gTLDs has, in fact, promoted competition, or added to consumer choice or market differentiation, even though it might have the potential to do so. Any proposed new gTLD must be clearly targeted at a particular industry, economic sector, or cultural or language community, with a requirement that there is sufficient support or demand the relevant industry, economic, cultural or language sector to minimize the concerns set forth with respect to Principal A above. The mere introduction of competition for registry services must be outweighed by the burdens and costs to IP owners and Internet users et forth with respect t Principal A above. ICANN does not need to and should not encourage registry competition in the absence of a clear need for a new gTLD, without which will only create a gTLD replete with defensive registrations and no added value to consumers.
D	A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet.	IPC agrees that technical and operational stability are imperative to any new gTLD introduction.
E	A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN's registry agreement.	ICANN should be in a position to inquire whether a registry applicant will depend for its financial viability on defensive registrations, and if so to withhold approval of such applicant.
F	A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.	To be feasible, the terms of registry agreements should be aligned with policies adopted by ICANN and allow enforcement by ICANN of any non-compliance. The impact of the absence of such criteria or the lack of enforcement thereof on the IPC and Internet users in general is evidenced in ICANN's 2006 Consumer Complaint Analysis (see, http://www.icann.org/compliance/pie-problem-reports-2006.html) In particular, the lack of access to Whois data, or the

		false or inaccurate submission thereof, significantly impacts the time and resources of and costs to IP owners vis-à-vis the handling of infringements on the Internet.

PROPOSED RECOMMENDATIONS

NUMBER	RECOMMENDATION	IPC Comment
1	ICANN must implement a process that allows the introduction of new top-level domains. The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process. [GAC2.5]	See comments with respect to Principle A.
2	Strings must not be confusingly similar to an existing top-level domain. In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains no two letter gTLDs should be introduced. [GAC2.4]	Agreed.
3	Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. The process for introducing new gTLDs must make proper allowance for prior third party rights, in particular trademark rights as well as rights in the names and acronyms of inter-governmental organizations (IGOs). [GAC2.3]	Agreed, and as stated before, appropriate mechanisms must be in place to address conflicts that may arise between any proposed new string and the IP rights of others. While the IPC notes that GAC has made a specific reference to trademark rights, the IPC agrees with NCUC that such rights could include "freedom of expression" rights to the extent they are recognized and enforceable under generally accepted and internationally recognized principles of law provided that such rights do not infringe the existing legal rights of others as set forth in the first paragraph.
4	Strings must not cause any technical instability.	IPC agrees that technical and operational stability are imperative to any new gTLD introduction.

5	Strings must not be a Reserved Word. ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities. [GAC2.2]	Agreed, to the extent that a Reserved Word is such that its use could cause technical or operational instability to the DNS.
6	Strings must not be contrary to generally accepted legal norms relating to morality and public order. New gTLDs should respect: a) The provisions of the Universal Declaration of Human Rights which seek to affirm "fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women". b) The sensitivities regarding terms with national, cultural, geographic and religious significance. [GAC2.1]	The IPC simply concurs with NCUC regarding the implementation issues raised by such a recommendation.
7	Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.	IPC supports this recommendation.
8	Applicants must be able to demonstrate their financial and organisational operational capability. An application will be rejected or otherwise deferred if it is determined, based on public comments or otherwise, that there is substantial opposition to it from among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support.	ICANN should be in a position, through various mechanisms, to determine that adequate resources exist to ensure that the applicant will not be dependent on defensive registrations for financial viability. Moreover, the IPC believes that the ability to reject an application as set forth in the second provision of this recommendation is an important feature for many members of the IPC (if there is substantial opposition, this raises the concerns set forth in our comments with respect to Principle A) and thus specifically and wholeheartedly endorses it.
9	There must be a clear and pre-published application process using objective and measurable criteria.	IPC supports this recommendation.

10	There must be a base contract provided to applicants at the beginning of the application process.	IPC supports this recommendation.
11	Staff Evaluators will be used to make preliminary determinations about applications as part of a process which includes the use of expert panels to make decisions.	IPC supports this recommendation, and in doing so stresses the need for ICANN to continue to increase its staffing resources to maintain the security and stability of the DNS.
12	Dispute resolution and challenge processes must be established prior to the start of the process.	IPC supports this recommendation.
13	Applications must initially be assessed in rounds until the scale of demand is clear.	IPC supports this recommendation
14	The initial registry agreement term must be of a commercially reasonable length.	IPC supports this recommendation.
15	There must be renewal expectancy.	IPC supports this recommendation.
16	Registries must apply existing Consensus Policies and adopt new Consensus Polices as they are approved.	IPC supports this recommendation.
17	A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.	IPC supports this recommendation assuming the process will have "teeth" and assuming ICANN's continued monitoring and enforcement of registry contractual obligations.
18	If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed.	IPC supports this recommendation.
19	Registries must use ICANN accredited registrars.	IPC supports this recommendation, assuming accreditation of registrars is held to high standards to avoid a "Register Fly" situation.

IMPLEMENTATION GUIDELINES

	Implementation Guideline	IPC Comments
IG A	The application process will provide a pre-defined roadmap for applicants that encourages the submission of applications for new top-level domains.	To the extent that the submission of applications is encouraged, it should be because of the clear need for a new TLD.
IG B	Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD	ICANN should be a position, through various mechanisms, to determine that adequate resources exist at an applicant to

	process. Application fees may differ for applicants.	ensure that the applicant will not be dependent on defensive registrations for financial viability.
IG C	ICANN will provide frequent communications with applicants and the public including comment forums which will be used to inform evaluation panels.	IPC supports a requirement for public posting of string applications in internationally recognized publications and comment forums on applicants.
IG D	A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. Applications will be time and date stamped on receipt.	Based on experience with the 'land rush' effect in domain name registration, it is apparent that first-come, first-serve simply does not work when many valid applications are received at the same time. IPC endorses the use of comparative evaluation methods to allocate new gTLDs. IPC strongly advises against the use of auctions or lotteries (that have nothing to do with the competence and financial viability of an applicant) to resolve competition between applicants.
IG E	The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round.	Given the potential impact any new gTLD will have on the IPC, ICANN must ensure that there will also be an adequate time period for public comment once applications are submitted.
IG F	If there is contention for strings, applicants may: i) resolve contention between them within a pre-established timeframe ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application iii) If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and; iv) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.	i) Yes. ii) Yes. IPC prefers the market driven approach and encourages the sponsorship by a well defined community. However, the "priority" for a claimed community support should be subject to Recommendation 8, second paragraph). iii) Yes. iv) Yes. IPC urges ICANN to ensure that its review of applications continues to be vigorous to keep a high standard to meet the selection criteria. IPC urges caution in presenting any proposal that would eliminate those aspects of the gTLD application process providing for the security and stability of the DNS. This concerns not only technical matters, but those aspects of the Internet DNS and registry operation designed to safeguard users and the general public, including, e.g. the

		examination of proposals to protect intellectual property.
IG G	Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exception: i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application Under this exception, Staff Evaluators will devise criteria and procedures to investigate the claim.	Yes, again subject to Recommendation 8, second paragraph. IPC again strongly advises against the use of auctions or lotteries to resolve competition between applicants. A comparative evaluation process will best meet ICANN's goals of fostering competition in registration services and encouraging a diverse range of registry service providers.
IG I	External dispute providers will give decisions on complaints.	IPC supports the use of external dispute providers in the same manner as existing UDRP mechanisms, but simply notes that this should not be necessarily to the exclusion of the ICANN Board. There may be decisions that only the ICANN Board can resolve and such issues should not be overlooked or not dealt with simply because there is no external dispute provider available to resolve it.
IG J	An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process.	IPC does not support the warehousing of TLD strings and supports a timeframe after applicant grant by which the TLD string must be operational.
IG K	The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing market place.	No comment
IG L	ICANN should take a consistent approach to the establishment of registry fees.	No comment
IG M	The use of personal data must be limited to the purpose for which it is collected.	Personal data collected by the registry should be used in ways that are not incompatible with the purposes for which it was collected, taking into account the full range of public policy considerations.
IG N	ICANN may establish a capacity building and support mechanism aiming at facilitating effective communication on important and technical Internet governance functions in a way which no longer requires all participants in the conversation to be able to read and write English.	IPC support multilingual effective communication on important Internet governance functions.

IG O	ICANN may put in place a fee reduction scheme for gTLD applicants from economies classified by the UN as least developed.	The IPC does not object *per se* to the use of a reduced fee scheme, but is skeptical that the positive effect of such a scheme will outweigh the negative impact of an underfunded applicant's inability to meet the selection criteria set by ICANN. We strongly recommend that any graduated fee structure be viable and significant enough to ensure compliance with appropriate registry selection criteria, as well as eliminate bad-faith actors who might seek to pay a minimal entry fee and then conduct unscrupulous activities.
IG P	ICANN may put in place systems that could provide information about the gTLD process in major languages other than English, for example, in the six working languages of the United Nations.	IPC supports the dissemination of information about the process in multiple languages.

Internet Service Provider and Connectivity Provider Constituency

Statement on Impacts – Introductions of New Top Level Domains

Overview

This is the ISPCP's statement on Impacts relating to the GNSO PDP Dec 05 – Introduction of New Top Level Domains – Consolidated Recommendations.

Section 1 – Principles

The ISPCP is highly supportive of the principles defined in this section of the PDP, especially with regards to the statement in (A):

"New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way."

Network operators and ISPs must ensure their customers do not encounter problems in addressing their e-mails, and in their web searching and access activities, since this can cause customer dissatisfaction and overload help-desk complaints. Hence this principle is a vital component of any addition sequence to the gTLD namespace.

The various criteria as defined in D,E and F, are also of great importance in contributing to minimize the risk of moving forward with any new gTLDs, and our constituency urges ICANN to ensure they are scrupulously observed during the applications evaluation process.

Section 2 – Proposed Recommendations

Here the ISPCP would like to make the following observations:

With regards to recommendation 2:

"Strings must not be confusingly similar to an existing top-level domain."

This is especially important in the avoidance of any negative impact on network activities.

The same applies to recommendation 4:

"Strings must not cause any technical instability."

The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organizational and operational capability of the applicant are the evaluators' instruments for preventing potential negative impact of a new string on the activities of our sector (and indeed of many other sectors). ISPCP Constituency Statement on Impacts – New TLDs Page 2

With regards to recommendation 13:
"Applications must initially be assessed in rounds until the scale of demand is clear."
This is an essential element in the deployment of new gTLDs, as it enables any technical difficulties to be quickly identified and sorted out, working with reduced numbers of new strings at a time, rather than many all at once. Recommendation 18 on the use of IDNs is also important in preventing any negative impact on network operators and ISPs.

Section 3 – Implementations Guidelines

We consider that guideline B, which states:
"Application fees may differ for applicants." ,
has some potential for negative impact on our sector. Our recollection is that this caveat was proposed with a view to reducing the application fee for certain categories of applicants, as a mechanism for avoiding exclusion based on application cost. Recent discussions in the GNSO have exposed some opinions that question the 'fairness' of the application fee (as it has been applied heretofore), on the grounds that it constitutes an entry barrier and disenfranchises legitimate potential applicants. The risk in proceeding with such a policy, is that it paves the way for hasty, last minute me-too applications, that have not really developed a solid project, and are simply trying their luck in getting a string…Perhaps when such arguments on exclusion are expounded, then the '.cat' sTLD can be pointed at as a prime example of a well-planned 'grass-roots' community TLD, which successfully applied for a string without any 'special' cost considerations. A potential profusion of hasty, ill-conceived new gTLDs is not something the ISPCP would view as beneficial to our sector.

Section 4 – IDN Working Group Areas of Agreement

The ISP community believes that areas of agreement 5, 6, and 9 are essential to the careful implementation of IDN TLDs. Without careful adherence to these recommendations, the implementation of IDNs may be successful on a technical level but will result in support and user confusion problems amongst the customers of ISPs. The ISPCP believes that these "Areas of Agreement" are essential to implement **prior** to any pursuit or proposal for IDN TLDs.
The ISP community also believes that the third "Area of Agreement" will be particularly difficult to implement in practice. The ISP community would be significantly impacted if the mechanism for gathering language community input on new IDN gTLD strings included a process that reached out to general, public Internet users through the community that provides access and connectivity. The ISPCP believes that a process for "***Language Community Input for Evaluation of new IDN gTLD Strings***" must be clearly established and vetted prior to allowing introduction of new IDN gTLD string. Failure to do so will impact many sectors, including the ISP and connectivity community. ISPCP Constituency Statement on Impacts – New TLDs Page 3

Section 5 – Reserved Name Working Group Recommendations

The ISP community accepts and agrees with the ICANN and IANA recommendations of Section 5 and finds no negative impact on ISP operations or support. The ISPCP is also support of, and finds no negative impacts for, the recommendation on symbols in new gTLDs.

The ISPCP community notes that recommendation 6 – reservation of single letters at the top level – is an important and critical recommendation to the ISP community. We believe that there are old resolvers in operation in developing countries that would be severely impacted (e.g. not work correctly) in the presence of single letters at the top level. Specifically we believe that very old versions of BIND – potentially in use in very small, underfunded ISPs in economically challenged areas – may not process incoming resolution requests properly. The ISP community strongly supports recommendation 6 and believes that further research, at a later date, would be necessary before all impacts on ISPs and connectivity providers could be identified.

The ISPCP notes that an unavoidable impact of these recommendations is problems resulting from poorly written application layer software. The ISP community was severely impacted during the introduction of TLDs that had more than 3 ASCII characters. Many pieces of software incorrectly filtered these TLDs – most likely because software designers thought that there could not be TLDs whose length was greater than three characters. During the first 18 months of introduction of those TLDs there were many calls to ISPs to "fix" the problem with the new TLDs – despite the fact that the ISP and connectivity community were not responsible for issues at the application layer. We fully expect that some software and application designers have also made assumptions about TLDs that will be contradicted by the new recommendations in section 5. The unavoidable impact on ISPs and connectivity providers will mirror the problems that occurred during the introduction of TLDs such as .areo, .travel, or .coop. The ISP community suggests that the existence of so-called "Controversial Names" will also lead to potential regulatory or community pressure impacts on those who provide connectivity.

Section 6 – PRO Areas of Agreement

The ISPCP believes that the six "Areas of Agreement" in the area related to PRO will have no significant impact on ISPs or connectivity providers.

Section 7 – Areas of Broad Agreement

The ISPCP sees the Principles and Recommendations in this section, as reasonable safeguards to a measured and controlled expansion of the generic domain namespace, subject to the comments expressed above.

COMMENTS FROM ICANN'S NON-COMMERCIAL USERS CONSTITUENCY (NCUC)

The GNSO New TLD Committee's Draft Final Report On The Introduction Of New Generic Top Level Domains

GNSO Policy Development Process (GNSO PDP- Dec05)

12 June 2007

Overview

ICANN's Non-Commercial Users' Constituency (NCUC) appreciates this opportunity to comment on the GNSO Draft Recommendations for New GTLD Policy. While much progress has been made in recent weeks to resolve differences, much work remains before a consensus policy can be reached. The NCUC refers to its earlier constituency statements on the introduction of new gtlds, in particular, its statement of December 2006.[1]

Our overall concern remains that despite platitudes to certain, transparent and predictable criteria—the GNSO's draft recommendations create arbitrary vetoes and excessive challenges to applications. There are some for incumbents; for trademark rights holders; for the easily offended, for repressive governments and worst of all, for "the public". It's a wolf in sheep's clothing. A recipe for irregularity, discretion and uncertainty in the new domain name space.[2]

Among the more troubling proposals is the introduction of criteria in which strings must be 'morally' acceptable and not contrary to 'public order' (Recommendation #6). A concept borrowed from trademark law without precedent in the

regulation of non-commercial speech.[3] NCUC opposes any string criteria related to 'morality' or 'public order' as beyond ICANN's technical mandate.

Following recent discussions and revisions, the draft now refers[4], in passing, to 'freedom of speech' rights, but concerns remain that a restriction on certain expression in part of the world will be extended outside that nation, possibly even to the entire world, through ICANN policy. If the GNSO disagrees with NCUC and ultimately include string criteria on morality and public order in its final report, then the recommendations should make clear that ICANN policy on this matter will not be more restrictive than the national law in which an applicant operates.

NCUC remains particularly troubled with Recommendation #20 that would allow the showing of a "substantial opposition" to entirely reject an application. It swallows up any attempt to limit string criteria to technical, operational, and financial evaluations. Recommendation #20 violates internationally recognized freedom of expression guarantees and insures that no controversial string application will ever be granted.

NCUC continues to reject Recommendation 11 and an expanded role of ICANN staff and outside expert panels to evaluate string criteria that is not technical, financial, nor operational.

Recommendation 1.

This is a laudable Recommendation and we support it. We support the broad introduction of many new gTLDs.[5] We welcome the recognition that there are no technical constraints to introducing new gtlds and we hope to see consumer choice and demand served by a more robust approach in the future. ICANN's role is not to second guess the market place and decide which ideas are likely to succeed, but rather, to facilitate

the process for the consumer's decision.

We refer to our concerns above as to the relationship between transparent, predictable criteria and vetoes over applications from unlimited sources.[6] By the many grounds for challenge introduced, criteria will be created and applied *ex post facto* by those responsible for determining challenges. We are also concerned that "normally" in this context be defined more precisely. These issues must be addressed if the objectives of this Recommendation are to be achieved. In particular, a public opposition period is in direct contraction with Recommendation 1 and Implementation Principle A: "New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way."

Recommendation 2

It is beyond dispute that the DNS does not mirror trade mark regulation. Rather it grants plenary rights in words,[7] without any of the compromises in the requirements for recognition, the limits to infringement and the defenses.[8] This is best reflected in the serious issue in the DNS, whereby— *all* rights-holders now seek protection from dilutive use –when only truly famous marks are entitled to that protection in trade mark law.

The Recommendation is vague and thus a general veto for incumbents at the top level. We refer to Professor Christine Haight Farley's legal briefing paper (Attachment A) as to the meaning of confusingly similar. [9] We also refer to Professor Jacqueline Lipton's legal briefing paper (Attachment B) and its discussion regarding the limitations within trademark law on the rights of trademark holders to regulate speech.

The GNSO's draft recommendations cherry pick from trade mark law to create a pastiche of 'values' –divorced from context and structure.[10] No account is taken of the legal requirement of

use in commerce[11] –yet trade mark law requires this. What about fair use, comment, nominative use, criticism, parody and tribute? All protected at law. Under the US Anti-Cybersquatting Consumer Protection Act (ACPA) for example, unless inherently distinctive (i.e. made up words), marks comprised of descriptive (ordinary dictionary) words must acquire secondary meanings in order to become distinctive, otherwise famousness must be made out.[12] Even then there is the safe harbor for fair and lawful use of another's trademark in a domain name.[13] These balancing requirements are not reflected in the Recommendation—although lip service is paid to them.[14] Defined criteria are absent and the promised balance and protection –a blank page open to numerous interpretations.

This Recommendation fails to adequately accommodate non-commercial speech and fair use of trademarks. Presumably what this all really means is that no "sucks" gTLDs (cyber-gripes) will ever be granted, nor indeed notdotcom, or anything that refers to or discusses an association with an existing trademark. Real competition often requires overlapping services that offer consumers choice.*[15]*

Recommendation 3.

This ground for challenge is for rights holders. The language is vague and overbroad— *"existing legal rights of others."*[16]

There is no recognition that trade marks (and other legal rights) have legal limits[17]and — *defenses.*[18] This Recommendation should also state that *such legal rights are subject to their legal limits* under their own national law. Without this—only half of trade mark law is adopted—the claimed rights, *but none of the defenses.*

After recent discussion and forthcoming revisions, the draft now refers to 'Freedom of Speech'.[19] We welcome the amendment

to the Recommendation, although believe it should use the term "Freedom of Expression" since that is the term used in international treaties and agreements. We remain concerned however that general references to Conventions and Treaties must be translated into real protection for the right of the public to make use of their legal rights to language and free speech.

Bizarrely, the level of support for the rights-holder seems to be thought to be determining –rather than the validity or extent of his claimed rights and the existence of defences:

"ii. An application may be rejected or deferred if it is determined, based on public comments or otherwise, that there is ***substantial opposition*** *to it from significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support.* ***ICANN staff will develop criteria and procedures for making this determination,*** *which may be based upon ICANN's procedures which were used to examine the 2003 round of sponsored TLD applications."*

What is provided for here is discretion.[20] This (now recommendation #20) cannot be meaningfully considered absent the criteria. We also oppose the "*substantial opposition*" formula –used again elsewhere. This is not predictable criteria and nor in this case is it of any relevance whatsoever to the nature and quality of the rights claimed and the existence of limits and defences. We refer to the objectives of Recommendation 1 and their contradiction with a public opposition period.

Recommendation 5

We oppose any attempts to create lists of reserved names. Even examples are to be avoided as they can only become prescriptive.

We are concerned that geographic names should not be fenced off from the commons of language and rather should be free for the use of all. This has been the traditional approach of trade mark law and remains the case in many nations.[21] Moreover the proposed recommendation does not make allowances for the duplication of geographic names outside the ccTLDs—where the real issues arise and the means of resolving competing concurrent use and fair and nominative use.

Recommendation 6

Again, we welcome the amendment to include recognition of rights to Freedom of Expression.[22] It is quite clear that this applies to single words and to strings, see *Taubman v. Webfeats* 319 F.3d 770 (6th Circuit 2003) (*"The rooftops of our past have evolved into the Internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and [defendant] has a First Amendment right to express his opinion about [plaintiff], as long as his speech is not commercially misleading, the Lanham Act cannot be summoned to prevent it).*

We welcome the deletion of GAC Public Policy principle 2.1 from the GNSO's recommendations. We objected in the strongest possible terms to the vague standard of *"sensitivities,"* which would subject all to the most restrictive views and had no place in the international legal order. GAC quoted selectively from the preamble to the 1948 Universal Declaration of Human Rights (UDHR) without reference to the enumerated specific right to Freedom of Expression in Article 19.[23] The UDHR Art. 29(2) provides the only permitted limits.[24] Similarly, the European Convention on Human Rights (ECHR) mandates Freedom of Expression should only be subject to limits prescribed by law[25] *and* necessary in a democratic society for one of the enumerated purposes, see Article 10[26] which also applies to commercial expression.[27] Strict scrutiny is applied to

any attempt to limit the free expression of an idea.[28]

This Recommendation is borrowed from trade mark law[29] and the French concept of '*ordre public*.'[30] This is now subject to Article 10 ECHR[31] and Freedom of Expression and the modern standard is high.[32] While a few nations limit Free Expression by laws preventing hate speech, and incitement to violence, lowering the threshold to 'sensitivities' is tantamount to mandating political correctness,[33] forced hegemony, and is dangerous and to be resisted in every context. It does not matter how laudable the public policy objective, ICANN should remain content neutral.[34]

We oppose any string criteria based on morality and public order. The context is not exclusively commercial speech so trade mark law is not an analogy as registration of marks on government Registers involves an element of state sanction[35] that is not true of the DNS (though many seek it).[36] There is no consensus on the regulation of morality in non-commercial speech in international law. We refer to the quote from *Taubman* (above)—the TLDs are billboards. *Democracies do not have laws requiring people to speak or behave morally.* Some nations do have such rules – undemocratic theocracies mainly.

ICANN should stick to its technical remit, which it risks grossly exceeding here. It should defer to applicable national laws on matters of public order and morality. Applicants should comply with the content laws in the countries in which they operate.[37] The only real issue is, in any event, public order which is already served by nations' own laws on obscenity, fighting words, hate speech and incitement.

Please be aware that criticism, satire, parody of others and their beliefs are a fundamental tenant of Freedom of Expression[38] *which includes the right to offend.* ICANN must ensure this *in practice* and mere references to Treaties and Conventions do not

go far enough.

Recommendation 7

We record that this must be limited to transparent, predictable and minimum technical requirements only. These must be published. They must then be adhered to neutrally, fairly and without discrimination.

Recommendation 8

We support this recommendation to the extent that the criteria is truly limited to minimum financial and organizational operational capability. We remain concerned that in implementation of this recommendation, burdensome, expensive, and unnecessary criteria could be applied. All criteria must be transparent, predictable and minimum. They must be published. They must then be adhered to neutrally, fairly and without discrimination.

Recommendation 9

We strongly support this recommendation and again stress the need for all criteria to be limited to minimum operational, financial, and technical considerations. We also stress the need that all evaluation criteria be objective and measurable. We note that a 'public opposition process' as contemplated by Recommendation 20 and the use of ICANN staff and expert panels (Rec. #11) to evaluate any additional criteria will significantly detract from the goals of Recommendation 9.

Recommendation 11

The use of ICANN staff to evaluate applicant criteria should be limited to the function of determining whether objective operational, technical, and financial criteria are met only. ICANN staff should not be making evaluations about morality or other public policy objectives. We furthermore strongly oppose any use of "Expert" panels to adjudicate someone's right

to use a domain name. Neither ICANN staff nor expert panels can provide any level of public accountability or legitimacy to adjudicate fundamental rights. This will only invite insider lobbying and gaming. Getting this issue right in the policy gives meaning to the rest of the recommendations. Without objectivity, neutrality, impartiality and accountability here –all of the other Recommendations are meaningless platitudes. This function should be tendered out – just as the validation process in the Sunrise Rights Protection Mechanism has been in some cases. Arms length contractors should perform this task.

Recommendation 12

Our position in relation to Recommendation 11 applies mutandis mutandi. This should be tendered to qualified professionals, selected by rota, at arms-length who apply certain criteria.

Recommendation 20

As discussed above, we strongly oppose the *'substantial opposition'* criteria for rejecting a domain. A public opposition period grants a veto on the creation of a domain for any vocal (or well-financed) minority, or for any competitor in the marketplace of ideas or services.

Recommendation #20 is *totally* incompatible with internationally recognized Freedom of Expression guarantees. Not even trade mark applicants must have everyone agree –they can still succeed in the face of an opposition. This Recommendation will insure that no controversial gtlds will exist and provides the means for killing the following types of applications for new gtlds:

- The Catholic Church objects to the Church of England's application for ".christian";

- China objects to an application of ".humanrights" in Chinese characters;
- A competing bank applies for a ".bank";
- Competing factions within the same community each claim to be the rightful owner;
- The Moral Majority objects to Planned Parenthood's application for ".abortion".

Recommendation 20 swallows up any attempt to narrow the string criteria to technical, operational and financial evaluations. It asks for objections based on entirely subjective and unknowable criteria and for unlimited reasons and by unlimited parties. ICANN should endeavor to keep the core neutral of these types of policy conflicts, both because they invite disaster for ICANN to become entwined in such issues, but also because such a policy is incompatible with freedom of expression rights. In short, Recommendation #20 is bad policy for the public and it is bad policy for ICANN.

ATTACHMENT A TO NCUC STATEMENT

LEGAL BRIEFING FROM LAW PROFESSOR CHRISTINE HAIGHT FARLEY

Professor of Law and Associate Dean for Faculty and Academic Affairs

---

17 June 2007

Author: ICANN – Liz Williams (liz.williams@icann.org)
GNSOPDPDec05 -- Introduction of New Top-Level Domains
Part B: Supplementary Materials
This is a working document and has no official status.

American University Washington College of Law

RESPONSE TO THE DRAFT FINAL REPORT OF THE GNSO NEW GTLDS COMMITTEE ON THE INTRODUCTION OF NEW GENERIC TOP-LEVEL DOMAINS

June 6, 2007

Statement by Christine Haight Farley

Professor of law

American University Washington College of Law

I want to begin by commending the GNSO New TLDs Committee on their policy recommendations and implementation guidelines for the introduction of new top-level domains. Through the Draft Final Report ICANN has explicitly stated its intention to make the GTLD application process open and transparent. The Draft Final Report has focused the issues and prompted a useful discussion. However, because I believe that the Draft Final Report includes a number of misstatements of domestic and international trademark law, I offer my legal analysis of these provisions.

I will address my remarks only to Recommendations 2, 3 and 6 as these recommendations rely heavily on trademark law concepts.

Before I make observations specific to these recommendations, I would like to offer some general remarks about the overall incongruence between trademarks and domain names. It is important to note at the outset this general lack of equivalence between trademark law and domain name policy. For instance, trademark law the world over is fundamentally based on

the concept of territoriality. Thus trademark law seeks to protect regionally and market-based marks without implication for the protection or availability of that mark in another region. In contrast, domain names have global reach, are accessible everywhere and have implications for speech around the world.

Likewise, trademark protections hinge on what the relevant consumer thinks. Again, the law considers the viewpoints of consumers of a particular country, region or market, and acknowledges the variability of these viewpoints across regions. Domain names are not directed to a certain class or geographical region of consumers—they are accessible to all. Therefore in order to take account of consumers' viewpoints, it would be necessary to consider a global public. The resulting one-size-fits-all approach would be anathema to trademark law in that it would leave consumers confused in one place while unjustifiably denying speech rights in another.

Finally, trademarks rights are not applied abstractly of in theory, but are always considered in context. Thus, in order to determine whether the use of a mark by another would likely cause confusion, it is necessary to analyze how mark is used in commerce. Consideration will be given to what goods or services it is applied to, what design or color scheme accompanies the use, what the level of consumer sophistication is, what marketing channels are used, etc. Generic top-level domains are necessarily abstract. We can not know in advance what the content of a website hosted at a certain address will be. It is therefore impossible to make fine-tuned conclusions about the appropriateness of certain domains. For these reasons, I strongly urge domain name policy makers to consider carefully the appropriateness of importing trademark law concepts into domain name policy.

Recommendation 2: "Strings must not be confusingly similar to an existing top-level domain."

In this recommendation, the Committee seems to be collapsing two distinctly different concepts: confusing similarity and likelihood of confusion. The Draft Final Report states that "'confusingly similar' is used to mean that there is a likelihood of confusion."[39] However, confusingly similar is a different legal standard than likelihood of confusion. The Committee appears to base this recommendation on Section 3.7.7.9 of the ICANN Registrar Accreditation Agreement, which it cites, implying that the legal standard is consistent. But that section of the ICANN Agreement explicitly employs the standard of infringement, which is likelihood of confusion.

A determination about whether use of a mark by another is "confusingly similar" is simply a first step in the analysis of infringement. As the committee correctly notes, account will be taken of visual, phonetic and conceptual similarity. But this determination does not end the analysis. Delta Dental and Delta Airlines are confusingly similar, but are not likely to cause confusion, and therefore do not infringe. As U.S. trademark law clearly sets out, the standard for infringement is where thee use of a mark is such "as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive…"[40] While it may be that most cases of confusing similarity are likely to cause confusion, because the infringement standard takes account of how the mark is used, some cases of confusing similarity will not likely cause confusion.

In trademark law, where there is confusing similarity and the mark is used on similar goods or services, a likelihood of confusion will usually be found. European trademark law recognizes this point perhaps more readily than U.S. trademark law. As a result, sometimes "confusingly similar" is used as shorthand for "likelihood of confusion." However, these concepts must remain distinct in domain name policy where there is no opportunity to consider how the mark is being used. As applied to

domain names, the only level of analysis is the first level of analysis: confusing similarity.

A related problem with this recommendation is that it equates domain names with trademarks as legally protectable properties. They are not. Trademarks are legally protected intellectual property because it is believed that the commercial use of a mark by another that is likely to cause confusion would injure consumers. Trademarks are legally protectable intellectual property also because their owners have developed valuable goodwill in the marks. Neither of these conditions of legal protection apply in the case of domain names.

Moreover, it is not clear what consumers would be confused about when encountering a string that is confusingly similar to an existing top-level domain. Because, unlike trademarks, strings are not inherently commercial communication means, it does not follow that consumers would incorrectly assume that the string would indicate source of origin. For example, http://nmhm.washingtondc.museum/ does not suggest to consumers a connection with www.museum.com.

Beyond top-level domains, the Draft Final Report states that "strings should not be confusingly similar either to existing top-level domains like .com and .net or to existing trademark and *famous names*."[41] The Draft Final Report notes that the Committee relied on "a wide variety of existing law" to reach this standard.[42] And yet, "famous names" is not a legal category under any trademark law. International trademark law grants rights to "well-known marks"[43] and to "trade names,"[44] and U.S. law grants rights to "famous marks,"[45] but "famous names" seems to be a construct created by the Committee. Clearly, the domain name policy should protect only recognized intellectual property.

Recommendation 3: "Strings must not infringe the

existing legal rights of others that are recognized or enforced under generally accepted and internationally recognized principles of law."

There are simply too many legally recognized trademarks in the world to make this recommendation workable. The United States alone registers well over 100,000 trademarks each year[46] and there were 1,322,155 active certificates of registration last year. In the United States, state registered trademarks and common law trademarks are also legally recognized. Protected trademarks include generic terms, geographical terms, names, and fanciful words.

Recommendation 6: "Strings must not be contrary to generally accepted legal norms relating to morality and public order."

The Committee is correct that a variety of trademark legislation restrict registrations based on some notion of offense or immorality. Unfortunately, the Committee seeks to extend this trademark law concept to domain name policy. This extension is not a natural one and presents many problems in its application.

Where these content restrictions exist in trademark law they are understood as merely restricting the registration of trademarks, not the use of such trademarks. That is, under certain legislation a trademark may be deemed unregistrable but the trademark owner may still use the trademark in commerce and may even have the benefit of legal protection over the trademark. The only restriction is that the trademark owner is denied certain benefits of registration.

The United States has such a content restriction in its trademark law.[47] What saves this legislation from violating the First Amendment is that it is not a restriction on use; it is merely a restriction on certain legal benefits deriving from federal

registration. Any restriction of the use of the trademark would need to comply with the First Amendment. For instance, a mark may be restricted from use where it has been found to be obscene. Obscenity is a legal category whose threshold is well above the category of immoral or offensive speech.

The restriction of a generic top-level domain is more akin to the restriction on use than to the restriction on federal trademark registration. Because restricting offensive words in Generic top-level Domains would concomitantly restrict the ability of all speakers, commercial and non-commercial, ICANN should consider legal models outside of trademark law that better address the balance of speech rights.

This recommendation also illustrates the lack of fit between trademark law and domain name policy. Because trademark law is territorial in nature, legal standards reflect the consumer perspectives of the particular state. These standards are thus expected to vary from state to state as the way consumers respond to marks in one state may differ from the way consumers would respond to the same mark in another state. Trademark content restrictions are similar in approach. For instance, under U.S. trademark law, a mark will be refused registration if it is deemed to be scandalous or immoral when considered from the perspective of "a substantial composite of the general public."[48] The "public" is understood to mean the U.S. public. In order to extend this legal standard to domain names it would be necessary to consider a substantial composite of the general public of the entire world. This is obviously an unworkable standard.

Moreover, trademark law standards are always applied in the context of how a consumer would encounter the mark. Thus, the USPTO and the courts consider the entire label, what products or services are sold under the mark and what channels of commerce and marketing will be used. As a result, marks challenged as being scandalous may in fact be found to have a

double entendre.[49] The extension of this trademark law standard to domain name policy thus risks prohibiting words as generic top-level domains that could well be used in inoffensive ways.

A few other observations are in order. First, under U.S. trademark law, in cases of doubt or ambiguity, both the USPTO and the Federal Circuit will pass the mark to publication to give others the opportunity to object.[50] If ICANN finally decides to employ any content restrictions, erring on the side of permitting the speech should be the rule.

Second, the Paris Convention permits rather than requires content restrictions. Article 6*quinquies* of the Paris Convention merely allows a Member state to deny registration to a mark duly registered in another Member state on the grounds of morality or public order.[51] This article makes clear the expectation that a mark may be acceptable in one state, while it is offensive in another. The WTO TRIPS Agreement is silent on content restrictions.[52]

Finally, although some trademarks have been denied registration under U.S. trademark law, this remains a little known or utilized provision of U.S. trademark law. Furthermore, the majority of challenges brought under this provision are brought by third parties and not the USPTO.

Thank you for your consideration.

Respectfully submitted,

Christine Haight Farley
Professor of Law and Associate Dean for Faculty and Academic Affairs
American University Washington College of Law - Washington, DC 20016
Phone: 1-202-274-4171 Fax: 1-202-274-4015
Email: cfarley@wcl.american.edu Web:

---

www.wcl.american.edu/faculty/farley

ATTACHMENT B TO NCUC STATEMENT

-

LEGAL BRIEFING FROM LAW PROFESSOR JACQUELINE LIPTON

Professor of Law

Co-Director, Center for Law, Technology and the Arts

Associate Director, Frederick K Cox Center for International Law

Case Western Reserve University School of Law

New Top Level Domain Name Introduction Proposals

Briefing Paper: Some Legal Issues

Professor Jacqueline Lipton

June 6, 2007

Background

I have been asked to prepare a brief legal issues paper for IP Justice, by its Executive Director, Robin Gross. The paper is in respect of ICANN's recent Proposed Recommendations for the introduction of new generic Top Level Domain Names (gTLDs) and the Noncommercial Users' Constituency's (NCUC) suggested amendments to those recommendations.[53]

---

17 June 2007

Author: ICANN – Liz Williams (liz.williams@icann.org)
GNSOPDPDec05 -- Introduction of New Top-Level Domains
Part B: Supplementary Materials
This is a working document and has no official status.

Issues Raised by IP Justice and NCUC (ICANN Recommendations 3, 6. 8, and 11)

The current ICANN recommendations contemplate that ICANN should implement a process that would accommodate the introduction of new gTLDs that are not currently available to Internet domain name registrants or registries. In its recommendation paper,[54] it contemplates several principles for deciding on strings of characters that may be utilized in a new gTLD. These principles include:

- New strings should not infringe the existing legal rights of others (*Recommendation 3*).
- New strings should not be contrary to generally accepted legal norms relating to morality/public order (*Recommendation 6*).
- Applications for new strings should be rejected or deferred if there is substantial opposition to a relevant string from 'among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support' (*Recommendation 8*).
- ICANN staff evaluators will make preliminary determinations about applications for new gTLD strings (*Recommendation 11*).

The NCUC and IP Justice have raised particular concerns about aspects of these recommendations.[55] Specifically, they are concerned that some of ICANN's proposals give too much weight to trademark holders' interests without giving sufficient weight to other competing legal interests in words and phrases, such as those arising from legal concepts of free speech.[56] They have also voiced concerns

that under Recommendation 6, ICANN may by default be trying to legislate internationally for morality and public order and that this may not be an appropriate burden for ICANN, as opposed to national lawmakers. They raise related concerns with respect to ICANN Recommendations 8 and 11 in the sense that these recommendations focus more on international legal and cultural norms than on the technical capacities and functions of ICANN. Recommendation 8 also raises the specter of censorship in the introduction/use of new gTLDs by bodies that have not been clearly defined in the ICANN proposals. It is also unclear how decisions would be made as to the rejection or deferral of new strings on this basis. Which organizations would be consulted? Whose policies would be applied? What experts, if any, would ICANN consult?

ICANN Recommendations 5, 9 and 12

I would add some similar concerns about the following ICANN recommendations:

- New strings should not include country, territory or place names or words describing countries, territories, languages or peoples in the absence of agreement with relevant governments or public authorities (*Recommendation 5*).
- Applications for new gTLDs must entail a clear and pre-published application process using 'objective' and 'measurable' criteria (*Recommendation 9*).
- Dispute resolution processes must be established prior to the start of the relevant process (*Recommendation 12*).

Recommendation 5. This recommendation raises the specter of government censorship or control of particular

gTLDs. This may or may not prove to be a problem in practice given the existence of two character country-code top level domains (ccTLDs) within the current system. These ccTLDs have apparently not, to date, created major problems, at least as compared with some of the issues arising under currently available gTLDs. However, it is possible that a new gTLD string pertaining to a country would prove to be more desirable than a corresponding ccTLD and this recommendation may give imbalances of power or control over particular new gTLDs to certain governments or public authorities. In some ways this concern mirrors the concerns of IP Justice and the NCUC about Recommendation 8 to the extent that it is unclear under that recommendation whose policies should be protected in the decision to defer or reject registration of a particular gTLD string. An associated concern with recommendation 5 is that it may not always be clear who is the relevant government or public authority who would need to agree to the use of a particular new gTLD: for example, would all Asian countries have to agree to the use of a '.asia' gTLD and, if so, how should 'Asian country' be defined in this context and who should define it?[57] Moreoever, who should decide which 'public authorities' should be consulted about use of particular new gTLDs? How should 'public authority' be defined here?

Recommendation 9. This recommendation calls for the use of pre-published 'objective' and 'measurable' criteria in the application process for new gTLDs. It is not clear how ICANN *per se* would establish such criteria. If it is contemplated that ICANN would consult relevant national and international bodies or individuals in discharging this problem, then perhaps this recommendation is not so problematic. However, such a consultation process would likely take a long time and may slow down the introduction of new gTLDs for a considerable period. Such a process would entail: (a) identifying relevant expert bodies; (b) consulting with them on relevant issues: and, (c)

translating relevant issues into a set of pre-published objective and measurable criteria for the new gTLD application process. This further assumes that such issues are indeed transferable to objective and measurable criteria.

Recommendation 12. Dispute resolution processes may be much more problematic in practice than contemplated by ICANN's recommendation 12. My assumption is that Recommendation 12 refers to simple dispute resolution processes for new gTLDs such as those currently in effect under the Uniform Domain Name Dispute Resolution Policy (UDRP)[58] for some existing gTLDs. The problem here is that dispute resolution processes that take account of multiple legal interests outside commercial trademark interests are not easy in practice. Different jurisdictions, and different bodies within the same jurisdiction, may diverge widely in attitudes and even in laws on free speech, public order etc. Arbitrators under simple UDRP-style dispute resolution processes may not be equipped to handle these kinds of disputes. Dispute resolution procedures may therefore have to be somewhat more complex than is currently contemplated by ICANN if they are to take account of a variety of competing legal interests, rather than merely trademark interests. For example, while there are some things a simple arbitration process can handle well, there are other things that are much more complex and difficult and may need to be turned over to national courts or experts.[59]

General Discussion

It is important to start re-focusing the regulation of the Internet domain name system generally on interests outside of pure trademark interests. The introduction of new gTLDs and the development of processes for introducing them may provide a good opportunity for achieving this goal. However, any attempt to regulate broad policy issues relating to social and cultural norms on speech, public order and morality in domain

names will be very difficult for any national or international body or group. ICANN also faces the practical difficulty that its major area of expertise is technical and functional. It is therefore important for ICANN to clarify what groups, bodies or individuals it might utilize in carrying out future legal and social developments within development of its domain name processes. In particular, ICANN should consider more specifically who to consult in formalizing specific processes for: (a) the introduction of new gTLD strings; (b) establishing dispute resolution procedures for those strings; and, (c) deciding whether the introduction of particular new strings should be deferred or rejected.

It should also be noted at the outset that many of the key problems identified by ICANN, IP Justice and the NCUC reflect legal issues that have arisen in the past with respect to existing gTLDs, although perhaps in slightly different contexts. In other words, the balance between trademark interests and other legitimate interests in Internet domain names, for example, has already proved problematic in situations involving disputes about registration and use of domain names under existing gTLDs (notably .com, .org and .net). Thus, in many ways, the 'balance of interests' questions in the new gTLD debates could be regarded as an extension of unresolved issues under current domain name laws and policies. The addition of new gTLD processes will likely exacerbate existing legal problems. The upside of this is that it may, and hopefully will, provide a new forum for addressing some of these problems.

In my view, it is important to put the debate about new gTLD processes into its historical context in order to properly address the concerns that have been raised here. So please bear with me for a couple of paragraphs while I describe this context and why it is important now. The current framework for regulating disputes relating to '.com', '.net' and '.org' domain

names has been focused largely on the protection of commercial trademark holders against cybersquatters.[60] There is little harmonized attention paid to the protection of other legitimate interests in relevant Internet domain names within this framework. This is evidenced in the drafting of the UDRP and the American Anti-Cybersquatting Consumer Protection Act (ACPA).[61] While these regulations do make allowances for 'legitimate interests' in domain names where relevant domain names have not be registered or used in bad faith,[62] they do not set out rules to affirmatively protect non-trademark-based registrations and uses of .com,. .org or .net domain names.[63] This is not particularly surprising because it was not the intention behind these rules to do so.

The historical focus on the protection of trademarks against bad faith cybersquatters is understandable within its context. These were key concerns of relevant regulators in the mid to late 1990s when e-commerce was in its infancy, and governments wanted to encourage this new medium of commerce. It was widely thought – although not universally agreed – that bad faith cybersquatting *per se* was a socially wasteful activity that potentially harmed the development of electronic commerce without producing any associated social benefits.[64] There is probably nothing inherently wrong with the UDRP and ACPA in this respect. They did deal with a real world problem and, in many respects, they are now old news. Presumably, this is why debates today about the introduction of new gTLD processes do not dwell on the rules and regulations implemented in 1999. However, those rules and regulations have raised new post-1999 problems that have not yet been addressed in a systematic way.[65]

Issues under the existing domain name system that relate to the balance of trademark interests with other legitimate interests in domain names do include the need to balance

trademark interests with interests such as: interests in personal names, cultural and geographic indicators, free speech (including the right to parody, comment on and criticize a trademark holder), other basic human rights, and rights to free and democratic government.[66] ICANN has identified some of these issues in its recommendations. IP Justice and the NCUC have raised concerns about clarification of, as well as appropriate implementation of, ICANN's stated goals here.

The main problem for ICANN in identifying and implementing these kinds of 'interest balancing ideals' is that, as with its administration of existing gTLDs, ICANN's expertise is largely technical and functional. It is not a body staffed with people whose main expertise is to deal with these difficult balances of competing legal and social interests in multiple societies around the world. Effectively bringing debates about international public order and morality, as well as free speech and human rights generally, into a predominantly technical process comes at a high cost. However, failing to address these issues in a relevant forum also comes at a high cost, as previous and current experiences have shown us.

What is needed at this point is a combination of the following: (1) ensuring that the technical aspects of this process do not somehow become a default proxy to legislate for important and complex national and international social, cultural and legal norms; (2) more clearly identifying bodies or individuals who can appropriately identify and make recommendations on relevant issues within the development of the more technical aspects of the process; and, (3) ensuring that these bodies are brought into the relevant process in time to prevent damage to important legal and social interests. To some extent, that may be what is happening at the moment, but this process may need to be more formalized to avoid exacerbating some of the problems that have arisen in the past under the

current domain name system.

Conclusions

The aim of this briefing paper has been to raise awareness of ideas that may be pertinent in the ongoing process to develop new gTLDs. My hope is that this paper generates, or at least facilitates, useful debate in this context. There are, as yet, no clear solutions to many of the problems addressed. We seem to be at a point in the development of the new gTLD processes where it would be useful to more fully identify and discuss relevant legal and social issues, as well as bodies and individuals that may be best suited to advise on them, and ultimately help draft and implement regulations about them where possible. This is an important time in the development of the domain name system and this kind of debate and development would prove extremely useful, particularly in order to avoid some of the practical problems with respect to new gTLDs that are already evident in the administration of domain names registered under existing gTLDs.

Jacqueline D. Lipton, Ph.D.

Professor of Law

Co-Director, Center for Law, Technology and the Arts

Associate Director, Frederick K Cox Center for International Law

Case Western Reserve University School of Law

11075 East Blvd, Cleveland, Ohio, 44106, USA

Email: JDL14@case.edu Tel: + 1 216 368 3303 Fax: + 1 216 368 2086

[1] Available online at: http://www.ipjustice.org/ICANN/NCUC_Comments_on_New_gTLDs.pdf

[2] Indeed— one of its refrains is a '*substantial opposition'* formula. This is not rule based predictable criteria.

[3] ICANN should defer to nations' laws on obscenity and not attempt to gold-plate them with unrelated concepts from trade mark law.

[4] This was added to the draft on 7 June 2007 to Recommendation 6.

[5] We note the defensive and cautious approach employed in the discussion on this recommendation is symptomatic of the suspicion with which the creation of new a gTLD has historically been approached— as the grant of an indulgence. This has led to the artificial scarcity of today.

[6] We also welcome standard contracts albeit that we believe that everyone would be also served by stronger analysis and recommendations on standardization in Rights Protection Mechanisms.

[7] G. Dinwoodie, *(National) Trademark Laws and the (Non National) Domain Name System,* 21 U. PA. J. Int'l Econ. L. 495 (2000) p. 520.

[8] Those include the requirements that marks be well-known or famous before dilution can be claimed; the limits to dilution, the requirement that the speech must be commercial and the infringing use— use as a trade mark, the prohibition on generic and descriptive marks; honest concurrent use; geographic and territorial limits and others.

[9] It says in (iii)"In addition, the concept of "confusingly similar" is used to mean that there is a likelihood of confusion on the part of the relevant public. In international trade mark law, confusion may be visual, phonetic or conceptual. The Committee used a wide variety of existing law to come to some agreement that strings should not be confusingly similar either to existing top-level domains like .com and .net or to existing trademark and famous names"

[10] The pre 7 June draft, referred to consumer confidence and security. These have now gone. No criteria replace them to provide any qualifications.

[11] See §10(6) of the UK 1994 Trade Marks Act 1994 which requires use in the course of trade for infringement. See also Art. 5 of the Trade Marks Directive (89/104). In *Arsenal Football Club v Matthew Reed* [2003] R.P.C. 9 the ECJ affirmed the proprietor cannot prohibit the use of a sign identical to the trade mark for goods also identical, if that use cannot affect his interests as proprietor having regard to its functions—so that certain uses for purely descriptive purposes are excluded from the scope of Art. 5(1). This includes use creating the impression of a link in trade, so that the use must be in the course of trade and in relation to goods within Art. 5(1). If there is identity of sign and goods or services, the protection under Art.5(1) (a) is absolute, whereas Art.5(1) (b) also requires a likelihood of confusion, see *Anheuser-Busch v Budejovicky Budvar NP* Case C -245/02 [2005] E.T.M.R 27. See also §10(6) which enables comparative advertising –also permitted by Directive (97/55/EC)—but also reference to and identification of genuine goods and services of the proprietor provided honest. See Lanham Act, 15 U.S.C. §1114(1)(a) which defines infringement as use of *"a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive…".* Further under the Federal Trademark Dilution Act (FTDA) a claimant alleging a violation must prove inter alia: *" the defendant is making a commercial use of the mark in commerce."* The Anticybersquatting Consumer Protection Act 1999 (ACPA) requires bad faith *intent to profit*. See *Taubman v. Webfeats* 319 F.3d 770 (6th Circuit 2003) (''The Lanham Act is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the First Amendment'' many expressions of a mark were not a 'trademark use' and not likely to cause confusion and therefore "outside the jurisdiction of the Lanham Act and necessarily protected by the First Amendment."). See *Bosley Med. Inst. v. Kremer*, 403 F.3d 672 (9th Cir. 2005)(non-commercial expression of opinion was not a "trademark use" subject to regulation by the mark holder). See also 1-800 Contacts v. WhenU.com 414 F3d 400 (2d Cir. 2005), (the vast majority of uses were outside the scope of trademark law and only those specific uses visually associated with the sale of goods/services could be regulated by trademark).

[12] The following factors are to be considered in relation to distinctiveness and famousness under 15 U.S.C. §1125(c)(1): (A) the degree of inherent or

acquired distinctiveness of the mark; (B)the duration and extend of use of the mark in connection with the goods or services with which the mark is used; (C)the duration and extent of advertising and publicity of the mark; (D)the geographical extent of the trading area in which the mark is used; (E)the channels of trade for the goods and services with which the mark is used; (F) the degree of recognition of the mark in the trading areas and the channels of trade used by the marks' owner and the person against whom the injunction is sought; (G)the nature and extent of use of the same or similar marks by third parties; and (H) the Act by which it was registered.

[13]15 U.S.C. §1125(B)(ii).

[14] See (ix) *"The proposed implementation plan deals with a comprehensive range of potentially controversial (for whatever reason) string applications which balances the need for reasonable protection of existing legal rights and the capacity to innovate with new uses for top level domains that may be attractive to a wide range of users"* In fact –this claimed balance is entirely absent. We can only assume it refers to implementation guideline 6 *"ICANN will provide for the ability to settle conflicts between applicants (such as string contention) at any time. A defined mechanism and a certain period for resolution of identified conflicts will be provided."*

[15] Muller & McKnight, *The Post .com Internet*, (2003) at p. 11, www.digital-convergence.info.

[16] Prior to 7 June, it also employed *"prior third party rights" and gave the examples of* trade marks and rights in names and acronyms of inter-governmental organizations.

[17] E.g.—commercial use; geographic and territorial limits; the Nice Classification system for classes; requirements of true fame for dilution.

[18] E.g. fair use; genericness/descriptiveness; honest concurrent use; own name; invalidity; deceptiveness, geography, etc.

[19] We would also like to see recognition of the rights of all to the commons of language. These include but are not limited to the rights of the public to free speech and to use descriptive and generic words, including where permitted by the law of the nation state where they reside, to use words which may be subject to Legal Rights in particular classes of the Nice Classification System– outside those classes. In relation to unregistered Legal Rights, they include the right to use words that are not subject to protection in their nation state or where no goodwill or reputation arises in their nation state in relation to such a

word. They include the right to make fair and legitimate use of words in which others may claim Legal Rights. Trade mark law does this—via the limits, and the highly sophisticated compromises in the defenses.

[20] Further, it continues: iii. There are a number of ways in which ICANN could approach the resolution of this type of problem which includes the full range of "ICANN saying nothing; ICANN identifies a possible issuing and ICANN files a complaint; ICANN identifies a possible issue but relies on a complainant to file it formally; ICANN identifies an issue, makes a decision and the applicant can appeal." iv. The final approach to this set of potentially controversial problems will be resolved through ongoing discussions with members of the Committee and ICANN's implementation team. This is Byzantine and esoteric. To the uninitiated it is also meaningless. To the initiated it represents the ability to lobby against a particular application. We refer the Council to the admirable aims expressed in Recommendation 1.

[21] The UK 1994 Trade Marks Act provides at §3(1)(c) that trade marks which consist exclusively of signs or designations which serve to indicate geographical origin should not be registered and the ECJ has interpreted this as requiring that geographical names which are liable to be used as undertakings must remain available to such undertakings as indications of the geographical origin of the category of goods concerned, see *Windsurfing Chiemsee* [1999] ETMR 585. See however the European Regulation 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, as amended by Regulation 535/97, which allows protections for these products.

[22] This change was made on 7 June 2007.

[23] "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[24] *" (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations* ***as are determined by law solely for the purpose*** *of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."*

[25] This binds all in the UK because it binds the courts who must interpret all law in accordance with it, §6 Human Rights Act 1998.

[26] "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...(2) The exercise of these freedoms, since it carries with it duties and responsibilities, *may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,* in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[27] *See Casado Coca v Spain* (1994) 18 EHRR 1 §§33-37

[28] Art 10's limitations must be justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued, see Case C-112/00 *Schmidberger Internationale Transporte und Planzuge v Austria* [2003] 2 CMLR 34, p.1043.

[29] Art. 6 quinquies, paragraph B3 of the Paris Convention of 20 March 1883 (as last revised at Stockholm on 14 July 1967) provides for refusal and invalidity of registration in relation to trade marks that are 'contrary to morality or public order'. See Art. 7(1)(f) of the Community Trade Mark Regulation and Art. 3(1)(f) of the Trade Marks Directive. In the UK §3(3)(a) of the Trade Marks Act 1994, trade marks shall not be registered if they are 'contrary to public policy or accepted principles of morality'.

[30] *Philips Electronics NV v Remington Consumer Products* [1998] RPC 283 at 310 per Jacob J. See also the use of the words 'contrary to … public order' in the English text of Article 6 quinquies of the Paris Convention and the words 'qui sont contraires à l'ordre public' in the French language versions of Article 7(1)(f) of the Community Trade Mark Regulation and Article 3(1)(f) of the Trade Marks Directive.

[31] This is treated as falling within prevention of disorder as the relevant enumerated purpose. That is, by accommodating the concept of *'ordre public'* within the *'prevention of disorder'* (in the French text of the Convention *'à la defense de l'ordre'*) under Article 10. However, the right to freedom of expression predominates and any real doubt as to the applicability of the objection must be resolved by upholding the right to freedom of expression,

hence acceptability for registration.

[32] See Case R 111/2002-4 *Dick Lexic Limited's Application* (25 March 2003) the Fourth Board of Appeal of the Community Trade Marks Office at §9 "these words merely designate things but they do not transmit any message; secondly, the association of the two words does not necessarily reinforce the connotation of the mark…. In principle, the mark does not proclaim an opinion, ***it contains no incitement, and conveys no insult.*** In the Board's opinion, in these circumstances, the mark should not be regarded as contrary to either public policy or accepted principles of morality." See also IN THE MATTER OF Application No. 2376955, to register a trade mark in classes 25 & 26 by Sporting Kicks Ltd, Decision by C Hamilton 11 November 2005 where the level was a badge of antagonism and likely to cause alarm or distress.

[33] The only measure we are aware of is the Additional Protocol (to the European Convention on Cybercrime) concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems in force in 2006. The US did not sign or ratify due to its conflict with First Amendment Free Speech and nor did the UK.

[34] In *Reno v. American Civil Liberties Union*, 117 St. Ct. 2329 not even the legitimate and important congressional goal of protecting children from harmful materials, was to abridge the freedom of speech protected by the First Amendment.

[35] For the US position see, *Moral Intervention in the Trademark Arena: Barring the Registration of Scandalous and Immoral Trademarks* (1993) 83 TMR 661 by Stephen R. Baird

[36] Further, trade mark laws are territorially limited and ccTLDs are premised on the assumption that a nation is monocultural with a unitary legal system and a generally accepted standard of morality and taste often with only one or two dominant religions. No such standards can be extrapolated globally in a multicultural context.

[37] If the proposed name would infringe ***a law*** in a nation state which objects to the application—the application could be granted with conditions restricting or preventing its use in the objecting state(s) which we understand is technically possible. This would prevent one State imposing its laws on others.

[38] We refer to the Parliamentary Assembly of the Council of Europe Resolution 1510 (2006) on Freedom of Expression and Respect for Religious Beliefs: *"10. Human rights and fundamental freedoms are universally*

recognized, in particular under the Universal Declaration of Human Rights and international covenants of the United Nations. The application of these rights is not, however, universally coherent. ***The Assembly should fight against any lowering of these standards…..****11.. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place. 12. The Assembly is of the opinion that freedom of expression as protected under Article 10 of the European Convention on Human Rights* ***should not be further restricted to meet increasing sensitivities of certain religious groups.*** *At the same time, the Assembly emphasises that hate speech against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the European Convention on Human Rights and the case law of the European Court of Human Rights."*

[39] See Draft Final Report of the GNSO New TLDs Committee on the Introduction of New Generic Top-level Domains, 2.iii (2007), available at http://gnso.icann.org/drafts/pdp-dec05-draft-fr.htm (as of June 6, 2007).

[40] See Lanham Act, 15 U.S.C. § 1051 (3) (d).

[41] See Draft Final Report of the GNSO New TLDs Committee on the Introduction of New Generic Top-level Domains, 2.iii (2007) (emphasis added), available at http://gnso.icann.org/drafts/pdp-dec05-draft-fr.htm (as of June 6, 2007).

[42] *Id.*

[43] See Paris Convention, at Article 6*bis* (1979), available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (as of June 6, 2007).

[44] See Paris Convention, at Article 1 (stating "[t]he protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition."), available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (as of June 6, 2007).

[45] 15 U.S.C. § 1127 (c).

[46] In 2006, the USPTO reported that 147,118 trademarks were registered. See http://www.uspto.gov/web/offices/com/annual/2006/50315_table15.html (as of June 6, 2007).

[47] Under U.S. law, marks can be refused registration if they are regarded as "immoral or scandalous." 15 U.S.C. § 2 (a). However, even if a mark is found to be immoral and therefore unregistrable, a mark owner may still use the mark to market its goods in commerce and may still avail itself of federal trademark protections including bringing suit in U.S. courts.

[48] See e.g., In re Mavety Media Group, 33 F.3d 1367 (Fed. Cir. 1994).

[49] See e.g., In re Hershey, 6 U.S.P.Q.2d 1470 (T.T.A.B. 1988) (where the mark was considered in the context of the design that accompanied it and found not to be scandalous).

[50] McCarthy on Trademarks and Unfair Competition, § 19.77.

[51] See Paris Convention, at Article 6*quinquies* (stating that marks duly registered in another Member state *may* be refused registration "when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. "), available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (as of June 6, 2007).

[52] See TRIPS: Agreement on Trade Related Aspects of Intellectual Property Rights §2, available at http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm#2 (as of June 6, 2007).

[53] Available at http://www.ipjustice.org/ICANN/062007.html, last viewed on June 5, 2007.

[54] Available at http://www.ipjustice.org/ICANN/GNSORecomOverview11May2007.htm, last viewed on June 5, 2007.

[55] These concerns are voiced at on IP Justice's website in NCUC's Recommended Amendments to the ICANN proposals: http://www.ipjustice.org/ICANN/062007.html, last viewed on June 5, 2007.

[56] See for example recommendation 3 which specifically mentions 'trademark' rights under the original ICANN proposal, but would additionally include free expression rights under the suggested NCUC amendments.

[57] In Australia, for example, 'Asia' colloquially tends to refer to Asia-Pacific countries such as Malaysia, Thailand, Indonesia etc, while in the United

Kingdom, the term is more likely to be used to refer to countries such as India and Pakistan, with the term 'oriental' often reserved for Asia-Pacific countries.

[58] Full text available at: http://www.icann.org/udrp/udrp-policy-24oct99.htm, last viewed on June 6, 2007.

[59] For example, an arbitrator can generally quite easily tell if a domain name has been registered for a socially wasteful purpose (eg registering a domain name and offering it up for sale without using the relevant website for any other purpose). This can be established by simply looking at the website and probably comes under a heading like 'socially wasteful bad faith cybersquatting'. However, if the relevant website contains some content and is being used in some way to communicate a message – whether complimentary or not - about an associated trademark holder or other entity, it is much more difficult for an arbitrator to establish respective rights and interests in the relevant domain name. This kind of situation (eg unauthorized fan website, unauthorized political commentary, unauthorized gripe site or parody site about a trademark holder) will entail balancing free speech interests against the legal rights of the complainant. Those legal rights themselves may be based in a variety of laws such as trademark, privacy, unfair competition etc. Any dispute resolution mechanism that truly attempts to balance these interests effectively, either in an existing domain space or with respect to an application to register a new gTLD, is going to have to be a lot more complex than existing systems like the UDRP. The question is how to establish such a system and who should administer it. ICANN may not be best charged with this function at the end of the day.See also discussion in Conclusion section of: Jacqueline Lipton, *Who Owns 'Hillary.com'? Political Speech and the First Amendment in Cyberspace*, Boston College Law Review, (forthcoming, spring 2008), draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982430.

[60] "Cybersquatting, according to the United States federal law known as the Anti-Cybersquatting Consumer Protection Act, is registering, trafficking in, or using a domain name with bad-faith intent to profit from the goodwill of a trademark belonging to someone else. The cybersquatter then offers to sell the domain to the person or company who owns a trademark contained within the name at an inflated price." (definition from Wikipedia, available at:http://en.wikipedia.org/wiki/Cybersquatting, last viewed on June 6, 2007).

[61] 15 U.S.C. § 1125(d).

[62] 15 U.S.C. § 1125(d)(1)(B)(ii); UDRP, para. 4(c).

[63] With the exception of 15 U.S.C. § 1129 from the ACPA which does protect personal names against bad faith cybersquatters regardless of trademark status.

[64] See, for example, discussion in Jacqueline Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 Wake Forest Law Review 1361, 1369-1371 (2005) (full text available at: http://www.law.wfu.edu/prebuilt/w08-lipton.pdf, last viewed on June 5, 2007). The most cited example of traditional cybersqsuatting is probably the case of Dennis Toeppen who registered reportedly around 100 domain names corresponding with well known marks in the hope of making significant amounts of money for transfer of the names to relevant trademark holders. Today, Toeppen chronicles his own story at: http://www.toeppen.com/, last viewed on June 5, 2007. Many have written about conduct such as Toeppen's and about its place in the development of the current gTLD regulation system. For a summary of these legal developments in the late 1990s and more detail on the concerns I raise here, see: Jacqueline Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 Wake Forest Law Review 1361 (2005) (full text available at: http://www.law.wfu.edu/prebuilt/w08-lipton.pdf, last viewed on June 5, 2007).

[65] Despite some attempts to refer certain issues to the World Intellectual Property Organization ('WIPO'): for example, the need to balance trademark interests against interests in personal names and geographic and cultural indicators. These issues are discussed in the Second WIPO Internet Domain Name Process, Chapters 5-6, available in full text at: http://www.wipo.int/amc/en/processes/process2/report/html/report.html, last viewed on June 5, 2007.

[66] I have written previously, and in detail, about many of these issues in the following articles: Jacqueline Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 Wake Forest Law Review 1361 (2005) (full text available at: http://www.law.wfu.edu/prebuilt/w08-lipton.pdf); Jacqueline Lipton, *Commerce vs Commentary: Gripe Sites, Parody and the First Amendment in Cyberspace*, Washington University Law Review (forthcoming, summer 2007), draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925691; Jacqueline Lipton, *Who Owns 'Hillary.com'? Political Speech and the First Amendment in Cyberspace*, Boston College Law Review, (forthcoming, spring 2008), draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982430.

Author: ICANN – Liz Williams (liz.williams@icann.org)

Impact Statement from the gTLD Registry Constituency regarding the Introduction of New gTLDs 6 June 2007

With regard to the GNSO Dec05 PDP (Introduction of New gTLDs) and in response to the requirement in the ICANN Bylaws Annex A (GNSO Policy-Development Process) for the GNSO Council to provide to the ICANN Board "(a)n analysis of how the issue would affect each constituency, including any financial impact on the constituency", the gTLD Registry Constituency (RyC) hereby provides the following information.

1. General Impact on the RyC

The introduction of new gTLDs directly impacts members of the RyC and the constituency as a whole by:

1. Increasing competition for existing gTLD registries
2. Enlarging the potential members of the RyC
3. Expanding the diversity of the RyC.

Regarding increased competition, the RyC has consistently supported the introduction of new gTLDs because we believe that:

- There is clear demand for new gTLDs
- Competition creates more choices for potential registrants
- Introducing TLDs with different purposes increases the public benefit
- New gTLDs will result in creativity and differentiation in the domain name industry
- The total market for all TLDs, new and old, will be expanded.

In the RyC consensus statement submitted at the beginning of the New gTLD PDP, we listed the following specific benefits of new gTLDs:

- Added choices for Internet users, not only in terms of the ability to obtain a domain name registration in a given new TLD, but also in terms of security options, trust features, use policies, and other innovative factors that vary by registry operator or sponsor
- Expansion of Internet usage through the market development efforts of new and existing providers of registry services
- Opportunity to test user demand for specific TLDs
- Particularly in case of TLDs with a focused and defined community, opportunity to develop a resource that best serves the needs of that community while providing intrinsic value to all internet users.

With regard to potentially enlarging the potential member base of the RyC and expanding the diversity of the RyC, we believe that this could have both negative and positive consequences. The RyC started out with one member, later expanded to eight members, then nine, and now has 15 members plus one pending member. Doing business as a constituency in some ways is much easier with a smaller number of members, so as the constituency continues to grow it can be expected that

participating in the GNSO will become more complicated for the RyC. Attempting to reach consensus positions as part of the policy development process will sometimes be more difficult. On the other hand, as the RyC membership has increased, the diversity of ideas and varied experiences of constituency members have expanded and thereby broadened the perspective of the entire membership. We believe that the challenges that come with a larger membership are manageable and are worth the benefits that come from new ideas and different points of view.

2. Financial Impact on the RyC

The financial impact on the RyC may best be divided into two categories: impact on RyC members and impact on the Constituency as a whole.

The financial impact on individual gTLD registry operators and sponsors will vary depending on many factors such as, but not limited to, the following: 1) whether or not they are involved in any new gTLDs; 2) what effects increased competition has on their current business; 3) the extent to which they may be able to leverage the investments they have made in their existing business model into new opportunities; 4) their ability to market their offerings in an expanded market; and 5) any changes in RyC fees as a consequence of increased membership and/or changes in expenses.

The financial impacts on the Constituency as a whole will be dependent on how many new members join the RyC and whether or not Constituency expenses grow in proportion to membership size or possibly can be used more effectively. At this point in time, the RyC believes that the financial impact on the RyC may be neutral. Some expenses may increase as the membership grows (e.g., Secretariat costs, luncheon meetings with the Board during ICANN meetings); other expenses may remain constant or rise at a rate that is lower than the membership growth. Regardless, the Constituency will have the ability to adjust RyC member fees up or down as needed to accommodate actual expenses approved by the membership.

3. Impact of Selected New gTLD Recommendations on the RyC

Recommendations included in the Draft Final New gTLD PDP Report that may have impact on the RyC and/or its members are listed below in italic font followed by discussion of possible impacts.

<u>Recommendation 2</u>

Strings must not be confusingly similar to an existing top-level domain.

This recommendation is especially important to the RyC. At least one gTLD registry has already received a customer service call that demonstrates user confusion with regard to an IDN version of an existing gTLD using an alternate root. It is of prime concern for the RyC that the introduction of new gTLDs results in a ubiquitous experience for Internet users that minimizes user confusion. gTLD registries will be impacted operationally and financially if new gTLDs are introduced that create

confusion with currently existing gTLD strings or with strings that are introduced in the future.

There is strong possibility of significant impact on gTLD registries if IDN versions of existing ASCII gTLDs are introduced by registries different than the ASCII gTLD registries. Not only could there be user confusion in both email and web applications, but dispute resolution processes could be greatly complicated.

It is also critical to remember that there are several hundred thousand domain name registrants who have registered IDN domain names at the second level in existing gTLDs who would likely desire in most cases to expand their IDN registration at the top level. If confusingly similar versions of existing gTLDs are introduced, would those registrants have to defensively register their names in the new gTLDs? If so, that could have large impact on those gTLD registries that have in good faith introduced IDN second-level domain names in response to user demand from the non-English speaking Internet community.

Recommendation 9

There must be a clear and pre-published application process using objective and measurable criteria.

This recommendation is of major importance to the RyC because the majority of constituency members incurred unnecessarily high costs in previous rounds of new gTLD introductions as a result of excessively long time periods from application submittal until they were able to start their business. We believe that a significant part of the delays were related to selection criteria and processes that were too subjective and not very measurable. It is critical in our opinion that the process for the introduction of new gTLDs be predictable in terms of evaluation requirements and timeframes so that new applicants can properly scope their costs and develop reliable implementation plans.

There is nothing that can be done now to correct the flaws in previous new gTLD rounds, but on behalf of new organizations that may consider applying and potentially become members of the RyC, we strongly support this recommendation and firmly believe that it has the chance of reducing the impact on them.

Recommendation 10

There must be a base contract provided to applicants at the beginning of the application process.

Like the comments for Recommendation 9, we believe that this recommendation will facilitate a more cost-effective and timely application process and thereby minimize the negative impacts of a process that is less well-defined and objective. Having a clear understanding of base contractual requirements is essential for a new gTLD applicant in developing a complete business plan.

Recommendations 14 and 15

The initial registry agreement term must be of a commercially reasonable length.

There must be renewal expectancy.

The members of the RyC have learned first hand that operating a registry in a secure and stable manner is a capital intensive venture. Extensive infrastructure is needed both for redundant registrations systems and global domain name constellations. Even the most successful registries have taken many years to recoup their initial investment costs. The RyC is convinced that these two recommendations will make it easier for new applicants to raise the initial capital necessary and to continue to make investments needed to ensure the level of service expected by registrants and users of their TLDs.

These two recommendations will have a very positive impact on new gTLD registries and in turn on the quality of the service they will be able to provide to the Internet community.

Recommendation 19

Registries must use ICANN accredited registrars.

The RyC has no problem with this recommendation for larger gTLDs; the requirement to use accredited registrars has worked well for them. But it has not always worked as well for very small, specialized gTLDs. The possible impact on the latter is that they can be at the mercy of registrars for whom there is not good business reason to devote resources.

In the New gTLD PDP, it was noted that this requirement would be less of a problem if the impacted registry would become a registrar for its own TLD, with appropriate controls in place. The RyC agrees with this line of reasoning but current registry agreements forbid registries from doing this. Dialog with the Registrars Constituency on this topic was initiated and is ongoing, the goal being to mutually agree on terms that could be presented for consideration and might provide a workable solution.

PART EIGHT -- REFERENCE MATERIALS

Davis and Holt, *Experimental Economics*, Princeton University Press, Princeton: 1993. (Materials for auction models is also available at the University of Haifa website http://www.gsb.haifa.ac.il)

DNJournal, *Global TLD Registrations Pass 50 Million as New Users Stream Online*. July 30 2005. On line version at http://dnjournal.com/columns/50million.htm.

Guermazi, Boutheina and Isabel Neto, *Mobile License Renewal: What are the issues? What is at stake?*, available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/09/23/000016406_20050923113019/Rendered/PDF/wps3729.pdf

Johnson, David and Susan Crawford, *Old Delusions and new TLDs*, comments submitted 13 November 2002 as part of ICANN Amsterdam meeting topic (http://www.icann.org/amsterdam/gtld-action-plan-topic.htm).

On line version available at http://forum.icann.org/gtld-plan-comments/general/msg00003.html.

Johnson, David and Susan Crawford, *A Concrete "Thin Contract Proposal*, submitted 23 August 2003 as comments on new TLD contracts. On line version including proposed draft contract available at http://forum.icann.org/mtg- cmts/stld-rfp-comments/general/msg00039.html.

Klemperer, Paul. Auctions: Theory and Practice. The Toulouse Lectures in Economics. (2004). http://www.nuff.ox.ac.uk/users/klemperer/VirtualBook/VirtualBookCoverSheet.asp

Klensin, John, *RFC 3071 (Reflections on the DNS, RFC 1591, and Categories of Domains)*. 2001. On line version at http://rfc.net/rfc3071.html.

Klensin, John, *RFC 3467 (Role of the Domain Name System)*. 2003. On line version at http://rfc.net/rfc3467.html.

Mannheim, Karl and Lawrence Solum. "The Case for gTLD Auctions." Research Paper #2003-11, Loyola Law School. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=515183

Matsui, Masayuki, *Comparing Domain Name Administration in OECD Countries*, available at http://www.oecd.org/dataoecd/46/38/2505946.pdf

Mueller, Milton and Lee McKnight. “The Post-.com Internet: Toward Regular and Objective Procedures for Internet Governance.” Telecommunications Policy 28 (7/8), 487-502 (2004) http://dcc.syr.edu/miscarticles/NewTLDs2-MM-LM.pdf

National Research Council, *Signposts in Cyberspace: The Domain Name System and Internet Navigation*, Committee on Internet Navigation and the Domain Name System: Technical Alternatives and Policy Implications; Washington, DC: 2005. ISBN: 0-309-09640-5. Executive summary found at http://www.nap.edu/execsumm_pdf/11258.pdf).

Paltridge, Sam and Masayuki Matsui, *Generic Top-level Domain Names: Market Development and Allocation Issues*, Working Party on Telecommunications and Information Services Policies. Paris: 2004. DSTI/ICCP/TISP(2004)/2Final. On line version at http://www.oecd.org/dataoecd/56/34/32996948.pdf

Perset, Karin and Dimitri Ypsilanti, *The Secondary Market for Domain Names*, available at http://www.oecd.org/dataoecd/14/45/36471569.pdf

Summit Strategies International, Evaluation of the New gTLDs: Policy and Legal Issues, August 2004. On line version at http://icann.org/tlds/new-gtld-eval- 31aug04.pdf. On line version of presentation at ICANN’s Rome meeting http://www.icann.org/presentations/sapiro-forum-rome-04mar04.pdf.

VeriSign, *The Domain Name Industry Brief*, Volume 2, Issue 2, May 2005. On
line version at
http://www.verisign.com/stellent/groups/public/documents/newsletter/030725.pdf

World Intellectual Property Organisation, *New Generic Top-Level Domains: Intellectual Property Considerations*, WIPO Arbitration and Mediation Center, 2004. On line version at http://arbiter.wipo.int/domains/reports/newgtld-ip/index.html.

ICANN Links

For a full listing of all inputs including Constituency Statements, Public Comment archives and Expert Papers, http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm.

GNSO gTLDs Committee Final Report on New gTLDs, May- June 2003
9 May, v4:
http://www.dnso.org/dnso/notes/20030509.gTLDs-committee-conclusions-v4.

html

21 May, v5:
http://www.dnso.org/dnso/notes/20030521.gTLDs-committee-conclusions-v5.html

02 Jun, v6:
http://www.dnso.org/dnso/notes/20030602.gTLDs-committee-conclusions-v6.html

12 Jun, v7:
http://www.dnso.org/dnso/notes/20030612.gTLDs-committee-conclusions-v7-1.html

IANA Listing of all TLDs
http://data.iana.org/TLD/tlds-alpha-by-domain.txt.

List of Registry Agreements http://www.icann.ORG/registries/agreements.htm