



ICANN's "Go/ No-Go" Decision Concerning New gTLDs

by Michael Palage

Last October, ICANN released a proposed Draft Applicant Guidebook that would govern applications for new generic Top Level Domains (gTLDs) such as .BLOG, .NYC or .BMW.¹ As ICANN itself declared, "New gTLDs will bring about the biggest change in the Internet since its inception nearly 40 years ago."² But ICANN's proposed implementation of new gTLD application process sparked fierce and almost universal opposition from the global business community and a number of governments.³ ICANN is now expected to release its second Draft Applicant Guidebook before its upcoming regional meeting in Mexico City in early March. Much as NASA's Launch Manager must make a final Go/No-Go decision before the launch of any mission, now is the time to examine the critical changes ICANN must make to the process for creating new gTLDs.

Based on the hundreds of comments submitted during ICANN's first public forum, and on my own 10+ years of experience within the ICANN community and direct involvement in the launch and/or operation of several new TLDs, I suggest the following key changes:

- Eliminate ICANN's proposed five percent (5%) global domain name tax as it currently appears in the draft agreement between ICANN and would-be gTLD registries (as well as in some existing registry agreements);

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1. ICANN, *New gTLD Program: Draft Applicant Guidebook (Draft RFP)*, October 24, 2008, available at <http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf> ("Draft Applicant Guidebook").
2. ICANN, *New gTLD Program: What kind of Internet do you want?*, June 2008, available at https://par.icann.org/files/paris/BAA_Intro_NewGTLDs_Paris_23Jun08.pdf
3. See Michael Palage, *ICANN's gTLD Proposal Hits a Wall: Now What?*, PFF Blog, Dec. 22, 2008, <http://blog.pff.org/archives/2008/12/print/005412.html>. See also Letter from Jorgen Abild Andersen to Peter Dengate-Thrush (PDF), Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark, *Comments to ICANN regarding New gTLDs*, Jan. 22, 2009, See also <http://www.icann.org/correspondence/andersen-to-dengate-thrush-22jan09-en.pdf>

- Create a Rebuttable Reserve Names List (a.k.a. a “white list”) to minimize the need for defensive registrations by qualified famous or well-known marks;
- Create an Expedited Domain Suspension Policy to provide a faster and more cost-effective remedy for abusive domain name registrations;
- Create a Uniform Proxy Registration Policy to address domain name registrations; and
- Recognize a new class of “Registrant-Verified” TLDs, in which the registry operator will be contractually required to verify the identity and qualifications of potential registrants, thus ensuring accuracy of Whois database information.

Elimination of ICANN 5% Global Domain Name Tax

As the world struggles with a global economic downturn on a scale rarely seen, ICANN’s proposal to tax the domain name registry marketplace is the last thing businesses need as they try to get people back to work. ICANN has proposed in its Draft Registry Agreement that registry operators pay ICANN the greater of (i) \$75,000 annually or (ii) 5% of the revenue generated by the registry operator in connection with domain name registration services as well as “all bundled products or services that may be offered by [a] Registry Operator and include or are offered in conjunction with a domain name registration.”⁴ These fee proposals are troubling on a number of levels.

A. The Proposed Fee Bears No Relation to Recovery of ICANN’s Costs

In 2000, the United States General Accounting Office (GAO) concluded that it was the U.S. Government’s stated policy “to hold project partners to the same standards applicable to the Department [of Commerce], allowing only for ICANN’s recovery of actual project costs.”⁵ But somewhere along the way, ICANN’s management abandoned this legal requirement and began charging tolls on the global domain name system without justifying those tolls based on the cost of its limited technical coordinating functions.

To illustrate that ICANN’s proposed tolls are arbitrary and unrelated to cost recovery, one need look no further than the recently approved .AERO TLD registry contract, which has a much more modest fee structure than new gTLD registries would pay:⁶

4. Draft Applicant Guidebook, Section 6.1.

5. See GAO, *Department of Commerce: Relationship with the Internet Corporation for Assigned Names and Numbers*, July 7, 2000, available at <http://www.gao.gov/new.items/og00033r.pdf>

6. ICANN, “Preliminary Report: Resolutions of Special Board Meeting,” February 3, 2009 (posted February 10, 2009), item #10, available at <http://www.icann.org/en/minutes/prelim-report-03feb09.htm>

- \$500 per year fee for less than 5,000 names under management;
- \$5,000 per year fee for between 5,000-50,000 names under management;
- \$0.25 per domain name for more than 50,000 names under management *independent* of the actual registration fee charged by the registry per domain.

Thus, SITA, the sponsor of the .AERO TLD, may pay a mere \$500 dollars to ICANN for the right to sponsor the .AERO TLD in the Internet's Authoritative Root Server. But a brand holder who felt compelled to apply for a gTLD merely to prevent cybersquatters from infringing their rights would have to pay ICANN at least \$75,000 dollars annually, whether or not a single domain name ever appeared in that TLD.

B. The Proposed Fee Is a Hidden Global Tax

Instead of simply stating in plain English that it will receive the greater of \$75,000 annually or 5% of certain annual revenue of a registry, ICANN has masked its proposed global domain name tax with complex legalese:

The Registry-Level Transaction Fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another) during the applicable calendar quarter multiplied by US\$0.25 (the "Transaction Fee") for calendar quarters during which the average annual price of registrations (including all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration) is equal to US\$5.00.⁷

ICANN's \$0.25 Transaction Fee just so happens to be 5% of \$5.00—the very same percentage by which ICANN would adjust the Transaction Fee up or down:

For calendar quarters during which the average annual price of registrations is less than US\$5.00, the Transaction Fee will be decreased by US \$0.01 for each US\$0.20 decrease [*i.e.*, 5%] in the average annual price of registrations below \$5.00, down to a minimum of US\$0.01 per transaction. For calendar quarters during which the average annual price of registrations is greater than US\$5.00, the Transaction Fee will be increased by US \$0.01 for each US\$0.20 increment [*i.e.*, 5%] in the average annual price of registrations above \$5.00.⁸

ICANN's insistence on this silly, legalistic disguise for its 5% tax speaks volumes about its lack of candor in evading its obligation to ground its fees on cost-recovery principles.

7. *Draft Applicant Guidebook*, Section 6.1.

8. *Id.*

C. The Proposed Fee Would Tax Even Bundled Services

But perhaps the most troubling provision in the draft Registry Agreement's fee structure is that ICANN's 5% tax would apply to "all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration."⁹ ICANN staff has defended this provision by claiming that registry operators might simply give away domain names and try to make money on related services. ICANN argues that it needs this provision to ensure that such registry operators pay their "fair share" of ICANN's operating expenses.

Clearly, each registry should pay a fair and equitable portion of the cost of ICANN's technical coordinating functions. But ICANN's current senior management seems more concerned with ensuring that ICANN takes its 5% share off the top of total registry revenues *independent* of any correlation between ICANN's fees and the services ICANN provides. This attitude is hardly surprising, considering that ICANN's current senior management has overseen the explosion of ICANN's annual budget from under \$8 million back in 2003 to over \$60 million today.¹⁰ Given ICANN's projections of new gTLD growth and its proposed five percent (5%) domain name tax, ICANN's annual budget will soon exceed \$100 million. So while the rest of the global business community struggles, ICANN is leveraging its monopoly over an essential facility of the Internet (*i.e.*, recommending additions to the Internet's Root A Server) to charge whatever fees it wants.

D. ICANN Must Eliminate Double Taxation Provisions

These annual fees, combined with ICANN's proposed \$185,000 application fee per gTLD, represent a significant economic barrier to entry during a time of global economic downturn. But even worse are additional provisions that amount to double taxation on businesses that might operate corporate or brand-centric TLDs (*e.g.*, .BMW).

ICANN recently commissioned a study by CRA International (CRAI) to evaluate the vertical separation requirements that have existed between registries (wholesale) and registrars (retail) since 2008.¹¹ In its report, CRAI proposed two business models that required relaxing this bifurcation. One such model was the "single owner" TLD, which a large corporation might want to have for use by its employees. The CRAI report recognized the "inefficiency" of requiring such a corporate/brand TLD to employ a registrar as intermediary.

9. *Id.*

10. ICANN, Adopted FY09 Operating Plan and Budget, Fiscal Year Ending 30 June 2009, p. 3, available at <http://www.icann.org/en/financials/adopted-opplan-budget-v3-fy09-25jun08-en.pdf> ("In summary, the budget proposes revenues of about \$60.77MM ..."). ICANN, Fiscal Year 2002-2003 Budget, adopted June 28, 2002, available at <http://www.icann.org/en/financials/budget-fy02-03-28jun02.htm> (Total Revenues for 2002-03 Adopted Budget: \$6,857,000).

11. CRA International, *Revisiting Vertical Separation of Registries and Registrars*, October 23, 2008, available at <http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>

Yet the draft ICANN registry agreement seems intent on taxing such “single owner” TLDs twice. Specifically, Section 6.4 of the proposed draft Registry Agreement provides for a Variable Registry-Level Fee to be paid by the registrar. Traditionally, this fee has been paid by the registrar to ICANN based upon fees usually collected directly from the registrant. However, since single-owner TLDs will not have registrars, ICANN seems intent on charging such a registry operator twice for each domain name registered within its TLD.

A Rebuttable Reserve Names List

The creation of a Rebuttable Reserved Names List (RRNL) is designed to minimize the need for qualified famous and well-known trademark holders to defensively register domain names that exactly correspond to their marks as the anticipated flood of new gTLDs begins. This proposal is narrowly tailored to protect the rights of brand holders while at the same time balancing the potential legitimate noncommercial or fair use of the domain name by a third party.

A. Rebuttable Reserve Name List Criteria

The World Intellectual Property Organization (WIPO) would be tasked with the creation of the criteria for the inclusion and removal of famous and well-know marks in the proposed RRNL database.¹² WIPO has already provided a framework for this analysis in connection with its Final Report of the WIPO Internet Domain Name Process prepared in 1999.¹³ Two key safeguards would prevent abuse by over-zealous trademark holders and their attorneys:

- A *procedural* requirement that all trademark owners seeking to have their mark included in the RRNL database have their applications made public along with WIPO’s final determination regarding the application. This required transparency would discourage some trademark owners from seeking inclusion on the list, as most trademark owners generally seek to avoid associating any negative procedural history with their marks. The criteria should be sufficiently clear and objective that an RRNL applicant has a reasonable degree of certainty to the outcome of the application before applying.
- A *substantive* requirement that the applicant provide clear and documented proof that the trademark in question has been the subject of some minimum number (to be determined by WIPO) of abusive domain name registrations. Thus, even a universally acknowledged famous and well-known mark would be denied inclusion in the RRNL database absent clear and documented proof that it has

12. It is envisioned that only the exact trademark would be eligible for registration (protection) within the RRNL, i.e. misspellings of famous and well-known marks would not be eligible.

13. See WIPO, *Final Report of the WIPO Internet Domain Name Process*, Chapter 4, “The Problem Of Notoriety: Famous And Well-Known Marks,” April 30, 1999, available at <http://www.icann.org/en/wipo/wipo-report.htm>

been the target of repeated abusive domain name registration practices. This clear nexus to abusive domain name registration practices is designed to prevent this list from becoming a *de facto* global “famous marks” list.¹⁴

A. Registry Name Reservation

During the sixty days prior to the launch of any new gTLD registry (*i.e.*, processing of applications from registrants into the database for the new registry), the registry would be required to reserve the entire RRNL database within that TLD. For every RRNL mark, the Whois information for the associated domain name (*e.g.*, MARK1.TLD, MARK2.TLD) would show the registry as the registrant of that domain, with additional qualifying text explaining that these names are being held in reserve as part of the RRNL process.

The name servers associated with reserved domains would resolve to a standard template webpage that explains why the domain name is being held in reserve with a link to WIPO’s publicly-accessible database. That webpage would also explain how a third party that believes it has a legitimate interest in registering—and using—that domain name may seek to rebut the reservation of that domain name so they can register it themselves. The registry would be prohibited from placing advertising on these template web pages.

B. Rebuttable Fair Use Claim

If a third party believes they have a legitimate claim to fair use of a domain name reserved through the RRNL process for a new TLD, they may file an administrative challenge with WIPO seeking the right to register that domain name in the new TLD.

Such a Challenger must pay an administrative challenge fee to WIPO and file a statement outlining their claim to fair use of the domain name in question. WIPO will then forward this information to all trademark owners in the RRNL database whose mark exactly matches the second level domain name that the Challenger is seeking to register. Because multiple trademark owners may seek to protect the same mark in connection with different goods and/or services (*e.g.*, Delta Faucets and Delta Airlines might both include “Delta” in the RRNL), these trademark owners each will need to decide whether the proposed use by the Challenger in that specific TLD infringes their legal rights.

A trademark owner who receives notice of a fair use claim from WIPO would have two options: (i) file an objection to the alleged fair use claim by paying the same fee that the Challenger paid or (ii) file no objection. If there are no objections filed by qualified rights-holders during the time frame designated by WIPO, the Challenger will be

14. *Id.* at ¶ 282, “It is recommended that determinations on applications for exclusions for famous or well-known marks should have no binding effect on national or regional industrial property offices or national courts in their implementation of international norms for the protection of famous and well-known marks.”

allowed to register the previously-reserved domain name—but it will be an express condition of the Challenge process that a trademark holder's failure to file an objection shall not constitute a waiver of their rights, nor a bar to any further administrative or legal action against the Challenger.

In order for a Challenger to meet their burden of proof, they must prove they have a legitimate fair use in connection with the domain name (*i.e.*, the second criteria of the UDRP).

If the Challenger prevails, they will be refunded their filing fee from the fees paid by the rights holder(s), they will be allowed to register the domain name in the TLD designated in the challenge, and the RRNL database will be updated with the outcome of this proceeding. If the Challenger fails to meet their burden of proof, they will forfeit their original administrative filing fee, they will be denied the right to register the domain name, and the RRNL database will be updated with the outcome of this proceeding.¹⁵

WIPO shall establish the appropriate procedures for processing situations in which multiple rights holder file objections against the Challenger, including an equitable redistribution of fees among the prevailing parties if a Challenger loses. Given the non-automated nature of these proceedings, the Registry Operator shall be permitted to charge the Challenger and Registrant a nominal processing fee to cover the cost associated with this process, independent of any fees paid to WIPO as an administrative dispute provider.

Expedited Domain Suspension Policy (EDSP)

ICANN's Uniform Dispute Resolution Policy (UDRP) has been an important way for trademark owners to protect their marks from abusive registrations over the past ten years. However, in an evolving domain name marketplace that may see the addition of several hundred new TLDs in the next few years, additional safeguards are needed to protect the interests of both trademark owners and consumers. One such potential safeguard is an Expedited Domain Suspension Policy (EDSP) that would provide trademark owners a more cost-effective and timely mechanism to address clearly abusive domain name registrations.

The EDSP would supplement the RRNL but would differ in three key respects:

- The EDSP would be available at any time, while RRNL operates only immediately prior to the launch of a new TLD;
- Brand holders whose marks do not qualify for the RRNL process might be able to file an EDSP; and

15. In the event of multiple Challengers seeking to contest the reservation of a specific domain, the Registry Operator will be permitted to determine the priority of Challengers.

- The EDSP process would also apply to variations upon mark names, while the RRNL process is limited to domain names that precisely correspond to marks.

The principles of the EDSP, like the RRNL, are designed to respect and balance the rights of trademark owners, consumers, domain name registrants, and the registrars and registrants that would implement this new proposed policy. The EDSP process is outlined below:

A. Rights Verification

Any trademark holder of a registered mark of “national effect”¹⁶ seeking to enforce their rights under the EDSP would have to obtain an electronic Trademark Registration Token (TRT)¹⁷ from a Trademark Certification Agent (TCA).¹⁸ ICANN would be tasked with creating a separate accreditation process for TCAs modeled in part on what ICANN has done in connection with administrative dispute providers. But unlike the UDRP (which allows complainants to allege common law rights), the EDSP would only protect marks of national effect. This narrow tailoring is the key to the EDSP’s ability to achieve both cost effectiveness and expedited resolution while also protecting fair use.

An applicant for a TRT would submit the following standard information to the TCA for verification: (i) registrant name, (ii) mark as registered; (iii) country of registration; (iv) registration number, and (v) date of Registration. The TCA would verify the information provided in the application with the appropriate national trademark registration authority and, if verified, would digitally sign the TRT using an asymmetric private encryption key¹⁹—thus providing a pre-verified authentication of this trademark information.

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16. “The Center will consider trademark registration certificates issued by national trademark authorities. European Community Trademarks also meet the condition of national effect. United States state trademarks or service marks do not meet the condition of national effect, nor does a registration in the supplemental register of the United States Patent and Trademark Office.” WIPO Guide to the Afilias Sunrise Registration Challenge Policy for .info, Question No. 6 “What qualifies as a trademark or service mark registration ‘of national effect?’”
<http://www.wipo.int/amc/en/domains/gtld/info/sunrise/guide.html#a6>
 17. TRTs could also have other uses within the domain name marketplace. Specifically, they could be used by trademark holders to facilitate participation in Sunrise programs associated with the various new gTLD launches.
 18. Depending upon the success of TRTs, it is possible that TCAs may develop a database with an EPP interface to further facilitate the processing of the EDSP and/or Sunrise claims.
 19. In asymmetric encryption systems, the (private) key used to decrypt the message is different from the (public) key used to encrypt the message. Only the TCA can “sign” a TRT using its private key, but anyone can verify the TRT using the TCA’s public key. If a TCA was to develop a database of TRTs, the TCA would employ appropriate safeguards to ensure secure access to the database to appropriate parties only.

A. Rights Holder Initiates a EDSP

Once a Rights Holder has obtained a TRT for a particular mark, they could initiate an EDSP proceeding with the appropriate registry operator for domain name registrations they believe infringe that mark. The Rights Holder would initiate the proceeding through an online interface maintained by the registry operator of the TLD in question by (i) electronically submitting the TRT for verification; (ii) completing an online form detailing the alleged bad faith registration and non-legitimate fair use; and (iii) paying a nominal processing fee (ideally under \$100).

B. The Registry Operator Provides Notification of the Complaint

Upon electronic receipt of the trademark holder's complaint, the registry operator would promptly notify the following "Impacted Parties" by email:

- The Complainant (trademark holder);
- The Registrar of record;
- The Respondent—(the domain name registrant of record); and
- The administrative contact of the domain name.

In addition, the complaint data would be immediately uploaded to an online EDSP database administered by the registry operator, although ICANN might consider providing an integrated universal database of all EDSP proceedings. (Maintaining such a database would allow third parties to develop potential value-added "watch services" and to provide a redundant form of notification to domain registrants, since overly-aggressive spam filters may block the original e-mail notification that a complaint has been filed.)

C. The Registration Authority Evaluates the Complaint

Because the TCA has already verified the Complainant's underlying registration data when issuing the TRT, the registry operator need not replicate this effort. The registry operator need only verify the authenticity of the TRT by using the TCA's public encryption key.

If authentication of the TRT fails, the EDSP proceeding would be terminated, notification of this termination would be provided to the Impacted Parties, and the EDSP database would be updated to reflect the termination. Due to the streamlined nature of the process, if the Complainant wanted to try again, they would be required to file another new complaint with a properly-authenticated TRT.

If authentication of the TRT succeeds, the registry operator would begin its substantive analysis by first determining whether the EDSP complaint falls within one of the enumerated "Out of Scope Proceedings," which would effectively serve as "safe harbors" for fair use. These Out of Scope Proceedings are designed to exclude

disputes over so-called “sucks sites,”²⁰ disputes between contracting parties (licensee/licensor)²¹, non-resolving domains (constructive/passive use²²), *etc.* By excluding this subset of more fact-specific disputes, the EDSP process can maintain its expediency and efficiency and provides the registry operator the ability to rely upon a more unified body of precedent when making its decisions than currently exists under the UDRP. Any complaint that falls within one of these “Out of Scope Proceedings” would be deemed outside the proper scope of EDSP and would be automatically denied.

If no such “safe harbor” applies, the registry operator would then undertake a streamlined version of the basic UDRP analysis, asking whether:

- The domain name is identical or confusingly similar to the Complainant’s trademark;
- The domain name registrant has no rights or legitimate interests in respect of the domain name; and
- The domain name has been registered and is being used in bad faith.

The nominal fee charged for this adjudicatory function should reflect its simplicity. On average it should take a properly trained paralegal or attorney approximately 15 minutes to review the complaint and make an initial determination. This should be done within five days after submission to the registry operator. It is also feasible that registry operators might offer an expedited initial determination processing time (*i.e.*, within twenty-four hours) for an additional fee if the complainant so elects.

D. The Registry Operator Makes an Initial Determination

If the registry operator makes an Initial Determination to deny a complaint, it should notify the impacted parties that the complaint has been denied and update the database. If, however, the registry operator concludes that the domain does infringe the mark (and that the complaint does not constitute an “Out of Scope Proceeding”), the domain would be subject to a single remedy: “non-resolution.” The domain name would be removed from the Registry’s zone file and placed in locked status within the

20. UDRP arbitration panels have defined “sucks sites” to mean “A domain name consisting of a trademark and a negative term...” See WIPO Overview of Selection UDRP Questions, 1.3 – “Is a domain name consisting of a trademark and a negative term confusingly similar to the complainant’s trademark?” (“sucks cases”), <http://www.wipo.int/amc/en/domains/search/overview/index.html>. While UDRP panels are split over whether such usage is “confusingly similar,” the EDSP is not designed to handle this kind of more difficult and fact-specific dispute.

21. *Id.*, Section 1.8, “Does a trademark licensee or a related company to a trademark holder have rights in a trademark under the UDRP?,” available at <http://www.wipo.int/amc/en/domains/search/overview/index.html#18>

22. See *Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO Arbitration and Mediation Center Case No. D2000-0003, available at <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0003.html>

appropriate TLD database for the duration of the domain's current registration, so that queries to that domain simply would not resolve to the IP address previously associated with the domain.

E. The Respondent May Appeal the Initial Determination Before Enforcement

If the registry operator makes an Initial Determination in favor of a Complainant, non-resolution would automatically occur within a specified number of days unless the Respondent filed an appeal. The window for filing such an appeal will depend upon how long the domain name has been registered: Domain names registered less than one year will receive a shorter window (5 days or less) while domain names that have been registered more than one year would have a slightly larger window to appeal (10 days). Both Complainant and Respondent would have to pay an administrative fee to the administrative dispute provider, and the prevailing party would receive a refund.

Uniform Registry Standard for Proxy Registrations

The provision of a properly designed proxy registration service within a TLD can enhance user privacy and protect legitimate anonymous speech by providing a way for registrants to prevent their name and contact information from being published online in the Whois domain name look-up database.²³ But a poorly designed or implemented proxy registration service could be used for illegal or other inappropriate purposes, harming legitimate users and the providers of such services as well as undermining the reputation of the TLD registry operator. Thus, ICANN and registration authorities should institute certain baseline practices and safeguards governing the provision of registrant proxy services through the registry services provisions in each registry's contract with ICANN to administer a new TLD.

Proxy Registrations—any registration for which the Whois contact for a domain name does not accurately reflect the data of the true beneficial owner of the domain name—should be allowed only under the following conditions:

- Only ICANN-accredited registrars would be permitted to offer proxy registration services, unless ICANN created a separate accreditation process to contractually bind the other providers of such services (“Proxy Agents”).
- All domain names in which Proxy Registration data is provided in the Whois data fields would have an additional tag/field added to the existing Whois elements to indicate that the Whois information associated with that domain name is, in fact, Proxy Registration data.
- The registry would charge an additional fee for each Proxy Registration. This would cover the cost of software changes to the existing EPP protocol as well as the operation of a compliance program to ensure that all Proxy Registration

23. See generally <http://en.wikipedia.org/wiki/Whois>

services are done in accordance with the baseline practices and safeguards stipulated in each registry operator's contract with ICANN.

- That contract would also stipulate, in standard language, the criteria under which the Registrar or Proxy Agent would have to promptly disclose the underlying Whois data in response to law enforcement or a subpoena issued in civil legal proceedings. Failure of the Registrar/Proxy Agent to comply with the baseline practices and safeguards would subject that party to a Proxy Non-Compliance fee/surcharge charged by the registry.

Registrant-Verified Top-Level Domains

Because of the inaccuracy of Whois data in most TLDs and the lack of universal proxy registration guidelines, it is difficult—if not impossible—for law enforcement, rights holders, and consumers to timely research and discover the identity of domain name registrants. Thus, ICANN should consider adding a new category of “Registrant-Verified” TLDs, the operator of which would be required to verify the identity of the potential registrant before a domain name could be registered (or first brought into use).

During the development of the new gTLD policy, the business community was very supportive of sponsored TLDs (or “sTLD”) because, among other reasons, sTLDs:

- Served distinct communities (e.g., .AERO);
- Verified the identity/qualifications of registrants prior to registration;
- Tended to have a smaller volume of registrations than unrestricted/open TLDs; and
- Are not generally subject to abusive registrations, thus minimizing the need for defensive registrations.

However, in the 2004 sTLD round, ICANN approved a number of the sponsored TLDs (e.g., .MOBI and .TEL) aimed at much broader and more amorphous community with no registrant verification prior to registration.

The blurring of the lines between traditional sponsored TLDs (2000) and newer sponsored TLDs (2004), coupled with ICANN's desire to seek a one-size fits all registry contract, ultimately caused ICANN to abandon the traditional distinction when preparing the 2008 Draft gTLD Applicant Guidebook. This creates a need to recognize a Registrant-Verified class of TLDs in the final Applicant Guidebook. Specifically, the possibility of creating a Registrant-Verified TLD should be among the evaluation criteria used by ICANN when multiple parties seek the same “string” (TLD), similar to the provisions associated with community based TLDs.²⁴

24. The current Draft Applicant Guidebook, provides that a properly qualified Community based applicant (a.k.a. a “clear winner”) for a TLD would receive preferential consideration over other qualified non-community based applicants. Specifically, Section 3.1 provides “If one application is

Conclusion

At a recent event at the US Chamber of Commerce, ICANN announced that it anticipated the release of a third Draft Applicant Guidebook mid-summer. This was a very welcome announcement given that ICANN's previous statements targeted ICANN Board approval of the *final* Applicant Guidebook in the second quarter of 2009. If, as ICANN has stated this new gTLD process will be the "biggest change in the Internet since its inception nearly 40 years ago,"²⁵ it is critical that ICANN implement a process that responsibly expands the domain name space on a cost recovery basis, and that balances the interests of businesses, consumers and governments with legitimate fair use rights.

Related PFF Publications

- [ICANN's Game of Chicken with the USG & The Need for Adult \(GAO\) Supervision](#), by Michael Palage, PFF Blog, Dec. 22, 2008.
- [ICANN's gTLD Proposal Hits a Wall: Now What?](#), by Michael Palage, PFF Blog, Dec. 22, 2008.
- [ICANN Internet Governance: Is It Working?](#), by Thomas M. Lenard, Testimony before the Subcommittee on Telecommunications and the Internet, Subcommittee on Commerce, Trade and Consumer Protection, Committee on Energy and Commerce, U.S. House of Representatives, Sep. 21, 2006.

found to be a clear winner, the application proceeds to the next step and its direct contenders are eliminated." See ICANN, *New gTLD Program Explanatory Memorandum: Resolving String Contention – A Complete Lifecycle Including String Contention Resolution*, October 22, 2008, available at <http://www.icann.org/en/topics/new-gtlds/string-contention-22oct08-en.pdf>

25. See *supra* note 2.

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