

# NEW gTLD DRAFT APPLICANT GUIDEBOOK VERSION 4 PUBLIC COMMENT SUMMARY AND ANALYSIS

## Sources

Public Comment Postings (31 May to 21 July 2010). The full text of the comments may be found at: <http://icann.org/en/topics/new-gtlds/comments-4-en.htm>.

## GENERAL COMMENTS

### Key points

- There should be a level playing field for the introduction of new gTLDs, with no privileged treatment for potential applicants.
- By working with SO and AC working groups, ICANN has sought to ameliorate concerns that, in considering and responding to public comments, staff is making policy.
- By publishing these comment summaries and making significant amendments to the Guidebook, ICANN has sought to ameliorate concerns that it is not responsive to comment.
- ICANN has created staffing and resource plans to be in a position to adequately monitor contractual compliance.
- The New gTLD Program has introduced new rights protection mechanisms and malicious conduct mitigation measure to help provide for the safety of Internet users.
- Success of the New gTLD Program will be measured by the benefits to Internet users and not by the number of gTLD applicants.
- The ICANN community is striving to avoid delays in launching the new gTLD process that would undermine the credibility of ICANN's multi-stakeholder, bottom-up policy development process.

### Summary of Comments

Public Interest TLDs. The sale of TLDs needs to be balanced with sound public policy. E.g., the potential use of a .health to signify health providers could make it increasingly difficult for consumers to differentiate between legitimate health providers and general commercial organizations. Also, TLDs such as .physio could be misused and potentially breach national laws (e.g. in Australia, use of physio.au by anyone other than a registered physiotherapist would breach registration laws). The fees for new TLDs are prohibitive for small not-for-profit groups that might appropriately manage public interest-oriented TLDs (e.g. a national physiotherapy association managing a .physio). ICANN should therefore reserve some TLDs where the public interest does or should outweigh commercial interests. *D. Mitsch (16 June 2010)*.

#### No privileged treatment and a level playing field.

In response to many requests for privileged treatment by various potential applicants, ICANN has wisely resisted these pleas. We support a single application window, a single set of rules, and no special priority to any type of application beyond those already contemplated in the DAG. *Minds + Machines 21 July 2010*).

Proposals for advantaged applicants should not be adopted. There will be an official communications and marketing period to give everyone the possibility (not just “insiders”) to get their community, geographical or standard TLD. Giving advantage to some applicants would compromise the ability of communities or governments to find the best TLD solution. *Bayern Connect (21 July 2010)*.

#### Glossary.

Definitions are often circular (e.g., the community-based TLD definition uses the term “community” and does not explain what comprises a “community”) and do not adequately describe the technical terms for those new to ICANN processes. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

CORE appreciates additions made to the DAG to address the specific needs of intergovernmental organizations or governmental entities. CORE requests a further clarification that “governmental entities” means any level of public authorities, according to their respective legal systems, be that national, federal, state, regional, local, municipal or other. In many languages there is a clear distinction between “governments” and “public authorities” where the former is sometimes reserved to the highest political body representing the sovereign state, and may go further down to federal or regional level, but rarely encompasses all levels of public authorities with a political and administrative mandate to manage a territory. *A. Abril i Abril (Module 5, 21 July 2010)*.

New gTLD-related enforcement resources--not-for-profits. ICANN should consider including in the Applicant Guidebook mechanisms that allow not-for-profit organizations to conduct enforcement activities in a more efficient and cost effective manner. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Compliance. The new gTLD program raises concerns over abuse in the secondary market for new TLDs which ICANN is not in a position to adequately monitor from a contract compliance standpoint due to the unlimited nature of the proposed gTLDs, and also raises concerns over abuse of solicitations for defensive registrations. *A. Aikman-Scalese (21 July 2010)*.

Compliance Officer. The entity awarded a new gTLD should be required to designate by name a Compliance Officer responsible for contract compliance and should be required to notify ICANN immediately of any changes in that designation. They should also be required to provide prominent public notice on their home page of the name and contact information for the designated Compliance Officer. *A. Aikman-Scalese (21 July 2010)*.

Whois concerns. Concerns about inaccurate Whois information should be addressed prior to implementation of the new gTLD program. *A. Aikman-Scalese (21 July 2010)*.

Costs. The effect of each new version of the guidebook is to raise operational costs for all kinds of TLD registries, when most of them don’t need the highest possible standards. One size does not fit all. *A. Abril i Abril (21 July 2010)*.

#### Overall approach.

ICANN must discard the mantra that more is better. Per the advice of the Economic Framework paper, it should analyze the likely costs and benefits of new gTLDs and move forward to authorize only those that can demonstrate a net public benefit. *MPAA (21 July 2010)*. *BITS (22 July 2010)*.

The Business and Commercial Users' Constituency (BC) wants to see new gTLDs rolled out in a systematic manner. All new names should meet five key principles—differentiation, certainty, good faith, competition and diversity. *BC (26 July 2010)*.

The four overarching issues are not integrated into the DAGv4 and ICANN's development of the implementation plan for new gTLDs. ICANN should develop a holistic implementation plan that includes a comprehensive set of safeguards for addressing these issues. *AT&T (21 July 2010)*.

ICANN's multistakeholder, bottom up process loses all credibility if delays continue. It is time to concede that the gTLD process has been overloaded. It must be redesigned in a way to constrain (a) the range of issues to be dealt with in the application documents; and (b) the range of gTLD applications accepted in the coming round. Both constraints can be applied by specifying a simple set of guiding principles rather than scoring systems or lists of names and codes. Examples of possible principles:

(1) ICANN must maintain an environment conducive to the beneficial development of the Internet  
(2) ICANN may deny the delegation of gTLDs or kinds of gTLDs whose likely negative externalities (external costs) outweigh their benefits for the development of the Internet in the public interest. *W. Staub (21 July 2010)*.

Flaws in policymaking process. Where public comments suggest a policy that does not yet have consensus through the bottom-up process, that proposed policy should not be introduced at the discretion of the ICANN staff. In such cases the proposed policy should go to the appropriate policy making body (e.g., the GNSO). The three issues of vertical integration/separation, single registrant single user (SRSU), and HSTLD do not have consensus and the ICANN staff exceeded its role by including them in some versions of the DAG in the implementation process despite that these issues are not explicitly discussed in the final report for new gTLDs. The staff's role is to make an implementation plan for what is figured out in policy discussions, not to introduce a new policy. Public comments of value to the staff are comments that: (1) suggest that a policy issue which became consensus is not implemented; (2) suggest that the implementation plan contradicts the policy consensus or ICANN bylaws, etc.; (3) suggest that there is a flaw in the plan so that there is difficulty in actual implementation; and (4) suggest an improvement for implementation of a policy issue which became consensus. *JPNIC (2 Sept. 2010)*.

Criterion for measuring success of new gTLD program. Belief in meeting consumer demand and eagerness for new gTLD business are deeply connected. But beyond the issues of competition and consumer choice is the additional issue of stability. Threats to stability caused by eagerness for new gTLD business have not completely disappeared. A high number of applications received and processed is not the measure of success for ICANN. In reality only a few applicants will succeed; others will fail because they do not represent real consumer demand. After this stage we will be able to enter into a new era in which people can calmly predict consumer demand and the stability threat will be reduced. Reaching that point will be an achievement for ICANN. It is of concern that by recommending single registrant single user (SRSU) TLDs, ICANN staff may be intending to increase the number of applications. This should not be true. *JPNIC (2 Sept. 2010)*.

### **Support for New gTLD Program**

Complete the guidebook and do not delay the program. Further delay of the launch will erode the credibility of the new gTLD program. The Guidebook is in very good shape and reflects hard-won

compromises. *Minds + Machines (21 July 2010)*. *Bayern Connect (21 July 2010)*. *R. Tindal (21 July 2010)*. *D. Schindler (22 July 2010)*. *J. Frakes (22 July 2010)*.

It is almost time to move to the gTLD implementation stage. Demand Media strongly believes that introducing new gTLDs will provide more choices for consumers, genuine uniqueness and specificity in TLDs and greater competition among registries. Many issues have been addressed by ICANN in the various version of the DAG with community's input. The Applicant Guidebook may need to be amended to deal with future issues and that is to be expected. The DAGv4 represents sound judgment and consensus in most respects. *Demand Media (22 July 2010)*. *J. Frakes (22 July 2010)*.

## **Opposition to New gTLD Program**

### Opposition.

The International Olympic Committee (IOC) opposes introduction of new gTLDs. IOC's recommendations should not be taken as a waiver of IOC's right to proceed against ICANN for damages resulting to the IOC or the Olympic movement from implementation of the proposed new gTLD system. *IOC (21 July 2010)*.

Introduction of new gTLDs is premature and launch should not proceed without further review and revision. It is imperative that any plan put in place will guarantee the safety of Internet users and protect the rights of all parties. *CADNA (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *AIPLA (21 July 2010)*. *IACC (21 July 2010)*.

ICANN has not adequately addressed the overarching issues. Unresolved malicious conduct concerns alone require that the gTLD program not go forward because it is far from ready. At minimum ICANN should assume at least another 18-24 months will be needed before it could launch new gTLDs given all the unresolved matters. As evidenced by the economic work produced by ICANN this summer, it is far from clear whether the public interest will be served; there has been no demonstration of demand for new gTLDs, or that a flood of new gTLDs will result in constructive, new competition. *SIIA (21 July 2010)*.

The case has not been made for and no sensible advantages would be gained by introduction of new gTLDs. The new program will create more confusion and worsen cybersquatting and trademark infringement problems. Instead of introducing an unlimited number of additional TLDs, ICANN should concentrate on improving the current DNS by finding effective solutions to cybersquatting and trademark infringement problems. *H. Lundbeck (8 July 2010)*. *VKR Holding (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*.

ICANN should cease its headlong rush to authorize an unlimited number of new gTLDs and instead follow a more considered approach based on an assessment of the need for new gTLDs and how they can be judiciously authorized so as to protect the interest of commercial users and the general public. *MPAA (21 July 2010)*.

Microsoft continues to object to ICANN's planned simultaneous introduction of an unlimited number of new ASCII gTLDs. If ICANN nonetheless proceeds despite the widespread opposition to the program and the economic downturn, then it should take the time necessary to consider and address the issues and questions raised by the community about the intended implementation of the plan. It is essential that ICANN "get it right" and as written the DAGv4 effectively ensures that it will not. *Microsoft (21 July 2010)*.

ICANN is not promoting competition. ICANN is not promoting competition with the new gTLD program but is acting in favor of registrars and registries and against the interests of the public. If competition is working, this will be seen through registration prices lower than .com. ICANN refuses to take steps to eliminate VeriSign's abusive .com monopoly by implementing a regular tender process so that each TLD is managed by a registry that will give consumers the lowest price for a set level of service. *G. Kirikos (1 June 2010).*

ICANN does not value public input. We will passively resist by not participating in a process that only leads to predetermined outcomes. We request that ICANN notify the community when it is ready and willing to demonstrate that it properly values public comments. *G. Kirikos (17 July 2010).*

## Analysis of Comments

### Policy development process and public comment

Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market, "The new corporation ultimately should ... oversee policy for determining the circumstances under which new TLDs are added to the root system." The secure introduction of new gTLDs, as specified in the White Paper, remains an essential element in fostering competition and choice for Internet users in the provision of domain registration services.

The introduction of new gTLDs continued to be identified as a core objective for ICANN in several key agreements, for example "Define and implement a predictable strategy for selecting new TLDs" in the 2003 Memorandum of Understanding. The study and planning stages, extending back several years, include two trial rounds of top-level domain applications held in 2000 and 2003. Experiences from those rounds have been used to shape the current process.

The New gTLD Program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the GNSO, formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholders, including governments, individuals, civil society, business and intellectual property constituencies, and the technology community were engaged in discussions for more than 18 months on such questions as demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The ICANN Board subsequently approved these recommendations in June 2008, and directed staff to develop an implementation plan.

The development of the Applicant Guidebook, and the resolution of the overarching issues identified during the process, has been a challenging task. Recommendations adopted from the trademark and malicious conduct working groups have been, where possible, incorporated into the Applicant Guidebook, while issues of root zone scaling and the overall demand for new gTLDs are being addressed in separate reports.

Since creation of the consensus policy to introduce new gTLDs, ICANN has commissioned several economic studies to describe the costs, benefits and conditions necessary to maximize net social benefit of the program. The studies have also explored anticipated benefits of gTLD expansion.

The program implementation contains several elements in mitigation of certain concerns, including:

- Developing dispute resolution procedures for:
  - Similar TLD applications causing user confusion
  - Misuse of community labels
  - Infringement of rights
- Introduction of additional rights protection mechanisms
- Measures to mitigate and reduce malicious conduct
- Root zone scaling and DNS stability measures

The multi-stakeholder model means that ICANN is responsible to a diverse range of stakeholders, and the ICANN community has done an outstanding job of considering, in many cases, diverse views on issues and finding workable solutions. While there are claims that the failure to launch new gTLDs could be interpreted as a failing of the multi-stakeholder model, the process is, on the contrary, an example of its success. The implementation of this program has been a truly collaborative, community effort, involving a number of individuals who have worked very hard to resolve many contentious and important issues in large part through dedicated working groups such as:

- The Implementation Recommendations Team - proposed solutions on trademark protection;
- The Special Trademark Issues group - made recommendations for a Uniform Rapid Suspense System and a Trademark Clearinghouse;
- The Zone File Access group - recommended a standard zone file access model to aid those addressing potential DNS abuse;
- The Temporary Drafting Group - worked with ICANN to draft selected proposed elements of the registry agreement;
- The IDN Working Group – completed work on definitions and solutions for variant TLD management.

Some may question the value of the public comment process, if all comments are not going to be acted upon. However, the analysis of public comments received on the new gTLD process has set a new benchmark for ICANN. It is acknowledged that the content of the Applicant Guidebook will not please everyone, but there has been a genuine commitment to consider and respond thoughtfully to the public comments that people have taken the time to make, and in many cases these comments have been directly acted upon. This is evidenced by the considerable number of changes that have been made to the various iterations of the Guidebook and the consideration of the overarching issues that arose during the process.

While listening carefully to the public feedback, one of the challenges has been to be careful not to reopen for debate issues that had been discussed and resolved during the policy development process while also ensuring that the consideration of public comment did not lead to new policy discussions. The Applicant Guidebook was developed around the principles, recommendations and implementation guidelines provided by the GNSO policy development process. These guiding principles in developing the Applicant Guidebook have been to: preserve DNS stability and security; provide a clear, predictable and smooth-running process; and address and mitigate risks and costs to ICANN and the global Internet community.

Registry-registrar cross-ownership was discussed in the context of promoting choice and competition. The GNSO considered the issue and was not able to come to consensus, which ultimately led to the Board making a decision supporting cross-ownership, with some protections built in.

The High Security Top Level Domain discussion was part of the overall concern about potential for increased malicious conduct and the principle that the introduction of new gTLDs should not cause security or stability issues. The community undertook a great deal of work on malicious conduct, which included a working group on a possible HSTLD designation. As a result of discussion on strategies for mitigating malicious conduct in the namespace, nine measures were recommended to increase the benefits to overall security and stability for registrants and trust by all users of new gTLD zones.

A well-defined process was undertaken which recommended the introduction of new gTLDs and was supported by the ICANN Board. We believe that many of the reasons for not supporting the introduction of new gTLDs that have been identified through public comment and public workshops and fora have been heard and addressed during the development of the Applicant Guidebook.

## **Compliance**

In addition to the development of the Applicant Guidebook and the operational readiness of the New gTLD Program itself, ICANN has allocated considerable time and effort to ensure the overall organization, including its Compliance group, will be able to manage the potentially increased volume from new Registries.

## **Glossary and definitions**

In addition to the glossary provided at the back of the Applicant Guidebook, Module 1 provides more detailed explanations of the meaning of terms such as “community” in the context of the new gTLD process.

We acknowledge that there are varying levels of governments, and differing terminology and levels among governments. Additions have been made to the next version of the Applicant Guidebook to respond to comments for clearer definitions. The geographic names section has attempted to identify the expected level of government support, non-objection, required for the different categories.

## **Success of the new gTLD program**

There are many ways to measure the success of the new gTLD program. From an operational standpoint, for example, we will look at the efficiency with which applications are processed, the performance of the TLD Application System (TAS), and the overall process flow and timelines.

There are other ways success could be measured. The Affirmation of Commitments calls for a review of Competition, Consumer Trust and Consumer Choice one year after new gTLDs go into operation. This analysis will likely answer critical questions that are asked today, for instance: has there been an increase in choice for consumers? Has the stability and interoperability of the DNS been impacted by the increased number of gTLDs in the root? Has the program allowed for more geographic diversity in the gTLD namespace?

## TIMELINE / MODELS

### Key Points

- The Board has directed staff to adopt as a working plan the Launch Scenario with launch date of Q2 2011.

### Summary of Comments

#### Finalize the new gTLD process.

ICANN should finalize the gTLD process and start accepting new applications. Actions to facilitate this are highly welcome, such as the proposed “ICANN Summit” in September. *dotBERLIN (3 July 2010)*. *dotBayern (20 July 2010)*. *dotHamburg (21 July 2010)*. *dotZON (21 July 2010)*.

It is important for the credibility of ICANN and the vast number of already existing applicants to continue with the process so that a final guidebook can be published as soon as possible. *Bayern Connect (21 July 2010)*. *Domain Dimensions (22 July 2010)*.

A reliable timeframe for the next application round should be set. *dotZON (21 July 2010)*. *eco (21 July 2010)*. *HOTEL (21 July 2010)*. *NIC Mexico (21 July 2010)*. *EuroDNS (22 July 2010)*. *dotKoeln (22 July 2010)*.

Now is the time for the new gTLD program to move forward. The guidebook should be in final form no later than the end of 2010 and the application window and communication/outreach completed by summer 2011. A schedule for the next 18-24 months should be provided which clearly delineates what will happen and when as it relates to the new gTLD program. *J. Frakes (22 July 2010)*.

ICANN should move forward with the program in a timely fashion. ICANN needs to recognize that it cannot focus the community’s time and energy on the “unknown”. It would be unreasonable to expect any group of people to draft policies today that would remain unaltered for eternity. It would be beneficial for all parties if these limitations were recognized. If and when issues arise let us all address them then. *Blacknight Solutions (21 July 2010)*.

Changes in the latest version of the DAG allow for the launching of the application round in the near future. *AFNIC (23 Aug. 2010)*.

With a few tweaks we believe the new gTLD program will be ready to launch later this year or early 2011. *Neustar (21 July 2010)*.

#### Official timeline and benefits of an incremental approach.

ICANN now needs to focus on publishing an official timeline as much as it needs to work on the final adjustment of the new gTLD program. Accumulated delays are detrimental to new gTLD applicants with projects having “net social benefit” and undermine ICANN’s credibility and legitimacy. The incremental approach previously suggested by AFNIC is still valid. If an incremental approach were not deemed appropriate for the application process (reserved windows for applications with defined characteristics), it could still be highly beneficial in the subsequent processing of applications, i.e., either for the actual processing of the application and/or later on upon negotiation of the Registry Agreements. Once ICANN

accepts applications, it would seem fairly reasonable that groups of like-featured applications could naturally appear (objectives, governance, policies and/or targeted audiences, etc.) Efficiency, simplicity and justice principles would then argue for specialization of the processing of such applications. Specialization could intelligently combine with the incremental approach. Batches of applications would form on the basis of rationality rather than mere chance. ICANN would gain time to deal with the most difficult problems posed by projects of uncertain “net social benefit” while it would realize and prove the value of its new gTLD program by unleashing initiatives that are of evident “net social benefit.” *AFNIC (23 Aug. 2010).*

#### Indifference toward public comments.

ICANN has admitted that it is ultimately indifferent to comments submitted by stakeholders in this process. Time Warner is deeply concerned that ICANN appears poised to move forward with the launch of new gTLDs despite the fact that none of the “overarching issues” identified by ICANN in early 2009 have been adequately addressed in the DAGv4. If ICANN plans to launch a successful gTLD program, it has more work to do before claiming “mission accomplished” and accepting applications. *Time Warner (21 July 2010).*

#### ICANN should revisit issues with open mind.

ICANN should revisit issues with an open mind and propose needed changes before the Board meets in September to consider all of the outstanding issues relating to implementation of the new gTLD program. *COA (21 July 2010).*

#### Take more time before introducing new gTLDs because issues remain unresolved.

Three substantive issues remain unresolved in the DAGv4: (1) the economic study; (2) proposed rights protection mechanisms; and (3) root scaling. *MarkMonitor (19 July 2010). Carlson (21 July 2010). BBC (21 July 2010). HSBC (21 July 2010). DuPont (21 July 2010). Comerica (3 Aug. 2010). Sunkist (21 July 2010). LifeScan (22 July 2010). Solvay (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*

As advised in the Economic Framework report, ICANN should move slowly in rolling out new gTLDs and study the implementation, demand, and potentially negative consequences arising from a new gTLD rollout. There has not been significant progress on the four overarching issues. *Verizon (20 July 2010). HSBC (21 July 2010). A. Aikman-Scalese (21 July 2010). Adobe Systems (21 July 2010). Rosetta Stone (21 July 2010).*

#### Clarity on next steps.

USCIB members would appreciate some clarity on how ongoing community discussions, the release of the Economic Framework study and expected second phase of that study, as well as the expected root scaling study, will affect the DAGv4 and possible launch of new gTLDs. For example, the Economic Framework study stated that it may be wise to continue ICANN’s practice of introducing new gTLDs in discrete, limited rounds. *USCIB (21 July 2010).*

ICANN should prioritize IDNs and introduce new gTLDs in discrete, limited rounds, consistent with the Economic Framework paper’s recommendations. *AT&T (21 July 2010). Coca-Cola (21 July 2010).*

#### Launch the less contentious cultural and linguistic TLDs.

Many of them will help developing countries and are less likely to be problematic with rights holders. *Blacknight Solutions (21 July 2010).*

## Analysis of Comments

### Finalizing the new gTLD process

ICANN continues to approach the implementation of the program with due diligence and plans to conduct a launch as soon as practicable along with the resolution of these issues.

### Timeline and benefits of an incremental approach.

A Special Meeting of the ICANN Board of Directors was held via teleconference on 28 October 2010 in which the Board discussed proposed timelines for publishing a final version of the Applicant Guidebook and the extent of public comment to be received on the Applicant Guidebook. After agreement on a proposed workplan to guide the remainder of staff's work, the Board directed staff to adopt as a working plan the scenario including a launch date in Q2 2011.

Staff continues to make progress towards the program development while, at the same time, working with the global Internet community towards a level of consensus on the Program's outstanding issues.

## COMMUNICATIONS

### Key Points

- The communications campaign is designed to address concerns about whether communications letting all parties know of the opportunity to operate a new gTLD are appropriately detailed, began soon enough, and contain enough detail to help entities that are new to ICANN's processes.

### Summary of Comments

Start communications period. The communications period should start sooner rather than later; 'outsiders' should get enough time to become familiar with the new gTLD opportunities. dotZON (21 July 2010).

Evaluation procedures—technical requirements training, education outreach. ICANN should provide greater detail and instruction regarding how to prepare for the technical requirements associated with the new gTLD application and process, and should provide education and training outreach for organizations such as not-for-profits that are new to ICANN activities. This outreach should begin immediately but be increased once the final Applicant Guidebook is released so that parties will have access to the final policy information. It should cover the application process as well as areas of interest to third parties, such as the objection procedures and rights protection mechanisms. Outreach should be done in all five ICANN regions, and ICANN should provide live in-person seminars open to the public rather than only posting information on its website or hosting webinars. AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).

### Analysis of Comments

The Applicant Guidebook, exceeding 300 pages in length, is already quite detailed about the application process. It covers topics that the commenters requested, such as objection procedures and rights

protection mechanisms. Regarding the request to provide greater technical instruction, the questions contained in the application are intended to inform and guide the applicant in aspects of registry start-up and operation. Inexperienced applicants should find them a natural part of planning. Supplemental documentation or more detailed guidance on particular areas of technical operations are referenced in the guidebook where available, and a number of resources are available elsewhere in the community.

Regarding the communications plan for new gTLDs, ICANN has already undertaken significant effort to achieve the objective of the four-month requirement recommended by the Generic Names Supporting Organization. ICANN's staff remains deeply committed to the primary goal of ensuring that all those who wish to participate in, and benefit from, the new gTLD Program have opportunity to do so.

A communications plan has already been posted, received public comment, and is being revised. The current plan includes live outreach presentations in all five ICANN regions, in addition to written and recorded educational materials. In order to give due consideration to all publicly expressed views, the plan will be finalized after ICANN's international meeting in Cartagena, December 5 – 10 2011.

## APPLICATION PROCESS

### Key Points

- An Applicant Support Working Group has been established to evaluate options to provide support for defined groups of applicants. This has resulted in various types of outreach and education that ICANN expects to offer to applicants. This group will continue to work to find sources of funds and criteria for awarding them.
- A reduction in the application fee for efficiencies gained from certain types of applicants (i.e. multi-string, single entity applicant) has already been considered in determining the \$185,000 fee. ICANN staff will review processes after Round One to determine where additional efficiencies may be gained for subsequent rounds and additional efficiencies gained will be passed on to applicants in future rounds.

### Summary of Comments

Fee standards—developing and undeveloped countries. Huge fees (\$185K evaluation fee, US\$70K-\$122K and US\$32K-\$56K for the M&PO and community objections respectively) would stifle the initiative of developing and undeveloped countries and dampen globally balanced development of the Internet. ICANN should be able to set a fee standard based on the costs and adopt a favorable fee policy for the developing and undeveloped countries. ISC (21 July 2010).

Discounted fees--IDNs and Exact String Translations.

ICANN should significantly decrease application fees for exact translation equivalents of the same TLD to reflect the effort the evaluating team would require to process the applicant. If all TLDs fall under the same applicant, community, business plan, string, backend registry, etc., then ICANN does not need to spend additional time repeating the same evaluation step needlessly since economies of scale/scope are reasonably justified. .MUSIC (20 July 2010). dotKoeln (22 July 2010).

Each community-based applicant should be allowed to increase their utility within their specific community by having the option to apply for their respective IDN-equivalent TLDs for a nominal additional fee (per IDN or translated equivalent). It would not be justified to ask a community based applicant to pay an additional \$185K for each translation to the approved string. BC (26 July 2010). R. Andruff (Module 1, 21 July 2010).

Different fee models for different types of TLDs. Given the high fees and costs associated with applying for and operating a new gTLD, ICANN should consider setting up different fee models for different types of TLD applications to alleviate the costs on applicants. A sensible fee model will greatly enhance the chance of success for the new gTLD process. CNNIC (21 July 2010).

Reduced fees for small cities, small cultural and linguistic community TLDs. Special consideration, including reduction of the \$185K application fee and \$25K annual fee, should be given for small cities and small cultural and linguistic communities which do not intend to compete with general commercial TLDs such as .com or new brand TLDs and for whom the current level of fees is not affordable. It is understood that a lower but appropriate application fee is still needed in order to prevent excessive applications. JIDNC (21 July 2010).

Special consideration regarding technical requirements and fees for developing country applicants representing cultural, linguistic and geographical communities is appropriate and consistent with the advice of the GAC in its Brussels communication. A. Al-Zoman (21 July 2010). Arab Team (21 July 2010).

Reduced fee for bundled variants. ICANN should provide for a lower fee in the case where the TLD names are not chosen but are pre-existing (e.g. geographical names, many of which have more than one common name including IDN variants). Charging \$185K for each variant seems punitive and unfair. Minds + Machines (21 July 2010). Bayern Connect (21 July 2010).

Not-for-profit organizations. ICANN should reveal and detail its actual costs for reviewing each new gTLD application and consider setting a lower cost pricing structure for not-for-profit organizations that will allow ICANN to recover its costs without imposing additional overhead on the not-for-profit applicants. This transparency and pricing consideration should also apply to extended evaluation fees, objection filing and proceeding fees (in objection proceedings fees should be capped, or at least the initial fees that must be paid as a “deposit” on the proceeding). ICANN should consider a two-tiered cost structure to separate commercial uses of the new gTLDs from the informational, educational and lifesaving functions served by not-for-profit organizations. AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).

Support for African new gTLD applications. The African ICANN Community urges that support be given for new gTLD applications from Africa and be prioritized. Civil society, NGOs and non for profit organizations in Africa are most in need of such support, and support is of utmost importance for geographic, cultural and linguistic and community based applications.

- Support should include but not be limited to: financial (reduced fees); linguistic (translation in the six UN languages); legal; and technical.
- Cost reduction is the key element in fulfilling the goals of Board Resolution 20, and the following should be entertained to achieve cost reduction: waiving the program development cost (\$26K); waiving the risk/contingency cost (\$60K); lowering the application cost (\$100K); waiving the registry fixed fees (\$25K per year); and charge only the registry-level transaction fee (\$.25 per

domain name registration or renewal). The reduced cost should be paid incrementally to give African applicants more time to raise money and since investors will be more encouraged to fund an application that has passed initial evaluation.

*African ICANN Community (28 June 2010).*

Developing countries applicant support working group—support for initiative. We welcome the recent ICANN initiative regarding possible support for applications from developing countries. The results of the working group should be taken into consideration in the final Applicant Guidebook. *Arab Team (21 July 2010).*

Developing country non-profit applicant financial support efforts by ICANN, where the applied for TLDs are for the public good, are welcome, and should include reduced fees for application, evaluation and the annual contract. For proposed gTLDs financially sponsored by certain governments, ICANN should consider the government's financial support commitment in place of the irrevocable standby letter of credit or deposit into an irrevocable cash escrow account, since some governments are reliable enough to guarantee sustainable operation of the registry(s). DNSSEC cost burdens should also be reduced and the application process should be made more accessible to global stakeholders. ICANN should provide document translations and conference simultaneous interpretations in six UN languages which may also help reduce costs for non-English speaking applicants. As for technical support, DNSSEC support is a necessity. *CONAC (22 July 2010).*

The consensus in the At-Large Community is that whatever the finalized processes and procedures, ICANN must embrace the prospect of providing affirmative support for participation of hitherto marginalized communities, especially those entrusted to act on behalf of disadvantaged groups or those with agendas widely recognized as active in the general public interest in the new gTLD economy. The ALAC strongly endorses continuation of these efforts. *ALAC (September 2010)*

Reduced application fee--brand and charitable organizations. The application fee is too high and could be discriminatory against certain types of applicants such as .brands restricted to employees of a company or charitable organizations. Such applicants should be eligible for a lower fee. *Hogan Lovells (21 July 2010).*

Application fee level is generally appropriate. The \$185K fee is likely to be a realistic average estimate of ICANN's costs to manage the program. Substantial changes to the new TLD process as described in DAGv4 could result in an increase in the fee. I support practical ways to reduce costs for the discrete group of applicants in need, especially those from developing countries. *R. Tindal (21 July 2010).*

Terms of payment—exchange rate. The following is suggested as addition in DAGv4 after section 1.5.4: "Section 1.5.5—Terms of payment: Payment to ICANN may be effected in USD or in the legal currency of the applicant's country. If the applicant decides to use his local currency for processing payments, the exchange rate used shall be the one which applies on the day the applicant registers with TAS (refer to paragraph 1.5.1)." This section is justified because the risk of exchange rates should not be borne by applicants alone, but shared with ICANN. It may be fair for ICANN to acquire financial products to hedge this currency risk, rather than each and every applicant having to provide this insurance on its own. *E. Blocher (Module 1, 5 June 2010).*

Refund of evaluation fee (1.5.1). The proposed 20% refund of the evaluation fee to unsuccessful applicants after having completed dispute resolution seems unreasonable. While it may be reasonable

to make such a refund if the applicant decides to withdraw at the outset of objection proceedings, there will be less incentive to take such an approach if the applicant knows that they will recover this sum whatever the outcome of the dispute resolution. BBC (21 July 2010)

## Analysis of Comments

### Fee Issues

Comments regarding fees have generally been consistent with previous versions of the Draft Applicant Guidebook. One comment is generally in support of the application fee to cover costs, while a number of comments have suggested a reduction in the application fee either based on where the applying organization is located (e.g., a developing country), its organization type (not-for profit, charities, small cities, a brand holder) or based on a presumed level of effort required to review an application (IDN variants, or multiple strings from the same organization).

Comments suggest a reduction of the \$185,000 application fee based on the type of TLD being applied for (linguistic, small community), the organization applying (not-for-profit) or where there may be multiple TLD strings applied for (e.g., IDN variants, translations of a string) by a single applicant. The processing steps and associated costs to perform each application evaluation are based on an average number of steps to complete each application and do not change based on the TLD type or organization applying. In addition, applications for translated versions of the same string would undergo the complete evaluation process as each application is expected to stand alone. Consequently, the current application fee is not expected to change for the initial application round. However, as stated previously, it is anticipated that subsequent application rounds will enable adjustments to the fee structure based on historical costs from previous rounds, the effectiveness and efficiency of the application evaluation process, and other data as it becomes available.

Currently, a working group, comprised of representatives from various Internet constituencies, is evaluating options to provide support for a defined set of applicants. The working group's preliminary recommendations were presented to the Board in September and a resolution was agreed on regarding the support to be provided by ICANN (<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.2>).

Progress is being made by the Applicant Support Working Group, tasked with, among other things, locating sources of funds to provide financial support for certain deserving applicants and determining criteria for releasing those funds in a way that avoids abuse and is fair.

There was a suggestion that payment of the application fee should be allowed in US dollars or in the legal currency of applicant's country to share exchange rate fluctuation risks. The payment of the application fee follows standard ICANN practices with respect to fees collected globally. For this process, ICANN receives funds in US currency only. It is the applicant's responsibility to arrange for funding in their own currency to equate to the evaluation fee at the time of the each wire transfer. ICANN does allow for normal fluctuations as the funds are applied to their respective application.

A comment questioned the relative incentives for applicants to participate in a dispute resolution proceeding or withdraw prior to the dispute resolution process. This was considered previously. The dispute resolution process is in place to allow a weighing of the objection in regard to the application. In

the event of an objection, an applicant may choose to withdraw at an earlier stage for a larger refund. The process is not designed to discourage applicants from completing a dispute resolution process just to afford some recovery to applicants who do not go through the entire evaluation.

## APPLICATION CATEGORIES

### Key Points

- Newly formed entities must be formally established prior to application submission. These entities will be evaluated similarly to established entities. Information required by newly formed entities is discussed in the Criteria section of the Application questionnaire.
- The standard for a successful community objection requires that the opposition be substantial so that the dispute resolution process is a consideration of the issues rather than a means for a single entity to eliminate an application.
- New TLD categories beyond what has already been described (community, geographic, and standard) will not be introduced, as ICANN believes that over time, the market and community interests are better suited to sorting TLD types. In addition, the introduction of categories may mean an unintended increase in compliance-related costs in areas without benefit to DNS security.

### Summary of Comments

Proposal for two categories under community-based TLDs—commercial and noncommercial. ICANN’s one-size-fits all approach does not accommodate all stakeholders. There should be two categories of community-based gTLDs—a commercial use and noncommercial use. Differentiated policies and evaluation procedures should be established for noncommercial TLDs—their evaluation should be simpler, as they may not be involved in trademark protection issues. ICANN should provide more support to noncommercial applicants—financially, technically and linguistically—and give some exceptions to them regarding vertical integration and Whois policies. This will simplify new gTLD management and accelerate the pace of evaluation to some extent. Moreover, GNSO has the commercial and noncommercial stakeholder groups, which perfectly matches the proposal. *CONAC (22 July 2010).*

Community-based application definition (1.2.3). The fourth factor (“Have its application endorsed in writing by one or more established institutions...”) seems too narrow in specifying “one or more” and is imbalanced when compared with the Section 3.3.1 grounds for a community objection. If it takes substantial opposition from a significant portion of the community to object, how is it possible that only one institution can represent a community in the application process? BITS suggests also that during the Initial Review process, reviewers should be required to change the designation from a “standard” to a “community-based” application if it is clear that the applicant intends the gTLD string to be targeted explicitly or implicitly at a specific community. It is also not clear why ICANN in Section 1.2.3.2 makes the assumption that community-based applications are intended to be a “narrow category.” *BITS (22 July 2010).*

Financial TLDs. Any domain name associated with financial services should be restricted to financial services companies, with substantial restrictions, guidelines and proof of eligibility. There should be a

formal Financial Services Panel for assessing financial service-oriented gTLD applications. Specific higher levels of security and stability should be mandated. The DAGv4 does not adequately address these recommendations. *ABA (22 July 2010)*.

Applicant Evaluation: yet-to-be formed entity. Clarification by ICANN is requested as to whether it is possible under the current DAG to submit an application in name and on behalf of a yet-to-be-formed entity, where checks and evaluations are performed on the submitting entity(s) while the future registry has to be defined in all terms, but not yet prove legal existence. ICANN is asked to clarify the required documentation for the future designated registry on behalf of which the application is submitted. Examples of such a situation would be community-based, non-profit entities wishing to form a Foundation to manage a given TLD, or a city that might establish an agency to manage a city TLD. *A. Abril i Abril (Module 2, 21 July 2010)*.

Brand category of applications. A third category of applications for brand owners would be beneficial. It is still unclear if brand owners could qualify to file a community-based application and whether a corporation could be considered to represent a community consisting of a restricted population such as its customers or employees. *Hogan Lovells (21 July 2010)*.

Closed gTLDs—lack of provisions.

The DAGv4 lacks provisions for operation of closed gTLDs. Would this mean that trademark owners owning a gTLD would need to open the registration procedure to second-level domain names applied for to third unrelated parties? In this case, what is the incentive of actually registering and operating such a gTLD? *PMI (21 July 2010)*.

Unique procedures are needed for single registrant TLDs. Such single registrant TLDs need different requirements in the utilization of ICANN authorized registrars. The DAGv4 does not address the unique procedures that are required for these unique registries, which are being used to increase online visibility of the TLD holder and not offering open registrations of second level names. *AT&T (21 July 2010)*.

Single registrant, brand, corporate TLDs—beyond scope of new gTLD program. Based on the GNSO report to the Board (11 Sept. 2007), single registrant, brand and corporate TLDs are beyond the scope of the current new gTLD process. We strongly urge ICANN to state this fact explicitly in the forthcoming final version of the new gTLD RFP for the next round. ICANN should also clearly state that “community-based TLDs” will not open the door for proprietary TLDs. *JPNIC (21 July 2010)*.

Opposition to single registrant, single user (SRSU) TLD category. ICANN staff should not propose single registrant single user (SRSU) TLDs because this proposal does not have consensus within the ICANN community. If the ICANN staff proposes it in its discretion, that would be a violation of process. In addition, such a proposal could increase the risk of lawsuits against ICANN by the SRSU applicants since many of the required elements of the new gTLD process do not properly fit for SRSU TLDs (e.g., mandatory use of ICANN registrars, data escrow and vertical integration). Therefore the third paragraph in the Background section addressing brand holders and organizations seeking to manage their own name should be deleted. The issue of SRSU TLDs is an important policy issue which should be discussed in the GNSO. It is not a consensus policy included in the 2007 GNSO final report for new gTLDs and it should be treated by a dedicated PDP. In case the dedicated PDP does not end in a timely manner, the next round of new gTLDs should exclude SRSU TLDs. This argument has the same logical structure as the

underlying logic of Board Resolutions 2010.03.12.17 and 2010.03.12.18 for Vertical Integration/Separation. *JPNIC (2 Sept. 2010)*.

## Analysis of Comments

A comment requests clarity on “yet-to-be formed entities” applying for a gTLD. Applications from or on behalf of yet to be formed legal entities, or applications presupposing the future formation of a legal entity (for example, a pending Joint Venture) will not be considered. All requirements of an existing entity continue to apply: proof of planned technical/operational and financial capabilities (see Criteria for Question 45 for financial information required by newly formed entities) will be required, background screening of the organizations forming the new entity as well as the new entity’s key officers and shareholders will be conducted, all required documentation for geographic names and/or community based applications must be presented, and all other requirements, as outlined in the draft Applicant Guidebook must be met to submit a complete application.

A comment notes a potential imbalance between the requirement for at least one endorsement of a community-based application, and the requirement that there be substantial opposition in the event of a community objection. It is intended that the application should have substantial support as well; however, this is difficult to establish based on a certain number threshold. It may well be that an applicant supported by one institution or group means substantial support for that case (e.g., a highly structured community with only one relevant institution or endorsement from the pre-eminent institution in that area). Conversely, the standard for a successful community objection requires that the opposition be substantial so that the dispute resolution process is a consideration of the issues rather than a means for a single entity to eliminate an application. Opposition from a single entity might also be determined substantial in a given case.

Comments provided suggestions for possible approaches to application categorization. Depending on the category, various accommodations are suggested: for example, no requirements for an ICANN contract, or to use accredited registrars, or to follow consensus policy, or policy provisions outlined in the GAC’s ccTLD principles. Some might be restricted to not-for-profit status, be eligible for reduced fees, require registration restrictions, and have names reserved in anticipation of registration by certain parties. There will be considerable debate and discussion in the community as to whether certain accommodations should be made. Should certain gTLDs not be required to have an agreement with ICANN or not be required to follow consensus policy? Should certain TLDs be required to maintain not-for-profit status? These discussions and debates will take considerable time and resources and may ultimately not result in consensus. The structure of TLD categories, if granted different accommodations with differing contractual obligations, would result in significantly higher compliance costs and therefore, annual fees.

Significant consideration has been given to the issue of introducing category-based TLDs in the new gTLD process. ICANN remains a strong proponent of innovative uses of new TLDs. This is especially so in cases where TLDs can be delegated to address the needs of specific communities such as intergovernmental organizations, socio-cultural groups and registered brands. Rather than having ICANN limit this type of innovation and identification with certain TLD models, more creativity might be spawned by allowing different groups to self-identify the type of TLD they purport to be and promote that model among their community.

If a self-declaration program is instituted and contractual accommodations are eliminated or minimized, fees can remain constant. Socio-economic groups, brand holders and other groups all can be accommodated under the existing structure and self-identify as a particular type of TLD. Over time, the market and community interests will sort TLD types – a model preferable to having ICANN make that determination a priori.

It may well be that as definitive categories of applicants emerge in practice, and as ICANN and the respective communities gain further experience of possible benefits of additional gTLD categorization over time, organizational structures might be developed with ICANN to reflect these categories. That will be a consequence of bottom-up policy developments by affected participants, according to the ICANN model. Nothing in the current implementation procedures forecloses those future developments.

Comments suggest that single registrant TLDs not be allowed as these may not have support from within the ICANN community nor is there policy to support such a category. Categorization of TLDs beyond what has been proposed (community, geographic, and standard) is not being introduced. In addition, an applicant is not required to have a minimum number of registrants to qualify for a TLD.

## PROCEDURES

### Key Points

- ICANN staff will conduct a Completeness Check of applications after the close of the 90-day Application Submission Period. Depending on the severity of missing information, incomplete applications may either be rejected or may be provided with an opportunity to provide missing information. Only after all applications have been designated as complete or have been rejected during the Completeness Check period will ICANN post the applied for strings and applicant data.
- The objection filing period begins with the posting of applied for strings and applicant data and ends 2 weeks after the close of Initial Evaluation. Applicant data necessary to file an objection will be made available via ICANN's website.
- It is important to note the distinction that reviews in Initial Evaluation offer no chance for appeal – the opportunity exists for clarifications only. Limited clarifications may be sought for String Similarity, DNS Stability and Background Screening as needed.

### Summary of Comments

#### Timing for amendment of incomplete applications.

The provisions in paragraph 1.1.2.8 (string contention) can be expected to be used in competing applications (contention sets) to take speculative advantage of intentionally caused delays by incomplete applications. Therefore applications should be given a limited time of a maximum 4 weeks to mend incomplete application parts. *dotBERLIN (13 July 2010)*. *dotBayern (20 July 2010)*. *dotHamburg (21 July 2010)*. *HOTEL (21 July 2010)*. *dotKoeln (22 July 2010)*.

Paragraph 1.1.2.8 should be amended so that applicants should be required to provide all information they can provide within a reasonable deadline set by ICANN. The string contention procedures will not

begin until all applicants in the contention set have completed all aspects of the evaluation. The deadline should help prevent applicants of speculative registrations from delaying the dispute resolution process. *eco (21 July 2010)*.

Supplements to applications. ICANN should allow supplements to applications after submission. This would help not for profit organizations that may have a learning curve to understand the process. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Notice of changes (1.2.7). Part of the application should contractually or otherwise obligate applicants to notify ICANN of changes. *BITS (22 July 2010)*.

Clarify objection filing timeframe (1.1.2.4). ICANN needs to clarify the objection filing timeframe. One part of this area suggests that the objection period is based on the Administrative Completeness Check, but another section suggests it is based on the Initial Evaluation Period with a two week window of time between posting of the Initial Evaluation results and the close of the objection filing window. *BITS (21 July 2010)*.

Reconsideration. In every case, an applicant should have an opportunity within the ICANN process to request reconsideration of an erroneous or adverse decision. The current process has three places where an applicant or application can fail without opportunity for appeal or extended review: background check, string similarity, and DNS stability tests. *W. Seltzer (21 July 2010)*. *R. Dammak (July 2010)*.

Proof of good standing. ICANN should require proof of good standing in the application process. The DAGv4's elimination of this step at the early stage of the process raises concern about its impact on the entire process—it could potentially lead to a greater number of illicit applicants ending up in the applicant pool. Even if ill-intentioned applicants end up getting eliminated at a later point, it may still result in a waste of time of resources for ICANN and others which could have been prevented earlier in the process. *CADNA (21 July 2010)*.

ICANN permission to use Applicant logos (Module 6, section 9). There is no basis to give ICANN unfettered permission to use an Applicant's logos as section 9 provides. It is basic trademark law that the value and distinctiveness of a trademark such as a logo can be destroyed through unregulated use by parties other than the trademark owner. If ICANN requires the right to use an Applicant's logo, it should enter into a proper trademark license with the trademark owner. *IBM (21 July 2010)*.

Confidentiality (section 11.b). The confidentiality standard in this provision is insufficient. Rather than state that ICANN use "reasonable efforts" IBM proposes that the section should state that ICANN will have "sufficient agreements in place" to ensure confidentiality is maintained. *IBM (21 July 2010)*.

TLD Application System Access. Sections 1.1.2.1, 1.4.1 and 1.4.1.1 speak to applicants, but it is not clear what process ICANN will use for other users who wish to review open applications for possible objection. It is also unclear how 1.1.2.2. and ICANN not posting certain information on the TAS (e.g. related to finances, architecture and security) will affect potential objectors' ability to assess an application and its applicants. *BITS (22 July 2010)*.

Timing of subsequent application rounds (1.1.6). Given the timeframes of other sections, is it realistic for ICANN to assume the launch of a next round of applications “within one year of the close of the application submission period for this round”? *BITS (22 July 2010).*

Required financial documents (1.2.2). BITS recommends that ICANN ask for 3 years of audited financial statements instead of just one. Multiple years of statements would serve to validate the applicant’s ongoing fiscal strength. *BITS (22 July 2010).*

Application form (1.4.1.2)—encryption of data. ICANN should encrypt the application data in transit across the Internet (i.e. use HTTPS) and while it is at rest in storage at ICANN—at least for selected information such as financials. *BITS (22 July 2010).*

Evaluation fee (1.5.1)—proof of concept round. Can ICANN provide a table of the 200 Proof-of-Concept round applications, and are these eligible for re-application? *BITS (22 July 2010).*

## Analysis of Comments

Comments have requested clarity on the timing of providing complete applications to ensure string contention procedures begin appropriately. Although timelines are not yet final, it is expected that all Applicants will submit completed applications, including the receipt by ICANN of the full application fee, throughout and up to the final day of the Application Submission period. A 4-week completeness check period will ensue, allowing ICANN staff to validate that all applications question are complete and all necessary supplemental documents are attached. This review will not look at the adequacy of answers; rather it will focus on ensuring that each question has an answer. If an application is deemed incomplete, the applicant will have one opportunity to provide any missing data during this period. If the application remains incomplete at the end of this 4-week period, then it will be ineligible for further review and application fees (less any expenses incurred) will be refunded. Only after the completeness check is complete for all applications will ICANN post the applied for strings and other relevant information. The posting will also mark the beginning of Initial Evaluation. String Similarity analysis will begin immediately thereafter and string contention sets will be posted once this analysis is complete. Contention sets will be posted prior to the end of Initial Evaluation.

Another comment seeks clarity on the objection filing period as well the availability of applicant information necessary to file. The objection filing period will begin at the end of the completeness check period and will close two weeks after the Initial Evaluation results are posted. Based on current estimates, the objection filing period is expected to last approximately 5 1/2 months. In relation to the availability of applicant information, the objection process allows for interested parties to file objections against the organization applying for the string and/or the string on any of four grounds: [Limited Public Interest], Community, String Confusion, and Existing Legal Rights. This process does not allow for objections to be made on the applicant’s ability to meet financial, technical or operational criteria. Accordingly, relevant and necessary applicant data to file an objection will be made available via ICANN’s website.

A comment asked about the viability of committing to a subsequent application round “within one year of the close of the application submission period for this round.” The GNSO’s New gTLD Policy Development Final Report suggests that “Applications must initially be assessed in rounds until the scale of demand is clear” and that “...the first round will include scheduling information for the subsequent

rounds to occur within one year.” ICANN expects to meet this recommendation; however, the timing of the second round may be affected by necessary changes and improvements to the new gTLD program. Any potential delays in beginning the subsequent round will be communicated as soon as practical.

Comments have requested clarity, or made suggestions regarding several areas of the guidebook. One suggests that applicants should be contractually bound to inform ICANN if any material changes arise in regards to their submitted application. The current wording in the guidebook requires notice of changes to information, and makes it clear that if an applicant is found to have failed to notify ICANN of a material change, their application may be rendered invalid.

Another comment mentioned the three areas of Initial Evaluation (IE) that do not allow for appeal or extended evaluation; background check, string similarity, and DNS stability. It is important to note the distinction that no area of IE offers a chance for appeal – the opportunity exists for clarifications only. Limited clarifications may be sought for the three areas mentioned above in IE, as needed. For DNS Stability and String Similarity, as the submitted string cannot be modified, the need for clarifications is expected to be minimal.

A comment concerns the usage of the applicant’s name and logo in section 9 of the Terms and Conditions (Module 6). While the language does constrain the areas of usage, it will be further narrowed in the next version of the guidebook to reflect only the use of the applicant name. The other comment on Application Terms and Conditions relates to maintaining the confidentiality of applicant information in seeking consultation to evaluate an application. The Terms and Conditions state that ICANN will use reasonable efforts to ensure that panelists maintain confidentiality of information in the application. This would include having agreements in place with panelists and other experts that may be consulted, as suggested in the comment.

One comment suggests that three years of audited financial data should be requested as opposed to the one required in the current version of the guidebook. Requiring only one year of audited financials is intended to provide sufficient data on the applicant’s financial capability and broaden the range of applicants by avoiding overly burdensome requirements.

One comment reiterated that confidential data collected in TAS must be protected. We agree and ICANN is taking reasonable and necessary steps, including hiring an independent security consultant, to ensure that Applicant data is secured throughout the process.

One comment asked for a list of the year 2000 proof of concept participants. That information can be found here: <http://www.icann.org/en/tlds/app-index.htm>

## **EVALUATION**

### **Key Points**

- Applicants are expected to provide all necessary and relevant information at the time their application is submitted including disclosing any known concerns as described in Section 1.2.1 Eligibility (Questions 11d – f of the Application questionnaire).

- ICANN is moving forward with developing additional Eligibility (Section 1.2.1) guidelines that will be communicated to both potential applicants as well as Applicant evaluators prior to receiving applications.
- Protocols are being developed to ensure that all Applicants are aware of communications on a timely basis and are provided with same time period to respond to any clarifications requests.
- A clear process describing the Board’s role in evaluation and delegation has been developed and communicated.
- Initial Evaluations cannot be completed until all relevant public comments have been considered and addressed. A summary of how public comments were addressed per application will be provided after the end of Initial Evaluation.

## Summary of Comments

Question 18 and additional questions. The BC urges ICANN to add two more questions to sharpen the criteria for new gTLDs that add value and differentiation: (1) which users/registrants/organization/group/community do you intend to serve? (2) How does your TLD differentiate itself from others in the DNS? ICANN should initiate the new gTLD rollout with safeguards for an orderly approach to market differentiation and if or when necessary make adjustments in future applicant guidebooks. *BC (26 July 2010). R. Andruff (Module 1, 21 July 2010).*

Guidelines are needed regarding how Section 1.2.1 of the DAG will be applied. This section enables ICANN to deny a new gTLD application if any applicant, partner, officer, director or manager or any person owning more than 15% of the applicant “is the subject of a pattern of decisions indicating liability for, or repeated practice of bad faith in regard to domain name registrations.” Applicant evaluators need to be provided with additional guidance on this eligibility factor. For example, a statute of limitations of 5 years should apply in regard to past infringing activities, given that trademark infringement can be unintentional and the UDRP process is unpredictable. Also, a few adverse UDRP findings over many years in the context of a large domain portfolio should not be presumed to indicate that an entity or individual is a “bad actor” who should be barred from any significant involvement in a new gTLD. *ICA (21 July 2010).*

Definitions—security (2.2.3.1). The “security” section of this area is very minimalist. BITS recommends either direct inclusion of other security related requirements or at least reference to other areas of the applicant guidebook containing those requirements (e.g. 5.4.1). *BITS (22 July 2010).*

Evaluation team—communications (attachment to Module 2, scoring, p. A-3). How will applicants be notified that there is a communication to them from the evaluation team available at the “online interface” (e.g. will there be email notification to check the interface)? *BITS (22 July 2010).*

“Average, reasonable Internet user”. This term in Section 2.1.1.1.2 should be more clearly defined. *Red Cross (21 July 2010).*

Public interest prioritization. Rather than randomizing applications for batch processing, ICANN should consider prioritizing applications based on public interest need. *Red Cross (21 July 2010).*

World Health Organization (WHO) concerns not addressed. Concerns of the WHO regarding public health and safety issues involved with International Nonproprietary Names for pharmaceutical products (from WHO letter to ICANN dated 9 December 2009) have not been addressed. *A. Aikman-Scalese (21 July 2010).*

Financial evaluation—not-for-profits. Evaluation should take into account the different financial picture and sources of funding for not-for-profit organizations when reviewing whether an organization has adequate funding for three years of registry operations. *Red Cross (21 July 2010).*

Reserved names—regional ccTLD organizations (2.2.1.2). The four regional organizations of ccTLDs (AfTLD, APTLD, CENTR and LACTLD) should be added into paragraph 2.2.1.2 like reserved names. Like ARIN, LACNIC, AFRNIC, RIPE and APNIC, for IP numbers the regional organizations of ccTLDs are involved directly in the process of ccTLDs and ICANN. The four regional organizations have liaisons in the ccNSO Council and participate in different working groups and are recognized by the community. *E.I Ahon (Module 2, 17 June 2010).*

Section 2.2.2.3—Evaluation—clarifying questions. With respect to language changes made in this section, note that the evaluators are under no obligation to ask clarifying questions. RySG repeats its recommendation from its DAGv3 comments that evaluators should be obligated to ask clarifying questions where needed. *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Section 2.2.3.1—Definitions—Security and Stability.

No changes were made to the definitions of security and stability. They need to be revised. They conflict with and exceed the draft gTLD agreement, and are based on a misunderstanding of IETF practices and definitions. The contract language must be revised to adhere to proper terminology (e.g., contracted parties should not be required to adhere to IETF best practices; by definition best practices are not mandatory.) *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Some language in the “security” definition is too broad and opens it up to expansive interpretation. It potentially takes in a wide variety of small and large security incidents on the Internet. The mere fact that services are operating on a domain name does not imply or require registry involvement. The current language in the guidebook seems to come from the RSEP definition of an “effect on security” but it is missing the context of that definition. After the DAGv3 RySG suggested that the “security” language be changed to read: “Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards.” *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

The “stability” definition’s phrase “authoritative and published by a well-established, recognized, and authoritative standards body” is unacceptable. ICANN should not leave the language open-ended and make contracted parties subject to any and all standards bodies. ICANN needs to explicitly enumerate the standards and name the authoritative body, which we believe is the IETF. Application of additional standards should be considered via the consensus process. *RySG (10 Aug. 2010).*

Question 11(f)—allegations of intellectual property infringement. The question as written is ambiguous. The more relevant question is whether the applicant has been charged with activities that infringe intellectual property rights in which a domain name has been used. The question should be rephrased to

refer to “allegations of intellectual property infringement relating to registration or use of a domain name.” The Notes column should make clear that ICANN can reject an application in which the applicant cannot provide a satisfactory explanation. *COA (21 July 2010)*.

Whois data quality policy disclosure. ICANN should require applicants to disclose their policies for Whois data quality—i.e. spell out how they will require registrars who sponsor registrations in the new gTLD to ensure the accuracy and currency of Whois data that they collect. The best approach is to include Whois data quality requirements in registry agreements with new gTLD operators, but disclosure in the application is a worthwhile fallback. ICANN should be able to use contract compliance tools to pursue registries that misrepresent their plans on critical issues such as improving Whois data quality. *COA (21 July 2010)*.

WHOIS requirements should be uniform. Whois enforcement must be stronger. The rules should be as specific as possible and ensure that accurate data is maintained. Applicants should be held to a uniform set of requirements in order to avoid any discrepancies. *CADNA (21 July 2010)*.

High Security Zone TLD Program—application-based incentives.

A specific evaluation question should be included to provide application-based incentives for applicants to protect the public by adopting the more rigorous protections spelled out in the High Security Zone TLD Program. Applicants should be awarded one or more optional points for a positive response, or alternatively points could be deducted from the evaluation score of an applicant who declines to take these additional steps to protect the public. *COA (21 July 2010)*.

We are concerned that an applicant’s decision to not pursue High Security Zone verification does not reflect negatively on the applicant or affect its scores in the evaluation process. There should be a right to object against any financial services gTLD applicant that seeks to avoid high security verification and such avoidance should be grounds for denial of the application. *ABA (22 July 2010)*. *BITS (22 July 2010)*.

ICANN Board role in evaluation and delegation.

The Board’s role in any part of the evaluation and delegation process is not sufficiently articulated or constrained. The Board’s role needs to be extremely clearly defined so that all parties know when and under what conditions the Board may step in. The Board, like the evaluators, needs to be bound by probity requirements to ensure there is no background lobbying (e.g. from national governments or others). The Board’s role in delegation must be clearly articulated (e.g., a Board bottleneck due to workload would be very unfair to an applicant who had successfully completed the application process). A full refund of costs of the evaluation would need to apply in cases of an applicant that passes evaluation but for which the Board denies delegation. *L. Williams (23 June 2010)*.

ICANN should assure that the Board’s role is to ensure that once submitted to ICANN that applications meet the criteria in the Final Applicant Guidebook as approved by the Board. ICANN should provide clarifying language in the Final Applicant Guidebook that if an application is deemed to have met the criteria, it is not the Board’s role to make further deliberations about the application’s validity or eligibility. *AusRegistry (20 July 2010)*.

Technical evaluation of new backend registry operators. Given the established registry backend operators—i.e., VeriSign, Afiliias, Neustar, AusRegistry and CORE, ICANN should evaluate them once and “pass” all applicants who have them as their backend registry providers. This would save ICANN money

and simplify the application process. The only backend registry technical evaluation that would make sense is if the backend registry is new and has no prior history in the business. *MUSIC (20 July 2010)*.

Delegation decision—certainty of process. The Final Applicant Guidebook should provide clarifying information about certainty of process so that each successful gTLD applicant has a clear indication of when their delegation will occur. It is not clear how ICANN decides the order of delegation and how and when successful applicants are informed. *AusRegistry (20 July 2010)*.

Registry Failure—continuity of operations and financial instrument requirement.

The requirement for a financial instrument that will guarantee at least 3 years of operation of essential registry services in the event of business failure is an unnecessary drain on the resources of prospective registries already damaged by the long delay of the new gTLD program. The requirement is especially punitive for small registries and will tie up important resources. It will discourage deserving applications and contribute to the failure of others. The goal of protecting registrants can be met by different means. Instead, continuity can be assured through cooperative agreements between registries and/or registry service providers who agree to provide these services in the failed registry. This sort of arrangement, already contemplated by ICANN in its Registry Transition Process document, should be extended to the application evaluation portion of the DAG. ICANN should provide for alternative, non-financial means of guaranteeing registry service continuity, either wholly or in part. *Minds + Machines 21 July 2010*). *NIC Mexico (21 July 2010)*.

Neustar supports the financial instrument requirement. ICANN has done a comprehensive job to deal with situations where a registry operator is also the back-end registry services provider. A financial instrument is appropriate in such a case since there is no third party to continue the registry operations and therefore ICANN could incur significant costs for transition. The current language does not adequately address the situation where the registry operator does not operate the registry services itself but outsources it to a back end registry services provider. In such cases failure of the registry may not result in loss of critical services if the back-end provider continues operations in the event of an applicant failure. This approach would not require a financial instrument. Neustar notes that ICANN has already addressed the issue of the back-end registry service provider failure by requiring contingency planning and submission of a transition plan. *Neustar (21 July 2010)*.

Clarifications of language—public comments.

In 1.1.2.5, who will handle public comments and in which way (e.g. ICANN staff, independent evaluators) and how will they be reflected in the evaluation process? *DOTZON (21 July 2010)*.

There should be guidelines for evaluators to use when assessing public comments. How will they be determined? How will comment periods be managed? Comments may be used in dispute resolution (1.1.2.7); DRPs should be given guidelines regarding how to assess comments. *RySG (10 Aug. 2010)*. *VeriSign (22 July 2010)*.

RSEP fees. The cost estimate for fees for use of the RSEP process seems extremely high (\$50K for a three person RSEP panel). What are the individual cost factors that make up this estimate? There are now actual RSEP cases that have been processed, so that the cost model should now be re-evaluated and made more cost effective. *RySG (10 Aug. 2010)*. *VeriSign (22 July 2010)*.

## Analysis of Comments

Some comments suggested that “market differentiation” should be reflected as a criterion in the evaluation process. This point can be interpreted in a number of ways. Implementing market-differentiating criteria could be construed as limiting competition for existing registries and potentially stifling innovation. As with any industry, two or more organizations focused on the same consumer provide that consumer with choice. It is this choice that drives competition which can lead to innovation, product/service differentiation, and price reduction. Additionally, evaluating (i.e., scoring) the beneficial effect of innovation is difficult or impossible and presents contract enforceability issues.

The proposed question “Which users/registrants/organization/group/community do you intend to serve?” is already explicitly part of the application for those designating their applications as community-based. It is also implicitly part of the existing question required of all applicants to state their mission and purpose (question 18). This is an open-ended question to give the applicant the opportunity to describe the overall scope of its proposal, and to enable informed comment on the application. There is no expectation that this question should be used to eliminate any overlapping user groups, nor is there an assumption that the same group cannot be served by more than one TLD.

The second proposed question, “How does your TLD differentiate itself from others in the DNS?” might provide an interesting perspective, but it is unclear how responses to this question could be scored, used as a threshold item, or enforced without a significant expansion of the scope of ICANN’s responsibilities.

ICANN’s Core Values include “...depending on market mechanisms to promote and sustain a competitive environment.” How applicants will differentiate themselves within a given market or industry should be a decision left to the applicants and the relevant markets. ICANN should not judge the effectiveness of an applicant’s business model. Rather, ICANN is focused on DNS stability, preventing user confusion, determining whether an applicant has demonstrated basic competencies to run a registry, and protecting registrants and users.

A comment suggests that additional guidelines are needed for the Eligibility requirements as covered in section 1.2.1 of the Draft Applicant Guidebook. ICANN agrees and is moving forward with developing additional guidelines that will be communicated to both potential applicants as well as Applicant evaluators prior to receiving applications. Applicants will still be required to disclose any known issues and can provide clarification of these issues upon submitting the application. Should other issues be found, not previously disclosed by the Applicant, ICANN will seek additional clarification from the Applicant. This clarification request will be conducted during Initial Evaluation.

A comment suggests rephrasing question 11(f), regarding relevant infringing activity in the applicant’s background, for greater clarity, to refer to “allegations of intellectual property infringement relating to registration or use of a domain name.” This is a useful suggestion and this change will be made in the revision.

Comments have been raised seeking clarity on communication with Evaluation Panelists. One comment asks how Applicants will be notified of communications from Evaluation Panelists while another seeks to ensure that Evaluation Panelists be obligated to seek clarifying questions where needed. Protocols are being developed and will be published to ensure that all Applicants are aware of communications on a timely basis and are provided with same time period to respond to any clarification requests.

In addition, Applicants are expected to provide all necessary and relevant information at the time their application is submitted. This includes complete and accurate information to support relevant criteria in the Applicant Guidebook. Evaluation Panelists are experts in their respective fields and are expected to conduct a thorough analysis based on the information provided by each applicant. If a thorough analysis cannot be completed, then clarification questions may be asked. However, as the Applicant can provide no new information - only clarifying information for the answer or information previously provided - a clarification request may not be needed. Accordingly, clarifications will be at the discretion of the Evaluation Panelist.

Note that the evaluation process is designed to afford several opportunities for clarification and amplification when needed. Applicants are expected to provide complete and accurate applications and supplemental data upon the first submission. A Customer Service function will be available to handle questions from applicants during the Application Submission Period. The Customer Service function will endeavor to provide and publish answers to all relevant questions from all applicants, to the extent practicable, in the applicant's language of choice. The guidebook encourages applicants to take advantage of this Question/Answer mechanism to address any particular areas of uncertainty before the application is submitted, to reduce the need for additional clarification and review steps. Once the Initial Evaluation has commenced, the evaluation panels and applicants will conduct a coordinated exchange of information, if needed, which should address any remaining oversights or misunderstandings. Finally, applications not passing Initial Evaluation will have the option of requesting Extended Evaluation procedures in which they may provide further data supporting their applications (there is no extra cost to the applicant for electing this option). The availability of these opportunities before, during, and after application submission should allow the applicant to provide all necessary information to the evaluators.

A comment suggests there should be some prioritization of batch processing applications versus random selection. Note that batching will only occur if the volume of applications is so high that the process as already built cannot accommodate it. In such a case, the same concerns highlighted in the discussion of application categorization also apply to establishing categories of applications and prioritization thereof for batch processing. Providing benefit to one set of applicants over another does not promote a fair and impartial process.

A comment suggests that the evaluation should account for differing funding sources when reviewing an application from a not-for-profit entity as opposed to a for-profit entity. It should be noted that the estimated level of funds required for three years of operation is determined by the applicant, not the evaluators. The financial review panel considers the information provided and assesses whether the proposed funding level will be adequate to maintain a secure and stable TLD. This is the case regardless of what type of entity the applicant is.

In relation to Whois requirements, comments suggest that additional steps should be undertaken in regard to Whois accuracy measures as part of the evaluation process. This was discussed and considered previously. Changes in Whois policy require a consensus based, bottom-up decision. ICANN is working on several fronts to improve Whois accuracy: policymaking support, technical, compliance, and performance reviews. In the meantime, there are improvements in the Guidebook including the requirement to maintain a thick Whois database and an option to implement searchable Whois.

In relation to increased security, one comment suggests providing an incentive to encourage applicants to implement more rigorous protections as highlighted in the proposed High Security Zone TLD Program

and another suggests that such rigorous protections be required of certain applicants. Continual improvement in security will always be part of the new gTLD program. Adoption of an HSTLD type certification will be urged for registries whose model connotes “security, such as a TLD providing financial services.” There are a number of reasons for making this a requirement of a specific type of application.

Comments seek clarity of Board’s role in the evaluation and delegation processes. We agree that further clarification is needed, and consultations with the Board have resulted in the detail provided in the new Guidebook.

A comment suggests that established back-end registry providers be evaluated once as opposed to on a per-application basis. It is agreed that certain efficiencies can be gained in the approach to reviewing applications with the same back-end registry provider, and this will be tested in the evaluation process. However, there is no assumption that all such applications will be identical or should be subject to a less thorough standard of review.

A comment seeks clarification about the order of delegation and how and when successful applicants are informed. This process has been clarified in the Guidebook. The order of delegation depends strictly on how quickly the applicant can complete each step in the process after Initial Evaluation. Note, all applications will complete Initial Evaluation at the same time. If an application passes Initial Evaluation and is not part of a string contention set or does not have any objections pending, then it moves straight to contract execution. Once the contract is signed, the applicant will move straight to pre-delegation check. As this check is passed then it will move directly to IANA for delegation. ICANN expects to have resources available to execute each step as the application progresses. Note, however, that this part of the process is dependent on many factors – including applicant level of readiness – and not solely controlled by ICANN.

In terms of communication, clear posting dates will be communicated to the public and the pool of applicants throughout the evaluation process. As the Applicant progresses through each step, updates will be communicated to the public and to the Applicant directly.

One comment suggests the addition of the names of regional ccTLD organizations to the list of names that are reserved at the top level. This was considered; however, the top-level reserved names list is intended to be as narrow as possible, and cover only those names which have an impact on the DNS infrastructure or are part of the organizational structure of ICANN. The bodies mentioned are certainly contributors to ICANN, but fall more into the category of constituencies, which are more loosely formed and self-governed, and it would expand the list considerably to include all of these as reserved names.

Several comments seek clarification of the public comment process. As discussed in the Applicant Guidebook, the public comment period will open with the public posting of applicant data at the end of the completeness check and prior to commencing Initial Evaluation. To ensure that Evaluation Panels and Dispute Resolution Providers are able to effectively and timely consider public comments, the public comment window will remain open for 45 days. A general comment forum will remain available, but if comments are to inform Initial Evaluation, they must be submitted within the 45-day period. All panelist and dispute resolution providers will have access to the comments. The availability and use of public comments will be discussed with the Evaluation Panels and Dispute Resolution Service Providers as part of their training. In the case of a dispute resolution proceeding, the panel must provide the reasoning

upon which the expert determination is based, which might include consideration of relevant public comments.

Comments regarding the financial instrument requirement suggest that ICANN should provide alternatives, or that the requirement would be irrelevant in the case where part or all of the registry operations are outsourced to a third-party service provider. The two options currently included in the guidebook ([a] letter of credit or [b] cash escrow deposit) are in place because they provide the most efficient and reliable means for transfer of funds in the event of a registry failure scenario. Other options (such as those contained in earlier drafts of the guidebook) have been considered in detail for implementation, but could not offer the same speed or reliability without being cost-prohibitive for applicants. Note that the funds are only released if a threshold is met for failure of one of the critical functions. It should be considered that even if the existing service provider continues to execute the critical functions in the short term, it is not clear that such a provider would be willing to continue such operations indefinitely, especially in the absence of financial provision for it by the registry operator. The financial instrument is considered a cornerstone of registrant protection and thus is a requirement across all new gTLDs for a particular time period.

With regard to the registry services portion of the evaluation process, a set of comments suggested changes to the definitions of ‘security’ and ‘stability’ that are employed. The current definitions are found in existing registry agreements and can also be found in the Registry Services Evaluation Policy (“RSEP”) -- see <http://www.icann.org/en/registries/rsep/rsep.html>, which was adopted as an ICANN consensus policy. The definitions are intentionally broad -- anything a registry might do that could harm other systems on the Internet would be considered a security/stability issue and could cause ICANN to withhold approval of a particular service. These definitions are critically important terms and part of a process that has a significant impact on the DNS. A change to the currently accepted and workable process should be subject to a broader stakeholder discussion.

With regard to estimated RSEP fees, comments suggested that the model could be more cost-effective. The current expected fee of \$50,000 was estimated based on a significant decrease from historical costs. Efficiencies were introduced so that the fee is less than 50% of the current cost per RSTEP evaluation. In the three years that the Registry Services Evaluation Policy has been in place, a small fraction of registry services proposed by existing gTLD registries have resulted in an RSTEP review. Each inquiry involving the RSTEP involves a 5-person panel and costs \$100,000-\$125,000. In the new gTLD process it is anticipated that most cases will be addressed using a 3-person panel.

## **TRADEMARK PROTECTION**

### **Key Points**

- Comments from every section of the ICANN community and broader Internet community have been thoroughly considered in the development of the current trademark protection mechanisms called for in the Applicant Guidebook.
- These trademark protections reflect carefully crafted compromises that received broad support within the GNSO and At-Large communities.
- Although some debate adequacy, the new trademark protections are unprecedented and aim to create a balance between all interested parties with a main focus of protecting rights holders and consumers, including both registrants and Internet users.

## Summary of Comments

Registry option to exceed baseline rights protection. Most of the comments to date from the IP community are of a “baseline” nature, while registries themselves can choose to go over and above these requirements. Big Room invites feedback from IP and trademark experts as to what a “best in class” sunrise and ongoing rights protection mechanism(s) would entail. *Big Room (21 July 2010)*. What is expected of a registry operator section (5.4.1). This is an important section which includes key requirements such as DNSSEC deployment requirement, Whois service, maintenance of an abuse point of contact, and continuity. BITS suggests that ICANN require both the Trademark Rights Service and the Sunrise period at startup. *BITS (22 July 2010)*.

### Support for level of IP protection

The DAG is sufficient and is a significant concession to trademark owners even though the IRT’s recommendations were not accepted in their entirety. Every interest group within the ICANN community has found that they need to live with something that is, from their point of view, less than perfect. The IP community should be no exception especially in light of the considerable concessions already made to them. *Minds + Machines 21 July 2010*.

We work in the interest of the global hotel industry and we support the proposed instruments for rights protection, which are the result of intense discussions within the ICANN community. *HOTEL (21 July 2010)*.

Subject to minor drafting matters the trademark overarching issue should be considered complete. The protections developed through stakeholder discussion and compromise will provide trademark holders with significantly more protection than exists in current gTLDs. *R. Tindal (21 July 2010)*. *Domain Dimensions (22 July 2010)*. *Demand Media (22 July 2010)*. *D. Schindler (22 July 2010)*.

### Trademark protection not adequate.

IOC appreciates ICANN’s recognition of IOC’s comments regarding special statutory trademark protection as a proposed standard for inclusion in the trademark clearinghouse. However, IOC finds troubling the statements from ICANN leadership confirming that trademark protection in new gTLDs is believed to be a settled issue. *IOC (21 July 2010)*.

Current RPMs do not adequately address trademark concerns. *WIPO Center (16 June 2010)*. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *JONAS (11 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *MarkMonitor (19 July 2010)*. *BBC (21 July 2010)*. *C. Speed (21 July 2010)*. *Hogan Lovells (21 July 2010)*. *IPC (21 July 2010)*. *DuPont (21 July 2010)*. *Comerica (3 Aug. 2010)*. *Carlson (21 July 2010)*. *Sunkist (21 July 2010)*. *Solvay (22 July 2010)*. *ETS (22 July 2010)*. *LifeScan (22 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Coca-Cola (21 July 2010)*. *News Corporation (21 July 2010)*. *Adobe Systems (21 July 2010)*. *SIIA (21 July 2010)*. *Microsoft (21 July 2010)*. *ABA (22 July 2010)*. *Liberty Mutual (22 July 2010)*. *AIM (Module 5, 14 July 2010)*. *Nestle (21 July 2010)*.

Nilfisk is against introduction of new TLDs as long as the current system does not secure effective solutions to cybersquatting and trademark infringement. *Nilfisk (13 July 2010)*.

ICANN has not adequately addressed the overarching issue of trademark protection in the new gTLDs. *INTA Internet Committee (21 July 2010). Adobe Systems (21 July 2010)*

Introduction of new gTLDs will create vast opportunities for bad faith registrations and harm intellectual property owners and consumers. Consumers will lose trust in trademarks as guides in the global market. *JONAS (11 July 2010). INTA Internet Committee (21 July 2010).*

It is inevitable that conflicts will arise between competing brand owners in different jurisdictions. It is naïve to suggest (as ICANN does) that applicants identified as in contention can be encouraged to reach a settlement or agreement to resolve that contention, at least where trademark rights are concerned. It is highly unlikely that a brand owner would be prepared to share or relinquish control over its brand to a competing brand owner either in the same industry in a different country or a different industry in the same or a different country. We do not consider it possible to reconcile the conflict between territorial trademark rights and the global nature of the Internet. It is for this reason among others that BBC has opposed and maintains its opposition to ICANN's proposals. ICANN needs to adopt a solution which genuinely lessens the need for defensive registrations and the administrative and financial burden on trademark owners. *BBC (21 July 2010).*

It is extremely disappointing that ICANN has failed to take the opportunity to require registry operators to adopt and implement rapid takedown or suspension systems to combat malicious conduct. Microsoft reiterates the proposal it made for this in its version 3 comments, including being amenable to having one or more Microsoft employees with relevant expertise to work on an ICANN-convened expert group to develop a required rapid takedown or suspension system. *Microsoft (21 July 2010).* Notwithstanding a succession of processes, there has been little truly substantive dialog on trademark considerations. Exchanges are subject to palpable registration-driven pressures, and have not lived up to a proper standard of open and informed dialog, which is key to a long-term, stable DNS framework. This is illustrated by the heavily compromised state of the envisaged protection mechanisms: the PDDRP ignoring willful blindness; the URS becoming overburdened; and the TMC not providing a level playing field. These circumstances support the Economic Framework paper's recommendations that ICANN proceed in a controlled manner, i.e., in discrete limited rounds. WIPO staff will continue to monitor developments and remains available to contribute to rights protection systems that work for durable DNS expansion. *WIPO Center (21 June 2010).*

The trademark protections in the current guidebook are weak and inadequate. If ICANN does not review the current guidebook and adapt it to respond positively to our concerns, our members will appeal to national governments and other bodies. *MARQUES/ECTA (21 July 2010).*

Significant issues of concern remain regarding intellectual property protection. The online community will benefit from a smartly designed TMC and URS and IHG looks forward to seeing them through. *IHG (20 July 2010).*

The cost of acquiring a gTLD is too high for most companies, as well as the cost of enforcement of their trademark rights. At the very least, ICANN should allow for a period of time for existing companies with established, registered trademarks to register those trademarks with ICANN (or ICANN should be required to do a trademark search) to avoid this problem. *Piper Aircraft (14 July 2010).*

AAFA requests that ICANN reevaluate and revise the current rights protection mechanisms proposed for both the application process and post-delegation to ensure that brand owners' (i.e., the apparel and footwear industry that is so dependent on the strength of their reputation and brand names) legitimate concerns and rights are properly protected and assured in the new gTLD space. Without requisite mechanisms in place to protect brand owners in the application process and post-delegation, AAFA is concerned that the new gTLD program could provide a vehicle for rampant abuses and exploitation of its apparel and footwear members' valuable marks and brands to increase exponentially. The apparel and footwear industry is concerned that the proposed high costs of registering a new gTLD will not deter the often well-funded and highly organized counterfeiting operations that are prevalent online. As cost alone is unlikely an impediment to these bad actors, stronger brand protection mechanisms are critical. The RPMs need to be stronger, less costly and more efficient than the RPMs currently proposed in the DAGv4 for protecting trademarks. The overwhelming burden still falls substantially on brand owners to stop infringement, and the proposed processes to do so remain overly cumbersome, expensive and time intensive for brand owners. *AAFA (21 July 2010)*.

ICANN should address trademark owners' concerns about the current inadequate protection measures in DAGv4 by providing for rules that:

- Avoid discriminatory treatment of trademark registrations;
- Provide for equitable and efficient resolution of situations of split trademark ownership (e.g. geographic split or product category split);
- Include clear procedures for the trademark repository and recognition of trademark registrations;
- Include IP rights other than trademarks alone;
- Provide for an equitable and efficient dispute resolution system (a shifting burden of proof after demonstration of a prior IP right, including the "loser pays" principle);
- Streamlining the appellate procedure;
- Providing unambiguous provisions for transfer or cancellation of domain names; and
- Including clarification on closed gTLDs.

*PMI (21 July 2010)*.

#### Dilution of IRT work.

ICANN has allowed the mechanisms proposed by the IRT to be worn away, as ICANN evidently hopes that stakeholders will be worn down until they can be ignored entirely. The relevant provisions in AGBv4 have changed little from the STI Review Team recommendations. There is not consensus on the RPMs in DAGv4 which, if taken together, fall well short of an effective response to the problem of trademark-related external costs in the new gTLD process. ICANN's refusal to strengthen these mechanisms, even so far as to bring them back to the level originally recommended by the IRT, is tantamount to concluding that trademark holders and the public at large should bear these costs, which is contrary to the public interest that ICANN has pledged to serve. *Time Warner (21 July 2010)*. *Com Laude (21 July 2010)*. *Hogan Lovells (21 July 2010)*. *HSBC (21 July 2010)*. *MPAA (21 July 2010)*. *INTA Internet Committee (21 July 2010)*.

ICANN should proceed generally with all of the mechanisms set forth in the IRT report. *USCIB (21 July 2010)*. *Microsoft (21 July 2010)*.

The overarching trademark issues have not been resolved. It would not be a backwards step to re-form the IRT; changes are needed and the IRT is well placed to advise in this area. *C. Speed (21 July 2010)*.

ICANN should either turn to qualified IP experts to craft a package of effective protection measures or return to the original recommendations of the IRT report. WIPO could have a key role in this process and could use the IRT's original proposals as the starting point. ICANN should start out with strong measures that could be liberalized later if necessary. To satisfy the broader community, a review of such measures could be instigated after they are operational (e.g. after two years). *MARQUES/ECTA (21 July 2010)*.

The AGBv4 is a step backwards—ICANN has inexplicably chosen to dilute the long-term solutions presented by the IRT. Without adequate remedies, the issue of trademark protection remains unresolved. The current proposals are too burdensome, expensive and unwieldy compared with existing remedies such as the UDRP or civil remedies available under the ACPA. We do not expect the business or trademark community to endorse or make wide use of the current trademark protection proposals in the future. At a minimum, all trademark protection remedies must be: (1) effective as a remedy; (2) reasonably expedited; (3) stringent enough to avoid gaming; (4) based on actual costs (which avoids further monetization and extraction of unnecessary fees from trademark holders); (5) provide for increased certainty; and (6) result in making the trademark holder whole. *Verizon (20 July 2010)*. *IPC (21 July 2010)*. *DuPont (21 July 2010)*. *Rosetta Stone (21 July 2010)*.

#### Process.

It is clear from comments of senior ICANN staff at the Brussels meeting that no further major changes to the AGBv4 on rights protection mechanisms will be seriously entertained. The cross-community efforts to date are not a triumph of the bottom-up policy development process. Rather, the almost complete lack of support for the final outcome (the insufficient mechanisms now included in AGBv4) among members of the community with the most at risk demonstrates that the process has been a failure. The real losers will be the consuming public on whose interests in avoiding marketplace confusion and fraud the entire trademark system is based. *COA (21 July 2010)*. *BBC (21 July 2010)*. *Adobe Systems (21 July 2010)*.

It is ironic that ICANN prepares to announce “mission accomplished” on RPMs just when its Economic Framework paper calls for an objective study of the full costs to trademark owners of new TLDs (e.g., enforcement, monitoring, defensive registrations). This should have been step one in devising a sound and efficient system of RPMs, not an epilogue to a tale on which ICANN is about to close the book. *COA (21 July 2010)*. *BBC (21 July 2010)*.

Relationship to UDRP. The current new gTLD program's RPMs should meaningfully complement, not destabilize, the proven, globally recognized UDRP. *WIPO Center (16 June 2010)*.

Expansion. There is a substantial gap in coverage among the currently proposed trademark protection proposals. Currently there is no DRP or other mechanism that allows a brand owner directly to confront registrar misconduct. *INTA Internet Committee (21 July 2010)*.

#### Globally protected marks list (GPML).

The lack of a GPML in AGBv4 is very disappointing as it could have provided some relief for trademark owners of such marks. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *Nilfisk (13 July 2010)*. *Vestas (16 July 2010)*. *MARQUES/ECTA (21 July 2010)*. *HSBC (21 July 2010)*. *IPC (21 July 2010)*. *DuPont (21 July 2010)*. *IPOA (21 July 2010)*. *Coca-Cola (21 July 2010)*. *News Corporation (21 July 2010)*. *Adobe Systems (21 July 2010)*. *SIIA (21 July 2010)*. *Nestle (21 July 2010)*.

Without the GPML there is no proactive trademark protection provided with the launch of new gTLDs. *AT&T (21 July 2010). AIPLA (21 July 2010). BC (26 July 2010). AIM (Module 5, 14 July 2010).*

## Analysis of Comments

Many have commented on the general nature of trademark protections that have been put in place for the New gTLD Program. Some think they are sufficient, some think they are not sufficient and some have said that there has not been enough substantive discussion on the issues. Still others state that any protections put in place should extend to registrars.

It is important to reflect on the chronology of events that led to the development of the trademark protections now included in the New gTLD Program for new gTLDs. After the early versions of the Applicant Guidebook were posted, the trademark community spoke out loudly and clearly – more trademark protections were needed. Those comments were heard by ICANN. In response, the Board resolved to establish an Implementation Recommendation Team (IRT), to help identify and propose rights protection mechanisms (RPMs) for trademark holders within the New gTLD Program (see <http://www.icann.org/en/minutes/resolutions-06mar09.htm#07>). The IRT described itself as a group of 18 people experienced in trademark protection on the Internet.

Specifically, the Board asked the IRT to develop a set of solutions that addressed trademark protection and consumer protection in a way that was workable, and that was acceptable to other interests. Other parties were invited to respond to the IRT work, to propose solutions, and an extensive public outreach process was initiated, including several regional events held throughout the world.

In a series of face-to-face meeting, conference calls, and public consultations, the IRT engaged in intensive substantive discussion and developed specific recommendations (<http://icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>), reflecting “the views of business and trademark interests in general.” Those recommendations included proposals for an IP Clearinghouse (“Clearinghouse”), a Uniform Rapid Suspension System (“URS”), a Trademark Post-delegation dispute resolution procedure (“PDDRP”), and a globally protected marks list (“GPML”). Concerns from the broader ICANN Community immediately emerged with respect to several IRT recommendations. After significant public comment, through both the public comment forum and numerous face-to-face meetings, additional refinement of the IRT proposals were needed in order to balance the interests of the community as a whole, the trademark holders, and registrants with legitimate interests in registering domains that might also be the subject of a trademark. Compromises were also required in light of the implementation difficulties of some of the IRT proposals.

The next iteration of the Guidebook included nearly all of the trademark protection mechanisms suggested by the IRT, including the Clearinghouse, the URS and the PDDRP. The GPML was not included in light of the implementation difficulties with, and the significant opposition to, such a list.

After further comment, discussion and revision, the Board sent the Clearinghouse and the URS proposals back to the GNSO. The Board requested the GNSO Council’s view on whether the Clearinghouse and URS recommended by the staff were consistent with the GNSO’s proposed policy on the introduction of new gTLDs, and were appropriate and effective for achieving the GNSO’s stated principles and objectives.

In response to the Board's request, the GNSO established the Special Trademark Issues Review Team ("STI"), consisting of members of each Stakeholder Group, At-Large, Nominating Committee Appointees, and the GAC. The STI issued a final report on 17 December 2009, including several recommended revisions to the Clearinghouse and the URS proposals (see <http://www.icann.org/en/announcements/announcement-2-17dec09-en.htm>), which were unanimously adopted by the GNSO.

In addition, ICANN invited community participation in an open consultation process to discuss and propose revisions to, among other things, the PDDRP. This group was formed as the temporary drafting group ("TDG").

Together, the IRT recommendations, the STI revisions, the TDG revisions, and comments from every section of the ICANN community and broader Internet community were taken into consideration in the development of the current trademark protection mechanisms called for in the Applicant Guidebook. These new trademark protections are unprecedented and are intended to create a balance between all interested parties with a main focus of protecting consumers, including both registrants and Internet users.

These trademark protections now part of the new gTLD Program include:

- The requirement for all new registries to offer either a Trademark Claims service or a sunrise period at launch.
- The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for trademark holders, registries, and registrars.
- Implementation of the URS that provides a streamlined, lower-cost mechanism to suspend infringing names.
- The requirement for all new gTLD operators to provide access to "thick" Whois data. This access to registration data aids those seeking responsible parties as part of rights enforcement activities.
- The availability of a post-delegation dispute resolution mechanism that allows rights holders to address infringing activity by the registry operator that may be taking place after delegation.

And of course, the existing Uniform Domain Name Dispute Resolution Policy (UDRP) continues to be available where a complainant seeks transfer of names. Compliance with UDRP decisions is required in all new, as well as existing, gTLDs.

Each of the recommendations above is intended to provide a path other than defensive registrations for trademark holders.

The application process itself, based on the policy advice, contains an objection-based procedure by which a rights holder may allege infringement by the TLD applicant. A successful legal rights objection prevents the new gTLD application from moving forward: a string is not delegated if an objector can demonstrate that it infringes their rights.

Contrary to the comment that there has been very little substantive discussion on this issue, the likely thousands of emails and hundreds of teleconferences had by the IRT, the STI, the TDG, the GNSO Council, the At-Large and numerous other stakeholder groups and constituencies relating to trademark

protection point to the significant effort and attention dedicated to the evaluation of these new trademark protections. These are in addition to the face-to-face meetings held at each of the ICANN Public Meetings as well as apart from those public meetings, such as those held by ICANN in Marina del Rey, New York and London.

Finally, in response to other trademark protections proposed but not included in the Applicant Guidebook, such as extending applicable trademark protections to registrar conduct, such ideas could be further explored through the initiation of policy development through the GNSO Council.

## TRADEMARK CLEARINGHOUSE

### General

### Key Points

- In terms of entry into the Clearinghouse, all nationally or multi-nationally registered marks are eligible, as well as mark validated by a court, or protected by statute or treaty (subject to some date limitations).
- Steps have been taken to ensure consistency and to prevent similarly situated applicants from being treated differently.

### Summary of Comments

#### Clearinghouse Proposals.

ICANN should share first drafts of the IP clearinghouse process as soon as possible. *dotZON (21 July 2010)*. *HOTEL (21 July 2010)*.

The Clearinghouse section should focus on “what we want” and avoid “how it gets done” as this section will be the nucleus for a later RFP and it is important to stimulate creative and competitive proposals from a wide range of service providers of the trademark industry. *EnCirca (Module 5, 21 July 2010)*.

Evolution of Clearinghouse. There should be a mechanism for the Clearinghouse to evolve in its uses in the future. To enable this, following the sentence “The reason for such a provision would be to prevent the Clearinghouse from using the data in other ways” add the phrase “without undergoing the ICANN public participation process.” *EnCirca (Module 5, 21 July 2010)*.

Support for Clearinghouse as drafted in AGBv4. It was supported by both the IRT and STI, has broad acceptance from ICANN constituencies and received approval from the GNSO Council. *R. Tindal (21 July 2010)*. *Domain Dimensions (22 July 2010)*. *Demand Media (22 July 2010)*.

#### Clearinghouse is not an RPM.

The Clearinghouse is not a protection mechanism—it is merely a database. *VKR Holding (13 July 2010)*. *MarkMonitor (19 July 2010)*. *Comerica (21 July 2010)*. *Solvay (22 July 2010)*. *ETS (22 July 2010)*. *Carlson (21 July 2010)*. *C. Speed (21 July 2010)*. *CADNA (21 July 2010)*. *Sunkist (21 July 2010)*. *Adobe Systems (21 July 2010)*. *LifeScan (22 July 2010)*. *Liberty Mutual (22 July 2010)*. *BC (26 July 2010)*. *NCTA (Module 3, 21 July 2010)*. *AIM (Module 5, 14 July 2010)*.

The Clearinghouse is just a database, and it would promote the need for defensive registrations. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *BBC (21 July 2010)*. *Verizon (20 July 2010)*. *PMI (21 July 2010)*. *HSBC (21 July 2010)*. *DuPont (21 July 2010)*. *AIM (Module 5, 14 July 2010)*.

The Clearinghouse provisions in AGBv4 do not fully encompass the IRT recommendations in focusing support of pre-launch service. *USCIB (21 July 2010)*.

#### Burden on trademark owners.

The Clearinghouse potentially obliges the trademark owner to record all of their trademarks from all territories, significantly increasing costs and workload. Since the trademark owner receives no notice of the application for registration and no opportunity to communicate with the registrant prior to registration, one national registration per mark may not be sufficient for inclusion in the Clearinghouse.

The Clearinghouse requires an extra charge for brand holders, does not provide comprehensive coverage given that only identical marks can be registered and common law marks are left out. The Clearinghouse is given unprecedented discretion to validate and authenticate trademarks for registration in the Clearinghouse. *MarkMonitor (19 July 2010)*. *Carlson (21 July 2010)*. *Comerica (21 July 2010)*. *Sunkist (21 July 2010)*. *Solvay (22 July 2010)*. *LifeScan (22 July 2010)*. *ETS (22 July 2010)*. *Liberty Mutual (22 July 2010)*.

## **Analysis of Comments**

There have been some comments about the timing and openness of the Clearinghouse proposal process. It should be noted that each version of the proposal (originating with the IRT proposal) has been published for public comment and continues to be revised and improved as a result of public comment. Importantly, as can be seen from the Clearinghouse proposal, not all aspects have been fully addressed as some are necessarily left to the potential providers to explore and develop.

Some commentators have suggested that the Clearinghouse is simply a database and others suggest it will promote the need for defensive registrations. It is unclear as to why that might be the case. The need for defensive registrations should be reduced if trademark holders register their marks in the Clearinghouse because it will better enable the trademark holder to avail itself of all rights protection mechanisms in the pre-delegation process.

The IRT recommendations with respect to the Clearinghouse have been the subject of substantial review and comment. The GNSO appointed the STI to evaluate the recommendations of the IRT and provide input. The STI then set forth its proposal at <http://www.icann.org/en/announcements/announcement-2-17dec09-en.htm>. That revision was posted in February 2010 and was the subject of public comment. Again the model was reviewed and published for additional comment in April 2010. In balancing the competing comments, not all suggestions could be incorporated as they often reflected opposite ideas, many of which had been considered by the STI. The resulting Clearinghouse is the product of this detailed review and analysis.

Much discussion surrounded which marks should be eligible for inclusion in the Clearinghouse. On the one hand, trademark holders wanted to be sure that they could register their marks but at the same time there were concerns that fraudulently obtained registrations could be used to game the system. The

result of review and input from a variety of constituencies was to create a list of specific criteria for entry. In terms of entry into the Clearinghouse, all nationally or multi-nationally registered marks are eligible, as well as marks validated by a court, or protected by statute or treaty (subject to some date limitations). In creating objective criteria, steps have been taken to prevent the exercise of discretion and to prevent similarly situated applicants from being treated differently.

## Procedural Aspects

### Key Points

- Costs should be borne by the parties utilizing the services.
- In order to protect access to data, providers will be the only entities that have full access to Clearinghouse data.

### Summary of Comments

#### Costs.

Registries and registrars (not most trademark owners) will be the main beneficiaries of the Clearinghouse and they should also contribute to its costs. ICANN should also bear some of this cost. ICANN stands to generate substantial revenues through the new gTLD process and it should bear some responsibility to ensure that the new program does not facilitate widespread infringement of brand owner rights and widespread confusion and deception of the public. *BBC (21 July 2010). CADNA (21 July 2010). NCTA (Module 3, 21 July 2010).*

The cost of funding the Clearinghouse should be apportioned between the entities that will profit economically from new gTLDs—ICANN, registry operators and registrars (see Clearinghouse, sec. 10). *IOC (21 July 2010).*

Trademark owners should pay only the transaction costs directly associated with the inclusion of their individual trademarks and they should not pay for elements of Clearinghouse overhead and its fixed operational costs. *IPOA (21 July 2010). AIPLA (21 July 2010).*

If the cost of the Clearinghouse is to be borne by those using the service, then there should be not additional charges by registries to trademark owners for sunrise/claims services other than the annual domain name registration fee and the fees should be the same as those charged for general landrush registrations. *Grainger (Module 5, 19 July 2010).*

IBM agrees that the cost of running the Clearinghouse should be borne by the parties utilizing the service and this cost should be nominal. The cost of establishing the Clearinghouse should be assumed by ICANN. Every study indicates that the new gTLD program will be a significant cost to brand owners for enforcement and cessation of brand misuse. The cost of the Clearinghouse should be shared with the new registries via a portion of the funds collected by ICANN for gTLD applications and maintenance. *IBM (21 July 2010).*

#### Setting Clearinghouse Fees.

Under subsection 4.2 fees for services should be set by ICANN. We also agree under subsection 4.2 that the detailed registrar accreditation agreement is an appropriate model. *IPOA (21 July 2010).*

Fees relating to the Clearinghouse should be determined as soon as possible so that not-for-profit organizations can budget in advance for the new gTLD process. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Fees under subsection 4.2 should be set by ICANN. *AIPLA (21 July 2010)*.

Clearinghouse operator. ICANN must choose a third party contractor with extensive experience in trademark protection issues and do so via an open and transparent process. CADNA requests a preview of the proposed contractual arrangement in order to gain a fuller understanding of what this role will entail. *CADNA (21 July 2010)*.

Access to Clearinghouse. Who will have access to Clearinghouse data and services must be clarified. *CADNA (21 July 2010)*.

Deposit of marks. Deposit of marks into the Clearinghouse should be clarified so that it is clear that a trademark owner does not need to register the corresponding domain name in the many new gTLDs. Trademark owners will not have a significant incentive to participate in the Clearinghouse if they have to deposit both their marks and also engage in multiple defensive registrations. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

## Analysis of Comments

Many comments revolve around who will pay for the Clearinghouse and the fees that will be charged. ICANN recognizes that this is an important issue, which has been often discussed, including by the IRT and the STI. As stated by the STI and adopted in the latest version of the Trademark Clearinghouse, “Costs should be completely borne by the parties utilizing the services. ICANN should not be expected to fund the costs of ... operating the TC. The TC should not be expected to fund ICANN from its fees.” The cost of establishing the Clearinghouse is to be borne by ICANN and the Clearinghouse provider(s). As for the fees that the Clearinghouse provider(s) will charge, ICANN will select provider on open bidding process and economical fees will be part of the consideration process.

One commenter notes that the Clearinghouse provider should be experienced in trademark issues and be chosen in open and transparent manner. As set forth in AGBv4, the service provider(s) will be selected on the basis of predetermined criteria which includes the ability to store, authenticate, validate and disseminate the data at the highest level of technical stability and security without interference with the integrity or timeliness of the registration process or registry operations. The process will continue to be transparent and subject to public comment. The details of the contractual relationship as it is currently envisioned is set forth in the AGBv4 at section 4.

In terms of access to data, the Providers will be the only entities that have full access to Clearinghouse data. As set forth in the current AGBv4, it is envisioned that one provider will house the repository and another provider will authenticate/validate the marks. There will be extensive provisions in the contract relating to maintenance of the data.

In terms of use of the Clearinghouse, it is not meant to be a bar to registrations of the trademark TLDs or an automatic registration in each TLD. It is a database that registry operators are required to utilize when offering either a pre-launch Sunrise service or Trademark claims process.

## Authentication and Validation

### Key Points

- ICANN intends to utilize a provider with regional presences so that appropriate expertise exists for complaints from any geographic area.
- Some form of penalty or graduated penalty system will be implemented for a rights holder's failure to keep information current in the Clearinghouse.

### Summary of Comments

Regional Authentication. No basis for the regional authentication service appears in the IRT or GNSO-STI reports. IPOA opposes it unless there is some justification. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Updated information. A trademark owner's failure to respond to a legitimate request from the Clearinghouse Administrator to update could yield a series of warnings and ultimately suspension from the Clearinghouse pending a response. It would be impractical to try to collect monetary penalties from trademark owners who may be out of business or who may have failed to advise their successors in interest of their Clearinghouse entries. IPOA also supports mandated periodic renewals (e.g., perhaps every 5 or 10 years) to maintain the quality of information contained in the database. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Data and Authentication Guidelines.

What is the intent of the last paragraph of Section 7, Data Authentication and Validation Guidelines? Is that a backdoor mechanism for Clearinghouse entry for marks that could not otherwise qualify? *AIPLA (21 July 2010).*

A qualifier is missing in the last paragraph for validation of marks by the clearinghouse. For the sentence that reads "in connection with a bona fide offering for sale of goods or services" should be inserted the phrase "in the goods specified in the trademark registration." This will help prevent the inclusion of sham trademarks in the Clearinghouse (e.g. generic words applied for in obscure trademark classes that have never been used in commerce for the goods specified). *EnCirca (Module 5, 21 July 2010).*

The criterion that a trademark owner must submit a declaration is costly and burdensome. Why does it not suffice to use a certified copy of a valid trademark registration certificate or the official online database record of the relevant trademarks registry? *BBC (21 July 2010).*

We strongly object to the Clearinghouse being used as a validator for marks because this is beyond the intended purpose of the Clearinghouse. The term "Clearinghouse—validated marks" should be removed. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Evidence of use for mark validation.

ICANN's proposal for the Clearinghouse's validation of marks through the trademark owner's production of evidence of continuous use of the mark is burdensome and inconsistent with national legislation where there is a grace period between registration of mark and the obligation to use it. Such evidence of use, if produced to "validate" the mark, should

not be published in any way or to any person as it could be highly confidential and commercially sensitive. *BBC (21 July 2010)*

A trademark owner should be required to provide evidence of current bona fide use, but should not be required to prove that they had rights “continuously” since registration. *INTA Internet Committee (21 July 2010)*.

## Analysis of Comments

Regional authentication has been the subject of public comment. Because the Clearinghouse will be a central repository that will be tasked with authenticating/validating data from all over the world, it was suggested that a provider with regional presence be enlisted to assist and expedite the process. On balance, given the efficiencies that can be achieved the current proposal suggests utilizing a provider with regional presences to be called upon when appropriate. All will still be subject to the same rigorous standards.

Some have commented on the particular penalties to be implemented for a failure to keep information current in the Clearinghouse. Currently, it is envisioned that some form of penalty or graduated penalty system will be implemented for a failure to keep information current, the details of which will be finalized when the provider(s) are selected. It is understood that monetary penalties will not be practical and will not serve the intended purpose of encouraging prompt communication with the Clearinghouse and keeping information current.

Comments have been submitted surrounding the use and description of the terms “authentication” and “validation”. One commenter requested clarification of the last paragraph of the Data and Authentication Guidelines and another suggested one addition. After careful review, this language will be revised. First, only authentication of registration of marks is required for entry into the Clearinghouse. The “validation” referenced in the final paragraph of this section of the Clearinghouse proposal refers to validation of “use”, which will be needed to ensure protection in a sunrise services offering by a registry. Second, the addition recommended does make the statement more clear and will be included.

In terms of safeguarding data, it is anticipated that to the extent there is confidential or commercially sensitive submissions made to the Clearinghouse for validation purposes, the provider will have the appropriate means in which to safeguard the confidentiality/access to such information. Such means for maintaining confidentiality will be required in the provider(s) contract(s) with ICANN and the tender process will require demonstration of this capability.

One group has commented that a standard for the Sunrise process inclusion that “continuous” use of the mark should not be required. Such level of use was included to ensure that only valid registrations are capable of registration in a Sunrise period. If the rights were not continuous, the registration in some jurisdictions will no longer be valid. Continuous does not mean, however, that it is used everyday, but rather that the use continued over time.

## Eligibility for Inclusion and Protection

### Key Points

- Substantive review by Trademark Clearinghouse validation service provider shall require: (i) evaluation on absolute grounds; and (ii) evaluation of use.
- Both the IRT and the STI agreed that identical match is required for a mark to be protected in sunrise or provide notice under claims services.

### Summary of Comments

Many critical, open issues remain with the Clearinghouse. It still limits the intellectual property that may be registered in the database to text marks that are (1) nationally registered; (2) court-validated; or (3) protected by statute or treaty. Much greater clarification is needed before the Clearinghouse can serve the objective for which it was intended by the IRT. *News Corporation (21 July 2010). IACC (21 July 2010).*

#### Substantive Review or Evaluation.

IOC is encouraged that “substantive review” of nationally registered trademarks is no longer a prerequisite for inclusion in the Clearinghouse (Clearinghouse secs. 5 & 9). But this will be futile if later rights protection mechanisms (e.g. Sunrise Registration Services and the URS) apply any “substantive review” standard. IOC reiterates that if domain name speculators are concerned about the ease by which generic words can be registered in certain countries, then the domain name speculators should bear the onus of initiating the challenge procedures previously recommended by ICANN. *IOC (21 July 2010).*

The “substantive review” or “substantive examination” language should be changed to “examination on absolute grounds”. This should address the problem of gTLD applicants basing applications/objections on trademark registrations for purely descriptive words obtained in countries that conduct no examination on absolute grounds. *C. Speed (21 July 2010).*

Under sec. 4.1.1, the language provides that the entity would “validate” marks from jurisdictions that do not conduct substantive review. If the disparate treatment of such marks remains in the Clearinghouse implementation scheme then the criteria for this validation should be specified. *IPOA (21 July 2010). AIPLA (21 July 2010).*

The term “substantive examination” should be clarified to specify that “substantive review” refers to examination for “inherent registrability” or “on absolute grounds”. *IPOA (21 July 2010). AIPLA (21 July 2010).*

“Substantive review” needs to be clarified to eliminate confusion as to what types of marks qualify for the Clearinghouse. *AT&T (21 July 2010). INTA Internet Committee (21 July 2010).*

ICANN should create a proper definition of “substantive review” or better still abandon the idea in favor, e.g., of “review on absolute grounds.” It is unfair to expect the operators of the Clearinghouse to decide which marks from which jurisdictions can be included. Discriminating between official trademark registries is not a role for the Clearinghouse operator or an appropriate issue upon which ICANN itself

has any standing to influence. *MARQUES/ECTA (21 July 2010)*. *Microsoft (21 July 2010)*. *AIM (Module 5, 14 July 2010)*.

Absence of a proper definition of “substantive review” means that mark owners in some parts of the world will be discriminated against (including the EU). Any Clearinghouse must be nondiscriminatory and the Clearinghouse operators must not be the arbiter of the validity of trademarks. *Com Laude (21 July 2010)*. *PMI (21 July 2010)*. *BBC (21 July 2010)*

ICANN should clarify what constitutes “substantive review” and what validation processes will be required, e.g., for marks registered in jurisdictions that do not require a “substantive” review. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *Hogan Lovells (21 July 2010)*. *IPC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *SIIA (21 July 2010)*.

“Substantive review” clarification is needed as it pertains to eligibility for Sunrise Services. I.e., whether “substantive review” includes: (1) absolute grounds; (2) relative grounds; or (3) absolute grounds plus an opposition period. Trademarks in many jurisdictions (e.g. from some European national trademark offices) could be excluded from eligibility for Sunrise Services if “substantive review” does not include examination based only upon “absolute grounds.” The trend for trademark examination in several jurisdictions such as Europe is moving away from a relative ground review and towards solely an absolute ground review, leaving relative ground review to oppositions. It would be anomalous if such trademarks were only eligible for Sunrise Services if they have been successfully opposed. *IBM (21 July 2010)*.

The current design appears to turn the Clearinghouse into an arbiter of the validity of trademarks legitimately obtained through systems applied in many jurisdictions. The Clearinghouse must be non-discriminatory to counter possible gaming. (The possibility could be explored of treating registered marks as prima facie valid, e.g., where subject to later challenge.) *WIPO Center (16 June 2010)*.

The Clearinghouse falls short because registries are not required to incorporate their pre-launch RPMs protections for all trademark registrations of national or multinational effect. *COA (21 July 2010)*.

The Clearinghouse should not be biased in a selective recognition of valid trademarks. If the Clearinghouse adopts exclusionary standards, many trademark holders will remain unjustly exposed to fraud and abuse. It is not the role of the Clearinghouse to judge the quality of international trademark regulations, but to enforce them. *IHG (20 July 2010)*. *AIPLA (21 July 2010)*. *Nestle (21 July 2010)*.

#### Identical match limitation.

Limiting use of clearinghouse data to identical matches (and only at launch) would miss many abusive domain name registrations. *WIPO Center (16 June 2010)*. *Verizon (20 July 2010)*. *C. Speed (21 July 2010)*. *PMI (21 July 2010)*. *BBC (21 July 2010)*. *Coca-Cola (21 July 2010)*. *Adobe Systems (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *USCIB (21 July 2010)*. *ABA (22 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

The identical match definition should at least be the same as IRT, should take into account the singular and plural of the Mark, and account for typographical variations (for typosquatting). *BC (26 July 2010)*.

The “identical match” for the Clearinghouse should be expanded slightly to avoid numerous potential instances of typosquatting (e.g. plural forms of domain names containing the mark). *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Given how cybersquatters and phishers operate, it is imperative that the Clearinghouse be broadened to include domain names which are “confusingly similar” not just identical. *IHG (20 July 2010)*.

The failure of Sunrise or Claims Services to recognize confusing similarity and foreign equivalents ignores rampant typosquatting in the domain name system (see Clearinghouse sec. 8). At a minimum, Claims Services should require registries to report domain names that are confusingly similar to, or a foreign equivalent of, trademarks in the Clearinghouse. If registries utilizing a Claims Service simply must provide notice and a mark holder does not obtain an advantage as it does if the registry offers a Sunrise Registration period, then no advantage is obtained in a Claims Service and “similarly situated applications are treated in the same way” regardless of whether the Claims Service protects against confusingly similar or foreign equivalent domain names. *IOC (21 July 2010)*.

Trademark owners should be permitted to deposit into the Clearinghouse names consisting of exact registered trademarks plus generic terms incorporated into their goods or services. We support the solution set forth by the Commercial and Business Users Minority Position under Annex 4 of the STI Work Team Recommendations. Such procedures have been used successfully with prior gTLD launches such as for the ASIA registry. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

Plural and singular forms of marks should be included in the Clearinghouse either through automatic operation or express request of a trademark owner. A substantial portion of abusive domain name registrations take advantage of either variant plural or singular forms, and the current rules do not address this issue. *AIPLA (21 July 2010)*.

The scope of searches for matching should be determined with input from proposed Clearinghouse operators about what searches could reasonably be conducted. ICANN’s rationale for limiting it to “identical matches” has not been supported. At a minimum, a match should include plurals of and domain names containing the exact trademark. *INTA Internet Committee (21 July 2010)*.

Contrary to the language about punctuation or special character replacement in the definition of identical match in this section, “underscores” are not a valid character for a domain name. *EnCirca (Module 5, 21 July 2010)*.

To maintain operational integrity and keep the processing volume manageable, it should not be expanded to include typographical variations of a mark. ICA questions whether any meaningful standard can be established to define the acceptable limits of such variations. Trademark owners should not be given the ability to assert potential control and have the Clearinghouse fire “warning shots” to potential registrants for the many thousands of possible variations of a single mark—especially as trademark infringement involving such names must arise from actual use and cannot be determined from the domain name alone. *ICA (21 July 2010)*.

The identical match definition (2.3) should be widened to catch “obvious misspellings.” *AIM (Module 5, 14 July 2010)*.

The refusal to extend clearinghouse-based RPMs beyond exact matches, or to incorporate any form of a globally protected marks list, means that the impact on reducing the volume of defensive registrations will likely be negligible. *COA (21 July 2010)*.

Design marks with a slight design element should be included in the “identical match” definition. *IBM (21 July 2010)*

Per comments with recommendations previously submitted by the BC: if the applied-for domain string anywhere contains text of a trademark listed in the Clearinghouse, then a TM notice is given to the applicant per the proposal in the Staff recommendation. If the domain is registered then the trademark owner is notified. Trademark owners would also have the option of triggering notices in the event that the applied-for domain string includes the trademark string altered by typographical errors as determined by an algorithmic tool. The domain applicant must affirmatively respond to the trademark notice either on screen or email and the registrar must maintain written records of such responses for every domain name. The trademark owner must get notice of every registration that occurs. The trademark notice should allow registrant the option of stipulating their intended response. *BC (26 July 2010)*.

Marks included in the Clearinghouse should generally include the text elements of marks consisting of stylized text, or designs plus text, rather than only word marks. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *BBC (21 July 2010)*.

ICANN should further define the term “text mark” to avoid misinterpretation. *IBM (21 July 2010)*.

Text marks should be defined to include the text elements of design marks where the text in its entirety has not been disclaimed. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

Best practice as used in recent RPMs should be explored with regard to the Clearinghouse. For example, the Clearinghouse scope should be widened to include device marks and plurals. *Com Laude (21 July 2010)*.

ICANN must clarify the definition of a “text mark” included in the Clearinghouse—it should include protection for stylized letters and text with design components. *CADNA (21 July 2010)*. *AT&T (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *News Corporation (21 July 2010)*. *BC (26 July 2010)*.

#### Marks protected by treaty.

ICANN should clarify to which marks “protected by treaty” it refers (page 2). *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Inclusion in the Clearinghouse of “Any text marks protected by a statute or treaty” should not be limited to those “in effect on or before 26 June 2008.” That limitation discriminates against future Olympic Games in new host cities that will receive statutory protection. *IOC (21 July 2010)*.

The punctuation used in section 2 for the two bullets labeled A and B is unclear. Does the phrase “and that was in effect on or before 26 June 2008” apply only to (iii), as it currently reads? That was not the intent. *EnCirca (Module 5, 21 July 2010)*

Reserved marks list for Olympic trademarks. If and when new gTLDs are introduced, the Olympic trademarks should be put on a list of reserved marks—just as ICANN currently reserves its own trademarks (see Module 2.2.1.2). ICANN is subject to and must act in a manner consistent with the U.S. Olympic and Amateur Sports Act and the Anti-Cybersquatting Consumer Protection Act in deciding whether or not to offer for sale any new gTLDs containing Olympic trademarks. *IOC (21 July 2010)*.

Classes of trademarks. Missing from the Clearinghouse is a provision that allows trademarks to be put in classes mirroring the International Classes of Goods and Services. This is crucial as it will compensate for similar and identical trademarks that under traditional law co-exist harmoniously. This is especially important for small and medium sized businesses and for trademark owners in developing countries. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

#### Dot-Trademark.

Exclusion of registrations that include top level domains as part of the trademark or service mark appears to be discriminating against valid trademark registrations and fails to take into account contemporary business trends. ICANN needs to provide the rationale why such trademarks cannot be included in the Clearinghouse. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010). BBC (21 July 2010).*

The AGB should specifically prohibit any advantage to holders of trademarks for a top-level domain (i.e., a trademark on “dot TLD”). While dot-TLD trademarks are not granted by the U.S. Patent and Trademark office, they are available in other jurisdictions to the detriment of all applicants. ICANN should provide assurances that not only will such TLD-specific trademarks be denied any priority in an application but that they will not be considered a valid ground for objection. *Minds + Machines (21 July 2010). NIC Mexico (21 July 2010). Domain Dimensions (22 July 2010).*

It is important that a “dot TLD” not put an applicant into any unjustified advantage and not be a ground for a later objection. In the case of a geographical application, this would compromise the position of a relevant government that wants to support the initiative that works in the best interest for the geographical area. *Bayern Connect (21 July 2010).*

ICANN offers no protection against the gaming of TLD applicants who have been publicly announced initiatives and have done all the leg work and communications outreach campaigns. Given this, TLD trademarks for publicly announced TLDs with years of exposure, lobbying, participation and business activities are warranted and in the public interest if used legitimately. While trademarks alone should not be the sole determinant of earning a TLD, it is the only means we have of protection since ICANN has not incorporated any mechanisms to prevent TLD applicant abuse, gaming and unfair piggybacking. *.MUSIC (21 July 2010).*

Use of Clearinghouse in URS and UDRP proceedings. The Clearinghouse has a potential to provide authentication of rights for both complainants and respondents in the case of any ICANN dispute proceeding. The Clearinghouse should incorporate a recognition of its use for this purpose in any ICANN dispute proceeding. *AIPLA (21 July 2010).*

## **Analysis of Comments**

The Clearinghouse is intended to be a repository for trademarks. In keeping with that aim, specific criteria for entry and management had to be articulated. The aim was to create a list of criteria that could be verified in a cost effective, consistent and efficient manner while, at the same time, prevent gaming of the system since it is intended to form as a basis for rights protection mechanisms. When the provider(s) are selected further detail will be provided.

Criteria for entry, and later validation, has been the subject of widespread comment and review. Authentication will ensure that all marks submitted for inclusion in the Clearinghouse are in fact nationally or multi-nationally registered. Validation will be required if a trademark holder wants to be ensured protection in a sunrise service - that mark must be either: validated for use at registration or by a court, protected by statute or treaty (subject to some date restrictions), or (if none of these above), validated by the Clearinghouse provider.

To be an effective RPM, the Clearinghouse must operate efficiently. Out-of-date or inaccurate data in the Clearinghouse will harm applicants, trademark holders, and others. To that end, it was agreed that as an additional safeguard to ensure reliable and accurate data, mark holders will verify the accuracy of their information and agree to keep it current. The mere fact that a certified copy of a registration exists does not mean that the named registrant is the mark holder or that the information is current and accurate. A sworn declaration in many cases is less time consuming and much less costly than a certified copy of a registration.

Numerous comments, as seen above, seek understanding and clarification of “substantive evaluation” as it is set forth in the guidebook. In order to make clear what was required for substantive evaluation, the Board adopted the following resolution on 25 September 2010 (see <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6>:

Substantive Evaluation: The Applicant Guidebook will provide a clear description of "substantive evaluation" at registration, and retain the requirement for at least substantive review of marks to warrant protection under sunrise services and utilization of the URS, both of which provide a specific benefit to trademark holders. Specifically, evaluation, whether at registration or by a validation service provider, is required on absolute grounds AND use of the mark. Substantive evaluation upon trademark registration has essentially three requirements: (i) evaluation on absolute grounds - to ensure that the applied for mark can in fact serve as a trademark; (ii) evaluation on relative grounds - to determine if previously filed marks preclude the registration; and (iii) evaluation of use - to ensure that the applied for mark is in current use. Substantive review by Trademark Clearinghouse validation service provider shall require: (i) evaluation on absolute grounds; and (ii) evaluation of use.

The Applicant Guidebook language will be revised to reflect the above clarifications.

A variety of comments suggest that limiting protections to “identical match” under trademark claims or sunrise services is too restrictive. This suggestion has been the topic of much discussion. Both the IRT and the STI adopted this same limitation to identical match. Accordingly, this definition and scope will not be revised.

Clarifying questions have been raised with respect protection for names or marks that are protected by treaty or statute. To address each of the questions above:

- Inclusion into the Clearinghouse does not require protection under statute or treaty.
- The reference to effective date is the effective date of the statute or treaty, not the date of the mark registration (i.e., the punctuation in the AGB paper is correct).
- Only marks under existing treaties are protected. While some future protections might be excluded, the limitation was developed in order to prevent potential abuse.

Two commenters suggest that classification of goods and services must be addressed. The Clearinghouse allows for entry regardless of international classification (“IC”) of goods and services. The description of the goods/services drives whether there is a possibility of confusion, not the class in which the good or service might be assigned. Moreover, not every jurisdiction follows the international classification system so to require it would result in unfair or inconsistent treatment for those registrations which issue from jurisdictions that do not use the IC system.

In response to comment for clarification about national effect, the language in Section 9 should be revised to be of national effect, not multinational effect. (The reference to the word “applications” refers to gTLD applications, not Clearinghouse applications.)

Whether a “dot-TLD” mark (e.g., “ICANN.ORG” or “.ICANN”) should be included in the Clearinghouse has raised differing views. Some do not understand why they should be excluded, while others support the exclusion. The Clearinghouse is designed as a repository for trademarks. To fulfill the objectives of the IRT and the STI, it has been decided that those marks that actually function as trademarks, i.e., indicate source, are those that will be eligible for inclusion. Many safeguards have been established to prevent abuse and to ensure neutral application of validation standards, including objectively verifiable data that the mark does serve a legitimate trademark purpose. It has been successfully argued that TLDs standing alone do not serve the trademark function of source identification. Instead of telling consumers "what" a product is or who makes it, they tell consumers where to get it. Because the TLD does not indicate source, and because allowing marks in the Clearinghouse that include a TLD will increase the likelihood of abuse and gaming substantially, on balance they are excluded. This will obviate the need for registration of defensive trademarks.

In answer to a query about potential uses of the Clearinghouse: the Clearinghouse was designed to serve the Sunrise and IP Claims services specifically. It may or may not also support the URS depending upon the results of the tender of services for the URS.

## Clearinghouse Provider Services

### Key Points

- The Clearinghouse can provide ancillary services but cannot use its position to a competitive advantage.
- Optional services may include post-launch registry services such as IP Watch.
- The standard for “match” to identify Clearinghouse “hits” was developed by the IRT.

### Summary of Comments

#### Pre-launch versus post-launch sunrise and claims services.

Both of these RPMs are pre-launch and they need to be post-launch to have any real value. Limiting the Claims Service to exact matches is clearly insufficient as most cybersquatting is not an exact match. There is no explanation for the different recognition accorded trademark rights for Sunrise Services and Trademark Claims Services (regarding substantive review/examination). *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk 913 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *PMI (21 July 2010)*. *BBC (21 July 2010)*. *DuPont (21 July 2010)*.

Additional protection for trademarks in the Clearinghouse should be extended by requiring mandatory post-launch notification procedures. A substantial portion of cybersquatting can be expected to occur well after a registry has launched. *AIPLA (21 July 2010)*. *Grainger (Module 5, 19 July 2010)*.

The Trademark Claims service should not be limited to pre-launch but should be required for post-launch registration applications, despite whether the registry uses Trademark Claims or Sunrise services at the pre-launch stage. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

Making the clearinghouse-based mechanisms such as trademark claims services wholly voluntary for registries in the post-launch environment kicks the bulk of the abusive registration problem into a later time frame. In many cases the RPMs will be wholly inadequate without these post-launch protections. *COA (21 July 2010)*.

In their present form neither the Claims nor Sunrise services reduces the number of domains being registered in bad faith. To be effective, the services should be mandatory both pre-launch and post-launch. *C. Speed (21 July 2010)*. *BC (26 July 2010)*.

Will not solve cybersquatting. No one should assume that the new gTLD registry operator’s option in the current proposal to have the Sunrise or Trademark Claims Services, while a positive development, will in fact solve the abuse problems given the limitations of these services in deterring cybersquatting and other abuses. *Coca-Cola (21 July 2010)*.

The requirement for registries for claims and sunrise should be standardized so that they are the same. *C. Speed (21 July 2010)*. *BC (26 July 2010)*. *AIM (Module 5, 14 July 2010)*.

Exclusive use of Clearinghouse. It should be made clear that registries must use the Clearinghouse exclusively for the submission of Sunrise or IP Claims submissions. *EnCirca (Module 5, 21 July 2010)*.

The Trademark Claims and Sunrise Services are not feasible for or applicable to all applicants. ICANN should not force a policy that is inapplicable to some entities. E.g. Chinese governmental organizations are prohibited from practicing commercial-related activities. CONAC, the registry for domain names of Chinese governmental organizations and public interest organizations, must pre-check all the domain names before registration. There is no way for a single brand name to be registered as a domain name in such categories, so that it is of no value to utilize Sunrise or Trademark Claims in these circumstances. It would force CONAC to bear the cost of using the Clearinghouse also. *CONAC (22 July 2010).*

Option for “Sunrise Period” or “Claims Service”. A Sunrise is likely unnecessary for a .brand registry operator planning to use its gTLD as a private registry, so it should have the option to implement only a Claims Service rights protection mechanism. *IBM (21 July 2010).*

Notice to trademark owner.

We disagree with the advantage given to prospective registrants by delaying notice to the trademark owner under the Trademark Claims service until after the registration is effectuated. The objective should be to prevent registrations by would-be cybersquatters and innocent prospective registrants to the extent possible before after-the-fact enforcement efforts by trademark owners are required. *IPOA (21 July 2010). AIPLA (21 July 2010).*

The Trademark Claims service should require a waiting period before registration is effectuated following notice to both the prospective registrant and the trademark owner. The notice to the prospective registrant should include the following: “A copy of this Trademark Notice has been sent to the Trademark Owner. If the Trademark Owner deems that granting your requested domain name conflicts with existing trademark rights, it may initiate an ICANN dispute resolution proceeding and/or court action against you.” *IPOA (21 July 2010). AIPLA (21 July 2010).*

The pre-launch proposals are unfairly balanced in favor of registrants. Trademark owners should be able to object prior to registration of a domain name. This could save time and money, instead of forcing parties into the post-grant URS. *BBC (21 July 2010)*

Sunrise fees.

Most registries will continue the established practice of offering pre-launch “sunrise processes” which only work to extract additional fees for defensive registrations most brand owners have no affirmative reason to want. There is no provision to limit sunrise fees; ICANN recommends that they operate “based on market needs” which means the highest fee the market can extract from the trademark holder. *Verizon (20 July 2010).*

CADNA noted the addition of a mandatory sunrise period, which could be beneficial to the trademark community as long as the domain names are not offered for inflated prices. Domains should not be held “hostage” by requiring trademark owners to pay more than anyone else would for their own trademarks. *CADNA (21 July 2010).*

Not-for-profits are concerned that most registries will pick the Sunrise service in order to create a revenue stream for registries. Not-for-profits with limited resources for registering numerous domains may not be able to take part in all or any of these Sunrise services. ICANN should consider suggesting or requiring alternative domain name pricing for not-for-profits. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

### Ancillary services.

The proposal allowing the Clearinghouse operator to provide ancillary services is contrary to what the STI recommended. The STI made clear that any ancillary services should be directly related only to trademarks (common law marks, etc.). It was decided that all other intellectual property rights fall outside the scope of the Clearinghouse and therefore should not be included. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

INTA Internet Committee applauds ICANN's recognition that the Clearinghouse operator may offer certain ancillary services and maintain a separate database containing a "panoply" of rights, such as "unregistered trademarks, company names, trading names, designations of origin, family and personal names, etc." These services would be for the purpose of allowing trademark owners to better police their marks. Offering of such services should be mandatory in the evaluation and grant of certain TLDs (e.g. High Security Zone). *INTA Internet Committee (21 July 2010).*

ICANN must reconsider the provision allowing ancillary services to be provided by the Clearinghouse operator on a non-exclusive basis. These services could include release of lists of generic words or common typographical variations of various trademarks—exactly the type of information that facilitates and enables cybersquatting and typosquatting. This data should not be available on a non-exclusive basis; it should be guarded for exclusive use by relevant trademark owners. Third parties should not be able to profit from public confusion by warehousing variant spelling and combination domain names that derive value precisely because of the association with the trademark owner. *CADNA (21 July 2010). INTA Internet Committee (21 July 2010)*

## **Analysis of Comments**

Comments question that:

- some pre-launch services, such as IP Claims, should also be required post-launch,
- identical match is not sufficient to protect marks, and
- there is no explanation for distinction between marks afforded protection in Sunrise versus those afforded protection in claims services.

With respect to suggestion that pre-launch claims services be extended to post-launch, the IRT stated the following: "The IRT considered whether the IP Claims Service should also extend to the post-launch period. The IRT concluded that it was unnecessary to extend the IP Claims Service post-launch because of the protections afforded by the URS that the IRT also recommends herein." (See <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>, footnote 6.) Such services will not be mandatorily extended to a post-launch environment. Although post-launch services are certainly something that the Clearinghouse service provider could offer as an ancillary service. Discussion about why exact matches are required for protection is set forth above. As to why there is a difference between marks afforded protection in sunrise versus claims, it has previously been made clear that in Sunrise there is an affirmative advantage, while a claims service is just notification. Other post-launch rights protection mechanisms are available including the URS procedure, the UDRP and the PDDRP as well as any remedy available in a court of competent jurisdiction.

Comments suggest that Sunrise or claims be required. This is the case. As set forth in the AGBv4, all new gTLD registries will be required to use the Clearinghouse to support its pre-launch rights protection mechanisms. These must, at a minimum, consist of either a Sunrise or Trademark Claims Service.

Some have suggested that notice to trademark holders should be provided before someone is allowed to register a name that is in the Clearinghouse, thereby allowing for a pre-registration dispute. As set out by the IRT, the goal of the service is not to be a blocking mechanism, as there are often numerous legitimate reasons for many different people to use the same word or phrase that may be trademarked. In addition, the potential registrant must indicate that it has a legitimate interest in the applied for name.

The Fee structure for Clearinghouse is that fees will be matched to transactions. Mark holders will pay for registrations of a name and registries will pay for administration of a Sunrise or IP Claims service. Matching the transaction to the fee will enable most efficient, economical operation.

Allowing the Trademark Clearinghouse Service Provider to offer ancillary services is something that the STI discussed at length. The Clearinghouse proposal has adopted the intent of the STI to ensure that the Trademark Clearinghouse Service Provider does not obtain any competitive advantage over competitors for ancillary services, such as post-launch claims services, or databases making other information available.

## UNIFORM RAPID SUSPENSION SYSTEM (URS)

### General

### Key Points

- The URS is meant to supplement other rights protection mechanisms, such as the UDRP, and is purposefully drafted to target a very narrow class of clear-cut cases of abuse.
- Further, feedback on the effectiveness of the URS once it is implemented is encouraged so that it can be evaluated in the future.

### Summary of Comments

#### Lack of Support for URS as drafted.

The URS is unlikely to achieve its full potential because it will in many cases be hardly faster than the UDRP and with weaker remedies, without adequate protections against abusive registrants, such as a loser-pays system for cases brought against high-volume registrants. *COA (21 July 2010)*. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *PMI (21 July 2010)*. *DuPont (21 July 2010)*. *AT&T (21 July 2010)*

The URS is overburdened for just a transfer and the burden consists of a combination of factors including: panel appointment even in default cases; panel examination of possible defenses in default cases; appeal possibility during two years from default; a higher burden of proof; uncertainty as to results (e.g., possible gaming and “revolving door” monitoring); use of the conjunctive bad faith registration and use; limiting marks forming the basis for a URS claim to either so-called substantive

review or clearinghouse validated marks (with cost and time implications); apparent translation requirements; a seeming option for re-filing; the possibility for de novo appeals; and significant timelines. *WIPO Center (16 June 2010)*. We support WIPO's call for the URS to be re-engineered. *JONAS (11 July 2010)*.

The BC has urged ICANN to undertake a feasibility study before making any decision to address whether the URS will be implementable as a sustainable business model and if it would be more sustainable if transfer were allowed (i.e. how many more complainants would use it). *BC (26 July 2010)*.

The URS is not "rapid" and given its required procedural elements it is not inexpensive. Since the ultimate remedy of the URS yields only suspension, it is likely that a majority of brand holders will be forced to buy a domain name in each gTLD corresponding to their trademarks or will be filing requisite UDRPs as opposed to relying on the equally time consuming and costly URS process. *MarkMonitor (19 July 2010)*. *Comerica (21 July 2010)*; *Carlson (21 July 2010)*. *C. Speed (21 July 2010)*. *Hogan Lovells (21 July 2010)*. *BBC (21 July 2010)*. *HSBC (21 July 2010)*. *IPC (21 July 2010)*. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *Adobe Systems (21 July 2010)*. *IACC (21 July 2010)*. *Sunkist (21 July 2010)*. *ABA (22 July 2010)*. *Solvay (22 July 2010)*.

Given the intent underlying the URS, it is imperative that the URS not be crippled by unnecessary, burdensome regulations, high expenses and limited remedies. *IHG (20 July 2010)*. *CADNA (21 July 2010)*. *M. Jaeger (22 July 2010)*

As currently structured the URS screams uncertainty for trademark owners and they will rationally choose the certainty and full remedies afforded by the UDRP. *Verizon (20 July 2010)*. *IPOA (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *AIPLA (21 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

All the changes and alterations have turned the URS into a weaker version of the UDRP (cheaper but no speedier and a weak means of redress—i.e. no transfer of the domain to the complainant). *C. Speed (21 July 2010)*. *AT&T (21 July 2010)*.

The URS has been watered down from the IRT version and is not effective: it is not rapid, it has become complex, burdensome and unworkable. ICANN should return to the version proposed by the IRT and improve it by making it faster (21 days at most); simpler (pro forma complaint with copy of Whois and website copy, not a 5,000 word document); practical (only for case with no real contestable issue); efficient (experienced examiners); and reasonable (remove the "questionable fact" defense and dismissal if examiner thinks defense would have been possible). The concept of "loser pays" should be looked at again and the URS should be open to all trademark owners without discrimination provided their registration is current. *MARQUES/ECTA (21 July 2010)*.

The URS has been seriously diluted; ICANN should revert to the URS as proposed by the IRT. *Com Laude (21 July 2010)*. *News Corporation (21 July 2010)*.

#### Support for URS as drafted.

I support the URS as detailed in the DAGv4. Critics who say it will be longer than the UDRP do not make a valid comparison—they compare the longest possible URS action to the shortest possible UDRP action. Similarly it seems very likely that the average URS cost will be substantially less than the average UDRP cost. *R. Tindal (21 July 2010)*. *Domain Dimensions (22 July 2010)*. *Demand Media (22 July 2010)*.

The changes have addressed many concerns of ICA members regarding due process, adequate notice and meaningful appeals. *ICA (21 July 2010)*.

#### Fees.

Fees relating to the URS should be determined as soon as possible so that not-for-profit organizations can budget in advance for the new gTLD process. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

ICANN should firmly commit to the URS being much less expensive than the UDRP—i.e., commit to a “not to exceed” fee (e.g. a URS complaint shall not exceed \$400) in final Guidebook. This would give trademark holders much more comfort. *Domain Dimensions (22 July 2010)*.

Paragraph 2--Fees edit. The phrase “it is thought, more often than not, that no response to complaints will be submitted” should be deleted. This sentence makes it appear that the URS is instructing its examiners to view URS disputes under a presumption of guilt for respondents, which is unfair, and against due process. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

All URS providers should be put under contract. The STI-RT reached unanimous consensus on this point. This will promote uniformity. *ICA (21 July 2010)*.

Qualifications of examiners. Examiners need only a legal background. How is this to be defined? *Hogan Lovells (21 July 2010)*.

Rotation of examiners. There might be an issue with the rotation of examiners given the variety of jurisdictions and languages. *Hogan Lovells (21 July 2010)*.

## **Analysis of Comments**

Some comments suggest that the URS as currently drafted will be effective. Others suggest it will not be effective, that the burden of proof is too high, that its remedies are not sufficient, that it is not fast enough and that it will lead to uncertainty.

The URS was devised by the IRT, modified by the STI and influenced and revised to take into account significant public comment. This procedure is not intended to be a replacement for any other additional methods of redress that a trademark holder may have for infringement. Rather, the URS is meant to supplement those other methods, such as the UDRP, and is purposefully drafted to target a very narrow class of clear-cut cases of abuse.

Indeed the URS is not intended to provide uncertainty. Different procedures in different jurisdictions provide different types of relief. If immediate relief for clear-cut cases of abuse is the goal the URS may be the right alternative, if transfer of a domain is sought the UDRP might be the right alternative, if damages are sought a court might be the right alternative. The objective of the trademark holder will ultimately drive where an action is brought. The URS provides an additional remedy, not a replacement.

Further, feedback on the effectiveness of the URS once it is implemented is encouraged so that it can be evaluated in the future. As a part of its introduction, as set forth in Section 14 of the URS, a review of the procedure will be initiated one year after the first Determination is issued. It is expected that the

evaluation will cover usage and statistics and will be posted for public comment to gauge the overall effectiveness.

Each of the specific comments as to the deficiency of the URS is addressed in detail in the sections below.

The amount of the fee for a URS has been the subject of comments. The precise amount is still under consideration and will be set by the provider with the goal of being as cost effective as possible. A suggested revision to omit an editorial comment regarding why a loser pays provision has not been adopted for the URS will be adopted.

While one comments suggests that all URS providers should be put under contract, it should be clear that all providers will be required to comply with standards and procedures, regardless of the mechanism under which they are engaged to provide URS services.

There has been one comment on examiners legal background and another on the rotation of examiners. Legal background of examiners will be determined based upon legal training or training in dispute resolution processes. With respect to the rotation and examiners in light of jurisdiction and language variations, this is something that the URS providers will be required to consider in rotating examiners.

## Complaints and Responses

### Key Points

- The trademark holder will have the burden of proof since it is the person or entity that seeks relief.
- Given other safeguards that are in place, the time to respond to a complaint has been changed from 20 days back to 14 days, with an opportunity for an extension of seven additional days.

### Summary of Comments

#### Trademark owner burdens.

The URS is flawed because the burden is on the trademark owner to prove that the registrant has no legitimate interest in the domain name. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *PMI (21 July 2010)*. *Adobe Systems (21 July 2010)*.

The burden of proof should not fall on the trademark holder. The complainant's case should be considered legitimate by virtue of evidence of a valid trademark and in such instances the registrant should be responsible for proving its "good faith". *IHG (20 July)*

#### Response filing fee.

The URS lacks a fee for filing a response to a complaint. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*.

What is the reasoning behind allowing the respondent to be in default for up to 30 days following a determination before they would be charged any fee with their response? The respondent should be obliged to file a fee in all cases where it files a response to provide some balance between the parties. Even if this is not the case there should be a fee when a response is filed late. *BBC (21 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

A fee should be charged for any response filed after a decision has been entered. No 30-day "grace" period should be allowed as currently proposed. *Grainger (Module 5, 19 July 2010)*.

Notification to registrar (6.2 & 6.5): Is essential that a copy of the notification must also be sent to the domain's sponsoring Registrar by the URS Provider. The Registrar should always be informed of actions that change the domain's status, because the Registrar is the party with the service and contractual relationship with the Registrant. Registry Operators are not in a position to communicate with Registrants. *RySG (21 July 2010)*.

Simple forms. ICANN should develop simple forms for the complaint, answer and decision, with a requirement that complaints that are too lengthy or complex to make use of such a form instead be required to be filed as UDRP complaints or that the complainant seek other remedies. This would reduce burdens and likely expedite the process. *AAMC (21 July 2010)*. *CADNA (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

### Word Limitations.

The 5,000-word limit for the complaint and response is too high for what should be a clear cut case and will increase preparation costs. *Hogan Lovells (21 July 2010). CADNA (21 July 2010).*

Any word limitation should be much smaller, such as 250 or 500 words. AT&T suggests a return to the initial form complaint and response approaches. *AT&T (21 July 2010).*

### Timeframes.

The registrant should have 14 days to file an answer. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). Microsoft (21 July 2010). NCTA (Module 3, 21 July 2010).*

The examiner should be required to render a decision within 7 business days, with a goal of providing it within 3 days as a best practice. *AAMC (21 July 2010). NPOC-FC (21 July 2010). Red Cross (21 July 2010).*

At a minimum, a decision should be rendered within 3 business days in cases of default. *INTA Internet Committee (21 July 2010).*

The response and decision-making timeframes are too long. The process needs to be streamlined. *CADNA (21 July 2010). AT&T (21 July 2010). AIPLA (21 July 2010).*

The URS fails to provide an expedited remedy; the URS timeline proposed by the IRT has been so extended in the current draft proposal that the timing for an initial decision may often be equal to or longer than under the UDRP. *INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). SIIA (21 July 2010). USCIB (21 July 2010). Microsoft (21 July 2010). EuroDNS (22 July 2010). BC (26 July 2010). AIM (Module 5, 14 July 2010). Nestle (21 July 2010).*

URS needs to be refocused to immediately take down a website. The role of the URS provider is to act as a rapid check on the bona fides of the complainant and to be a conduit between the complainant and the registry. The URS should operate with dramatically reduced timelines, which will stop the criminal act being conducted and cover probably 99% of URS cases:

- Complaint starts
- 24 hours—URS provider validates bona fides of complaint and notifies registry;
- 24 hours—Registry notifies Registrant that it will act to lock and then prevent resolution of the web site in 24 hours.

If the registrant reacts (defined as confirmation of registrant data and a statement that the complaint is or is not valid) within 24 hours the presumption of bad faith should be reversed and the web site should immediately be allowed to resolve again. If the registrant reacts as defined, the Registry notifies the URS provider who notifies the complainant within 24 hours and the URS finishes. At that point the complainant should then be invited to instead launch a de novo UDRP. *AIM (Module 5, 14 July 2010).*

### Revisions needed.

Section 1.2(f) seems to need revision, as it is inconsistent with the examination standards in Section 8.1(a). *INTA Internet Committee (21 July 2010).*

Paragraph 1.2(f) should be rewritten to place the word “and” in front of (ii), deleting the word “and” after (ii) in the original, and so that “;and” appears before (iii), deleting “and;” before the (iii) in the original. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

This edit does not change the content, seems to make sense.

Split Paragraph 4.3. For purposes of clarity paragraph 4.3 should be split into two sections:

- 4.3—“All Notices to the Registrant shall be sent through email, fax (where available) and postal mail. The complaint and accompanying exhibits, if any, shall be served electronically.”
- 4.4—“The URS provider shall also notify the registrar of record for the domain name at issue via the addresses the registrar has on file with ICANN.”

*K. Komaitis (21 July 2010). R. Dammak (22 July 2010)*

## Analysis of Comments

Who has the burden of proof and what the standard of proof should be have been the subject of comments. The trademark holder will have the burden of proof since it is the person that seeks relief. To hold any other way would afford the trademark holder a presumption it is not entitled to hold. All use of a trademark is not unlawful or infringing use, as such, the mere ownership of a mark by “A” and use of a similar mark by “B” does not mean that A should prevail.

Whether a respondent should have to pay a fee and at what point in time has been the subject of comments. A loser pays system was rejected by the IRT and STI but is still being discussed. Currently, the respondent needn't pay a filing fee for the action to commence. This is because in most cases the registrant abandons the registered name and does not reply or pay. In other cases, the respondent may respond but not pay. Therefore, waiting for a reply and fee before proceeding would delay righting the wrong while not garnering any extra fees.

Therefore, it was decided there would be no filing fee unless the registrant decides to respond after being in default for a prolonged period of time. The ability to respond after default provides legitimate registrants the right to regain the use of a legitimate domain name. Thus, default responses will continue to be allowed under the URS Proposal.

Some commenters suggest use of “form complaints” and answers, and others suggest a limitation on the submission. While forms can facilitate filings in certain situations, given the fact-intensive nature of the bad faith standard, a form complaint would not be appropriate. In a similar vein, the 5000-word limit was arrived at by balancing the need for the RPM to be rapid against the need of the complainant to be able to plead and prove its case with a clear and convincing standard of review. There is no requirement that a complainant use all 5,000 words.

Many think that the time frame to respond is too long. ICANN agrees. The Board has stated as follows: “URS timing: In response to public comment, change the time to respond to a complaint from 20 days to 14 days, with one opportunity for an extension of seven days if there is a good faith basis for such an extension.” (See <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6>.) The URS Proposal will be revised to reflect this change.

There are other protections available for registrants in the event they cannot respond within 14 days. First, a seven-day extension can be requested. Second, there are opportunities for filing after default and for appeal. It is thought that there will be very few legitimate cases where the registrant will not be able to respond within the prescribed period. For those instances, there are the safeguards of default

filing and appeal. On the other hand, increasing the period to reply from 14 to 20 days means that every harmful registration can be misused for an additional period.

While some have suggested that a URS complainant should be referred to UDRP under certain scenarios, the UDRP and the URS are separate procedures, tying rights to initiate one to the result of another is therefore inappropriate.

Comments relating to language revisions are appreciated, will be considered and made where appropriate.

## Eligibility and Standards

### Key Points

- The URS is meant to provide a quick process in the most clear-cut cases of abuse, thus a clear and convincing burden of proof is appropriate.
- Standing is not limited to certain jurisdictions; standing is afforded to those holding trademarks registered in jurisdictions that conduct substantive review or that are otherwise validated in certain ways.

### Summary of Comments

#### Eligibility requirements.

By requiring that complainants' trademarks be registered in jurisdictions requiring "substantive review", ICANN is making the eligibility requirements for the URS unreasonably high. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

There is no reason why the URS should be available only for certain marks that were registered in countries with substantive review. A procedure for rapid take down of a clearly abusive site is needed regardless of where the mark at issue was registered. Remedies can be put in place (and indeed are in place) against abusive use of the URS proceeding. *Coca-Cola (21 July 2010)*.

The URS, now much weaker than what the IRT report proposed, is apparently only available to owners of trademarks registered in countries conducting a so-called substantive review (para. 1.2(f)), so that all CTMs and most national European trademarks are excluded. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *PMI (21 July 2010)*. *BBC (21 July 2010)*. *Red Cross (21 July 2010)*.

#### Clear and convincing standard.

It will be difficult for many trademark owners to meet and will be easily gamed by defendants to thwart a URS finding. This standard is not only higher than the UDRP but higher than that required in most civil actions. *Verizon (20 July 2010)*. *Hogan Lovells (21 July 2010)*. *News Corporation (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *BC (26 July 2010)*.

A clear and convincing standard is appropriate. *Domain Dimensions (22 July 2010)*. *ICA (21 July 2010)*.

The URS clear and convincing standard is higher than the UDRP; mark owners will continue to use the UDRP as they have in the past with success. The statement that a URS complaint will only be granted in favor of complainant if there is no genuine issue of material fact seems appropriate. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

Dismissal threshold for complaints is far too low. ICANN permits a URS complaint to be dismissed by an examiner based on a vague and exceedingly low threshold—i.e. if "evidence was presented" to indicate a domain name is non-infringing or a "defense would have been possible" to show it is non-infringing. *Verizon (20 July 2010)*. *Hogan Lovells (21 July 2010)*. *IPOA (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Microsoft (21 July 2010)*.

### Bad faith criteria.

To be truly rapid, the URS should use a conjunctive “OR” standard of bad faith. *IOC (21 July 2010).*

Criteria (iii) in paragraph 1.2 (g) should refer to the registrant having registered the name primarily for the purpose of disrupting the business of another, rather than of a competitor. There may be many reasons why someone might register a domain name in order to disrupt the business of a third party that is not a commercial competitor. *BBC (21 July 2010)*

The sale of traffic (5b) should be presumed to be bad faith, not merely a factor for consideration. The Registrant should bear the burden to prove that the sale of traffic is not bad faith, once it has been pled in the Complaint. *IPOA (21 July 2010). AIPLA (21 July 2010).*

“Pattern”. If the registrant exhibits a pattern of abusive registrations, it should not be a point in its favor that this particular registration does not seem to share the same abusive characteristics as those in the pattern (5.8(d)). *AIPLA (21 July 2010).*

## **Analysis of Comments**

Comments suggest that eligibility requirements for utilizing the URS are too high and limited to certain jurisdictions. The IRT developed the URS in order to provide a quick avenue for the most clear-cut cases of abuse. In order to provide such a process, some limitations on standing to file a complaint pursuant to the URS are necessary. Nevertheless, standing is not limited to those holding trademarks registered in jurisdictions that conduct substantive review. There will be a provider to validate use of marks if such validation was not conducted in the jurisdiction of the trademark registration, or the mark is not otherwise protected by statute or treaty. Such limitations are placed on the marks eligible for URS consideration in order to limit gaming of the system by those who simply register marks for no reason other than to obtain a domain name.

Some think a clear and convincing standard is appropriate while others do not. Further, some have pointed out that this is higher than the UDRP standards, and thus complainants will simply bypass the URS for the UDRP. Others suggest that the dismissal threshold for URS complaints is too low. It is true that a clear and convincing standard is higher than the UDRP; that is the intent. In addition, the threshold for dismissal of complaints is intended to be low. As noted above, the URS is meant to provide a quick process in the most clear-cut cases of abuse. Thus, a higher standard is appropriate. Further, as the IRT stated: “If there is a contestable issue, the matter is not appropriate for decision under the URS and the Complainant should pursue a decision in a different forum.” (See page 34 of IRT Final Report at: <http://www.icann.org/en/topics/new-gTlds/irt-final-report-trademark-protection-29may09-en.pdf>).

Therefore, neither the clear and convincing standard, nor the threshold for dismissal of a URS complaint will be revised.

The evidence needed to show bad faith has been the subject of commentary. Some comments have suggested that a disjunctive requirement should comprise the standard of review in a URS case, i.e., that the domain name was registered **or** is being used in bad faith. Further, it has been suggested that the requirement of bad faith reach would reach “disrupting the business of another”, instead of a “competitor.”

While two different types of possibly infringing conduct are captured by the disjunctive standard, the goal of the URS is to reach only the most clear cut cases of abuse. Because of this heightened standard, the decision was made to require a complainant to plead and prove both that the domain was registered and is being used in bad faith. Thus, the conjunctive will remain as the standard for a URS case. This is not the standard in every type of RPM. Further, because of the type of harm the URS is intended to address, the “competitor” standard will be retained.

One question above is, what is meant by 5.8(d). In addition, some think that the sale of traffic data, as referred to in 5.9, should be presumed bad faith. The language as proposed in section 5.8(d) is not meant to provide a way to avoid liability for deviating from previously abusive practices. The standard in this section is meant to capture the good faith registrant that does not register a series of typographical spellings of a registered trademark - it is not meant to provide a safe haven for serial cybersquatters. Further, given that the Complainant must show clear and convincing evidence to prove its case, a presumption against the respondent for a URS case is not appropriate. However, a factor that an examiner can consider as evidence of bad faith is the sale of traffic in the appropriate cases. Thus, the standards set forth in Section 5.9, allowing consideration without creating a presumption in favor of the complainant, will remain as written.

## Defenses

### Key Points

- The purpose of this more restrictive entry standard (as compared to UDRP) is to avoid time-consuming analysis over the question of rights, which would undermine the intended purpose and ability of the URS process to provide a fast inexpensive remedy for cases of clear abuse.
- Evidence of fair use of the disputed name must be analyzed by the Examiner to determine its validity

### Summary of Comments

#### Common law rights.

It is ironic that a complainant can only launch a URS complaint based on trademark rights but a registrant can defend such action on the basis of common law rights. We do not see why the procedure cannot accommodate a consideration of the complainant's common law rights also. *BBC (21 July 2010)*.

Wider pattern—defense. We do not agree that the fact that the domain name is not part of a wider pattern or series of abusive registrations should in itself be a freestanding defense. *BBC (21 July 2010)*.

Language change from “safe harbors” to “defenses”. ICANN should provide to the community the independent analysis that led to the change of wording from “safe harbors” to “defenses”. Instead of “defenses” the term should be changed to “absolute or complete defenses”, which is closer to the original term “safe harbors”. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Paragraph 5, section 5.4—addition. Another paragraph (e) “Absolute/Complete Defenses” should be added. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Fair use defense Paragraph 5, section 5.8(b). The current language implies that the Examiner has discretion to determine whether a fair use defense will be acceptable. This is against due process and would give Examiners too much power. The phrase “that is found by the Examiner” should be removed. Fair use is an affirmative defense and as long as the registrant can provide evidence of such use the Examiner should accept it unwittingly. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Paragraph 5.9 edit. The word “not” is missing and this appears to be a typographical error. It should read: “Other considerations that are not examples...” *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

#### To many defenses.

The current version of the URS adds more factors to support a defense that the registrant has not acted in bad faith, without adding any additional presumptions in favor of trademark owners, which seems to reflect a bias against trademark owners. *NCTA (Module 3, 21 July 2010)*.

To be truly rapid, the URS should reduce the number of defenses for panelists to consider. *IOC (21 July 2010)*.

## Analysis of Comments

One commenter challenges why a complaint cannot be based on common law rights. The intent for the URS is to be applicable only in cases of clear-cut abuse. The UDRP, which is still available to any URS complainant, allows for determination based upon common law rights. As stated in footnote 38 of the IRT Final report (see <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>), the “IRT recognizes that entry standard for utilizing the URS is more limiting than the standard provided in the UDRP, which permits claims to proceed based on any registration of trademark rights or on common law rights. Parties that do not meet the higher entry standard proposed for utilization of the URS may, of course, still proceed with claims under the UDRP or in courts, as appropriate. Exclusion from the URS is not intended in any way to prejudice a party from proceeding under other available avenues. The purpose of this more restrictive standard is to avoid time consuming analysis over the question of rights, which would undermine the intended purpose and ability of the URS process to provide a fast inexpensive remedy for cases of clear abuse.” Thus, the URS will not entertain complaints from those with only common law rights.

Two commenters have asked for an explanation for changing “safe harbor” to “defense.” As explained in the comment summary and analysis posted on 28 May 2010, “[t]he language modification strikes a balance between the trademark holder bringing the claim and the rights of the registrant who remains free to allege a defense of good faith. However just as there is no absolute right for the trademark holder to prevail, similarly there is no absolute right to prevail in the basis of alleged good faith, otherwise all would allege it and no successful claim could ever be brought.” See <http://www.icann.net/en/topics/new-gtlds/urs-comment-summary-and-analysis-28may10-en.pdf>. Therefore, it is thought the term “defenses” is more accurate. These same commenters suggest that a new paragraph for absolute defense should be added. Absolute defenses, if any, are contained within the term defense.

Two comments suggest that that the Examiner must unconditionally accept evidence of fair use for trademarks from jurisdictions without substantive review. This is not correct. The Examiner will be required to determine whether evidence of fair use exists. Evidence of fair use must be analyzed by the Examiner to determine its validity, which is why the phrase “that is found by the Examiner” is included. Accordingly, a change of language in response to these comments is not required.

Two commenters suggest revision to some of the language of 5.9. While the word “not” was never intended to be part of this section, there may be some lack of clarity in the language. Thus, the language will be changed from “Other considerations that are examples of bad faith for the Examiner” to “Other factors for the Examiner to consider.”

One comment suggests that the defenses create bias for trademark holders and another says there are too many defenses for URS respondents. There is no intent to create a bias for trademark holders. The URS was developed by the IRT, subsequently modified by the STI and others, solely for the protection of trademark holders. The result is an attempt to balance the rights of a trademark holder, against a registrant of a domain name that may have the same words as a trademark, but is being used in a non-infringing manner.

## Default

### Key Points

- Full examination, even in cases of default, is intended to ensure all parties, whether or not they respond, are provided an opportunity to a fair analysis of the facts.

### Summary of Comments

#### No panel in cases of default.

Where a registrant fails to present a defense (default), an immediate judgment should be rendered in favor of the complainant. A panel should not be appointed to debate hypothetical points of defense. IHG (20 July 2010). IPOA (21 July 2010). Coca-Cola (21 July 2010). NCTA (Module 3, 21 July 2010).

Respondent default should result in suspension of the domain name. There is no need for panel appointment and substantive review in the event of a default. IPOA (21 July 2010). AIPLA (21 July 2010).

To be truly rapid, the URS should deny panel review in cases of respondent default. IOC (21 July 2010).

Returning name servers upon default response. In case of a default response, name servers should not immediately be returned to the state prior to “hold” status until an initial examination of a default response is completed to prevent frivolous filings and delays in implementing decisions. Allowing the return to initial status would be contrary to the “rapid” intent of the URS and provide a loophole for cybersquatters to extend the process. Grainger (Module 5, 19 July 2010).

No default responses should be allowed. No default responses should be allowed unless, upon initial examination, there is strong and compelling evidence that the decision was in error. As with a UDRP the registrant still has the option of filing suit in court to reclaim the disputed name. Grainger (Module 5, 19 July 2010).

### Analysis of Comments

Some commenters are against evaluation upon default and think an immediate ruling in favor of the complainant should be issued. Others think that default responses should be allowed. One commenter has suggested that until an initial examination of a default response is completed, the name server should not revert to allow the registrant to utilize the domain name.

Examination in case of default is something that was identified by the IRT, and accepted by the Special Trademark Issues Review Team (“STI”). The intent was to ensure that someone other than the Complainant had a chance to at least analyze the claim for merit. Thus, there is full review even when there is no response. Further, given the quick nature of the URS proceedings, the intent is to provide a balance to legitimate registrants that may not have been available to respond in a timely fashion. The ability to respond after default and revert to the same position as if the response had been timely filed, provides legitimate registrants the right to regain the use of a legitimate domain name, at least pending Determination. Thus, default responses will continue to be allowed under the URS.

## Appeals

### Key Points

- If there is an appeal, independent review (rather than review by the same panel that decided the complaint) seems to be in the best interest of all parties given the type of proceeding, and the bad faith standard a complainant must meet.
- The filing of an appeal will not change the domain name's registration until the appeal decision is issued.

### Summary of Comments

De novo appeals—statute of limitations. A proposed 2-year statute of limitations for filing a de novo appeal from a panel decision would address any concern about registrants missing the notice and having a review on the merits of every case. *IOC (21 July 2010).*

Appeals must be efficient.

In case of any judgment (default or otherwise) the appeals process must be efficient and succinct. Allowing a defendant to appeal up to two years later is counter-intuitive and counter-productive. *IHG (20 July 2010). Verizon (20 July 2010). Hogan Lovells (21 July 2010). IPOA (21 July 2010). Rosetta Stone (21 July 2010). AIPLA (21 July 2010). NCTA (Module 3, 21 July 2010).*

Two years for a defaulting registrant to reopen the proceeding is much too long. The window should be reduced to 30 days from issuance of the Notice of Default, and subject to a showing of good cause why the default should be lifted. *INTA Internet Committee (21 July 2010).*

Two years for a defaulting registrant to reopen the proceeding is much too long. The window should be reduced to 90 days from issuance of the Notice of Default. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). BC (26 July 2010).*

De Novo review.

The de novo appeal standard is inappropriate; it allows an unsuccessful appellant to simply hope for a different decision by a new reviewer. De novo appeals will take longer to resolve. *NCTA (Module 3, 21 July 2010).*

De novo reviews by filing an answer during the life of the registration period should not be allowed. If the abuse is clear cut and obvious enough to warrant a decision in favor of the complainant, there should be nothing compelling enough in a response filed after default, and certainly not months or a year or more later, to warrant automatic reinstatement of the site. *Grainger (Module 5, 19 July 2010).*

We strongly object to the proposal that a registrant who fails to file a response shall have the right to a de novo review at any time up to two years after the determination. Two years is much too long. We also object to the domain name resolving back to the original IP address where the registrant files a request for de novo review. The domain name should resolve back to the original IP address only where the response has been filed within a limited grace period, i.e. a few months. *BBC (21 July 2010)*

Time for filing appeal.

The window to file an appeal after issuance of a URS decision should be reduced to 14 days. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

There should be a de novo appeal by either party; the filing deadline should be shortened. *AIPLA (21 July 2010)*.

Notice of appeal should be filed within 10 days and a date for a decision on appeal must be set. *INTA Internet Committee (21 July 2010)*.

Limits on new evidence. Any new evidence submitted as part of the appeal should be limited to evidence that (1) was not available at the time of the initial proceeding; or (2) relates to an issue that was not raised by the parties but formed part of the basis for the decision. *NCTA (Module 3, 21 July 2010)*.

Fee for Evidence on Appeal. Making the introduction of new evidence contingent upon an additional fee is unfair and we fail to see the rationale for it. If an appellant pays the required fees for an appeal, there is no justification for another fee for introducing new evidence. ICANN should waive this requirement. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Appeal procedures (paragraph 12) are inadequate. 12.5 merely says that “The Provider’s rules and procedures for appeals shall apply.” There must be explicit provision that notices will be sent via e-mail to the Registrant, the Complainant, the Registrar, and the Registry Operator. The current lack of specificity also exposes Registry Operators to needless liability and unpredictable procedures. If an appeal is successful, URS requires the Registry Operator to unlock the domain and possibly restore back to the previous name servers. Registry Operators should perform domain actions only under explicit and formal notification from the URS Provider, under fully documented procedures. *RySG (21 July 2010)*.

## Analysis of Comments

Questions have arisen with respect to why two years for an appeal is permitted. Some have suggested that this time period is too long. The only way in which an appeal can be taken two years later is if the respondent is seeking relief from Default. Otherwise, the appeal must be filed in 14 days pursuant to Section 12.4. To balance any perceived harm and to deter any gaming of the default mechanism, the filing of an appeal does not change the domain name’s resolution. So if there is a determination in favor of the Complainant, the domain will continue to point to the informational page of the URS provider. Given that the status quo is preserved, it is unlikely that the default/appeal procedure will be gamed for the two-year period. Also, the intent of the URS is to address clear-cut abuses. In these clear-cut cases, the appeal will be lightly used and have little effect on process administration.

Other comments have been submitted regarding the de novo review. Some commentators support it while others believe that it will lengthen the appeal process. Given the limited evidentiary submission before the URS examiner, it is unlikely that the de novo review will substantially increase the time in which review and appeal resolution are complete. Moreover, given the type of proceeding at issue, and the bad faith standard a complainant must meet, on balance, independent review of the materials submitted seems to be in the best interest of all parties. As such, the de novo standard should remain.

Additional comments question the right to introduce new evidence on appeal and suggest that it be limited only to evidence unavailable at the time of the initial proceeding or relates to an issue that was not raised by the parties but formed part of the basis for the decision. As the appeal standard is currently drafted, it reflects the intent to prevent handicapping an opponent on appeal with the requirement that the evidence be limited to that which predates the filing of the Complaint. The availability or unavailability of the evidence is a factor that could be considered by the appeal panel.

One commentator has suggested that since the registrant is filing an appeal, it should not have to pay to submit additional evidence. While costs are a concern, merely instituting an appeal does not carry with it the right to introduce new evidence. Also, the additional costs of the hearing associated with the introduction of new evidence must be recovered. As such, a separate payment will still be required.

One group has requested additional rules and procedures on appeal. In response, some additional notice requirements have been included in the current version of the URS posted in November 2010 at the same time as this analysis is posted. Further, the comment about time for filing an appeal seem reasonable and the time for doing so has been reduced from 20 to 14 days. Additional procedures will be developed once URS Providers have been selected.

## Abusive Filings

### Key Points

- The URS attempts to balance benefits and harms by permanently barring those who have submitted two material falsehoods, and barring those submitting two abusive complaints for just a year after the second complaint is deemed abusive.
- If persons have been found to be abusive in the complaint process an appeal of the finding must be only on very limited grounds.

### Summary of Comments

#### Abusive complaints and Deliberate Material Falsehoods.

The definition of “abusive” complaints is not clear; legitimate trademark owners could be labeled as having an abusive behavior and thus barred from using URS. *PMI (21 July 2010)*.

The standard for imposing a penalty on complainants has been unjustifiably lowered, and the process is silent on the burden of proof placed on the examiner making a finding of an abusive complaint. The bar should be set extremely high given the severe consequences of such a finding. *NCTA (Module 3, 21 July 2010)*.

IBM welcomes the clarifications provided for identifying an “abusive” complaint and for identifying a “deliberate material falsehood” (11.4). Clarification is required on what is considered “material”. *IBM (21 July 2010)*.

The abusive complaints section should be removed or reworked; the current section is troubling because it is highly likely that every registrant will plead the abusive nature of the complaint, thereby increasing costs and time to respond. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

The safeguards for abusive complaints go too far. The requirement in Section 11.4 that the false statement would have an “impact” on the outcome is too low for it to be held to be a deliberate “material” falsehood. *INTA Internet Committee (21 July 2010)*. *BC (26 July 2010)*.

No time period is set with regard to the two findings of “deliberate material falsehoods” that can permanently bar a party from using the URS. *INTA Internet Committee (21 July 2010)*.

The threshold for the sanction is too low. Perhaps two abusive complaints or deliberate material falsehoods within a five-year period should warrant the sanction (barred from URS for one year). *AIPLA (21 July 2010)*.

The “two strike policy” is unprecedented in international law (see URS sec. 11). Jurisdictions do not bar trademark owners from filing complaints—under any circumstances—and neither should ICANN. *IOC (21 July 2010)*.

IBM agrees that two findings of “deliberate material falsehood” by a party should permanently bar the party from utilizing the URS. *IBM (21 July 2010)*.

The abusive complaint provisions should not be diluted. Those who make deliberate misstatements of material facts to prevail in a URS should face sanctions stronger than being barred from using the process; such sanctions should include monetary fines for egregious cases. *ICA (21 July 2010)*.

The appeal standard of review for findings of abuse should be *de novo*—as is proposed for a default appeal or appeal of a determination. *INTA Internet Committee (21 July 2010)*.

## Analysis of Comments

There have been several comments about the terms and application of the abusive complaint standards. Some commenters think being barred from utilizing the URS requires a much higher standard or should not ever be allowed, some think that the stated standard is too lenient, and others think simply barring a complainant from the URS is not enough. What was provided for in the URS Proposal attempts to balance all of these positions, by only permanently barring those who have submitted two material falsehoods, and barring those submitting two abusive complaints for just a year after the second complaint is deemed abusive.

It is true that if trademark holders are found to have submitted abusive complaints, as they are defined in the AGBv4, they will be barred from using the URS. This will not bar them, however, from using other enforcement mechanisms, including the UDRP.

One commenter asked for a clarification of the term material and another has stated that a false statement simply having an impact should be insufficient to be deemed a deliberate material falsehood. We used section 11.4 of the URS, where deliberate material falsehood is one that “contained an assertion of fact, which at the time it was made, was made with the knowledge that it was false and which, if true, would have an impact on the outcome on the URS proceeding.” Something is material if it would have an impact on the outcome of the URS proceeding. Whether or not something would have an impact on the outcome, however, only goes materiality. This does not discount the fact that it must also be a “deliberate material falsehood,” and not merely a “false statement.”

One commenter has suggested that the appeal standard of review for findings of abuse should be *de novo*. But, the purpose of the URS is to address only the most clear-cut cases of abuse. Thus, if persons have been found to be abusive in the complaint process an appeal of the finding must be only on very limited grounds. This helps ensure that only legitimate trademark holders with legitimate reasons for filing a URS complaint are permitted to use the process in an unfettered manner.

## Remedies

### Key Points

- Both the IRT and the STI called for suspension, not transfer of a domain name in the event a URS complainant prevails.
- In addition to requiring the URS Provider to post the Determination on its web site, the requirement to provide electronic notice to relevant parties has been added.

### Summary of Comments

Notice of Determination. Section 9.2 says that “[i]f the Complainant satisfies the burden of proof, the Examiner will issue a Determination in favor of the Complainant. The Determination will be published on the URS Provider’s website. “There is a vital omission here: the procedures do not require any active notice to the various parties involved. The procedure MUST be amended so that the URS Provider sends a copy of the Determination via e-mail to the Registrant, the Complainant, the Registrar, and the Registry Operator. These formal notices MUST be sent. If the Determination is in favor of the Complainant, the Registry Operator is then required to suspend the domain as per 10.1. Registry Operators should act only under explicit notification from the URS Provider, and this notification should be documented in the URS requirements. And in general, it is only logical that the various parties should receive an e-mail notice of the Determination, as is done with UDRP decisions. *RySG (21 July 2010)*).

#### Remedies not sufficient.

The URS should provide trademark owners with the ability not only to temporarily suspend a domain name but also to have the option to transfer valuable domain names back into their portfolios. At best the URS as now proposed allows only a temporary suspension for the remainder of the registration period with the option to suspend for an additional year. During this time the trademark owner cannot make use of a valuable domain name itself. This forces trademark owners into perpetual monitoring and enforcement obligations as the frozen domain name eventually lapses, falls into the pool and is likely picked up by another cybersquatter. *Verizon (20 July 2010)*. *PMI (21 July 2010)*. *DuPont (21 July 2010)*. *IPOA (21 July 2010)*. *CADNA (21 July 2010)*. *Coca-Cola (21 July 2010)*. *News Corporation (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *AIPLA (21 July 2010)*. *BC (26 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

URS should offer a meaningful remedy—e.g., transfer, placement on a registry-maintained black list, or imposition of a presumption of bad faith for all domains that have already been suspended once (see URS sec. 10). *IOC (21 July 2010)*.

Suspension as the only remedy would not lower costs for the trademark owner because of the risk that the same squatter will or another squatter could register the name upon expiration. If a complainant opts for the 1-year extension of the suspended domain name, will the Whois information continue to reflect that of the respondent after the initial expiration date? Who will monitor suspended domain names to ensure that no changes are made to the Whois or the site during the suspension period? *Grainger (Module 5, 19 July 2010)*.

The URS decision should be binding for life, not a few months. *AIM (Module 5, 14 July 2010)*.

Regarding the remedy (10.2), a successful complainant should have the right to cancel the domain to avoid causing damage to the goodwill associated with its trademark through having the contest url containing its mark resolve to a website not under its control for a lengthy period of time. *IBM (21 July 2010)*.

If the point of the URS is to address blatant abuse, then the domain should not resolve past the point at which initial administrative review is passed in an initiated URS proceeding and internet access should be promptly disabled. *Coca-Cola (21 July 2010)*.

Transfer should not be available under the URS. The UDRP and URS remedies should remain distinct. *ICA (21 July 2010)*. *Domain Dimensions (22 July 2010)*. *M. Jaeger (22 July 2010)*.

No re-registration after an adverse URS decision. To not exacerbate the “revolving door” problem and the need for costly defensive registrations, registrants should not be able to re-register a domain name after an adverse URS decision. *IHG (20 July 2010)*.

Right of first refusal. At the very least the successful complainant should be given the right of first refusal to register the domain name when it next comes up for renewal. *BBC (21 July 2010)*

#### Paragraph 4 Domain lock.

Asking registry operators instead of registrars to perform the domain lock is highly problematic. This paragraph bypasses one layer of the registration hierarchy (registrars) and in this respect conflicts with the way the UDRP operates. Registrars should be the point of contact for the URS panel. Registrars have existing procedures in place to perform similar functions, have a direct relationship with registrants and already have customer services that seek to assist registrants. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

The lock process could cause substantial ongoing damage to a trademark owner whose rights are being infringed or to the public by virtue of how it operates (name still resolving for a period of time with website visible). There should be some provision for an interim remedy at least in cases of significant potential harm (akin to an interim injunction in court actions). *BBC (21 July 2010)*

Extension of registration period. Section 10.2 says: “There shall be an option for a successful complainant to pay Complainant to extend the registration period for one additional year at commercial rates.” The mechanism for this is unspecified. The RySG notes that Registry Operators are generally precluded from offering registration services directly to registrants, and the RySG assumes this option will be offered without Registry Operator involvement. *RySG (21 July 2010)*.

## **Analysis of Comments**

The method and manner in which notice should be provided to the parties has been the subject of comments. In addition to requiring the URS Provider to post the Determination on its web site, the requirement to provide electronic notice to relevant parties has been added.

Many comments submitted involve the nature of the remedy available to a URS complainant. Some have suggested that the remedy should be a transfer; others have suggested that the decision should be binding for longer periods of time. Both the IRT and the STI called for suspension, not transfer of a

domain name in the event a URS complainant prevails. As noted above, the URS is intended to be a way in which trademark holders can obtain prompt relief from the most clear cut cases of abuse. The remedy reflects the evil it is designed to prevent. If cancellation is sought, that option can be obtained through a different rights protection mechanism, such as the UDRP.

The manner in which registrants losing URS proceedings can continue to register domain names has been the subject of comments. It has been suggested that an adverse ruling should prevent the registrant from re-registering a domain name. Each case would be determined on its own basis. Accordingly, the URS procedure will not include a ban on future participation in the domain name registration process.

Some have suggested that a successful URS complainant should be given a right of first refusal for the domain name when it comes up for renewal. On balance, this remedy was rejected since the purpose is to stop blatant abuse and the remedy of suspension achieves that end. Another has suggested that an interim remedy, similar to that found in injunction proceedings, be imposed. The URS is designed to remedy a very specific harm and the remedy reflects that precise harm—clear-cut cases of abuse, and to do that quickly. Such a rapid process will obviate the need for any interim remedy. Further, the URS is not the only manner in which an aggrieved trademark holder can obtain relief, it is simply one of many different rights protection mechanisms available to it. If injunctive relief is sought, the trademark holder can proceed in the appropriate jurisdiction to obtain it.

With respect to the comment relating to the ability of a successful URS complainant to register a domain name for an additional year, we agree that this mechanism requires implementation details that will need to be resolved in consultation with the registries and the providers.

## ECONOMIC ANALYSIS

### Key Points

- Independent economists retained by ICANN will answer substantive comments.
- Regarding the timing of the analysis, this study is not a new effort but rather part of the ongoing question of whether to undertake the new gTLD program that was first answered in ICANN's founding documents and later in ICANN's policy development process.
- ICANN took the results of earlier studies seriously, implementing trademark protections and malicious conduct mitigation measures.

### Summary of Comments

The economic analysis work is incomplete.

ICANN has not yet performed analysis of the economic effect of the program on trademark holders (e.g., cost of defensive registrations, costs/benefits) nor has it analyzed consumer demand. ICANN has not yet shown that the new gTLD program will achieve its stated goal of creating innovation and competition. MarkMonitor agrees with Economic Framework report's conclusion that new unrestricted gTLDs with traditional business models for domain name registration will not provide any significant competition to .com. Community-based gTLDs and IDN gTLDs should be expedited. It is hard to predict a successful launch of the new gTLD program without further study and analysis. The initial conclusions in the Economic Framework document contradict the original reasoning by ICANN for introducing new gTLDs

(i.e., .com is the dominant gTLD and introducing additional gTLDs may not untether its dominance). *MarkMonitor (19 July 2010). Red Bull (21 July 2010). BBC (21 July 2010). DuPont (21 July 2010). Comerica (21 July 2010). Carlson (21 July 2010). Sunkist (21 July 2010). Solvay (22 July 2010). LifeScan (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*

Report does not add value. The economic report, while professional in appearance, says very little and its main message regarding the issues is “it depends.” The report predicts various possible risks and benefits without quantifying any of them and lacks empirical evidence. *Minds + Machines (21 July 2010).*

ICANN released the Economic Framework report just days before the last ICANN meeting, with little time for review by the community. Before rolling out new gTLDs, ICANN must perform an economic analysis including the cost to trademark holders and users and the actual consumer demand for various types of new gTLDs. It appears that IDNs have the most demand and other gTLDs have little if any. *Verizon (20 July 2010).*

Launch of new gTLDs must be preceded by a more thorough economic analysis that takes into account actual consumer demand and costs to trademark owners. ICANN needs to decelerate its new gTLD launch plans and take time to ensure that the costs do not end up outweighing the benefits of registrants and users. *CADNA (21 July 2010). INTA Internet Committee (21 July 2010).*

The Economic Framework paper cautioned that an open entry process may not lead to the societally optimal number of new gTLDs. Yet ICANN has persisted on following an open-entry process that will certainly lead to an avalanche of new gTLDs that will bury users of the Internet in confusion, abuse and higher costs. *MPAA (21 July 2010).*

The economic analysis findings suggest that far from responding to an economic demand for new gTLDs, the approach ICANN has taken could have devastating consequences for the stability of the DNS. The economic analysis recognizes the tremendous costs imposed by the new gTLD program on brand owners, consumers and ultimately civil society. Further work needs to be done—especially in the area of identifying the risks and impacts on existing markets for gTLDs. *SIIA (21 July 2010).*

It is alarming to see the introduction of an economic analysis at such a late stage of planning. We expect ICANN to fully consider the recommendations now put forward under the Economic Framework and to undertake the relevant pre-launch studies. These results should be factored into the DAG and the overall approach to launching new gTLDs. *HSBC (21 July 2010).*

The Economic Framework study suggested that positive competitive effects from new gTLDs may not be large, while it also suggested some potentially important and beneficial innovations from new gTLDs such as the opportunity for differentiation. ICANN should seek mechanism and applicant structures to maximize competition and encourage innovation in the DNS. DAGv4’s rules on community-based gTLDs both in the evaluation and objection portions represent a good example of the way in which gTLDs can offer innovation in the DNS. ICANN should also be deliberate in its ongoing analysis, rollout and evaluation processes once new gTLDs are launched. USCIB supports the Economic Framework study’s suggestion for ICANN to gather information from any new gTLD program in order to more clearly identify the general benefits and costs of implementing new gTLDs, including those related to consumers. *USCIB (21 July 2010).*

More comprehensive data and study required.

To facilitate a proper economic analysis of the costs and benefits of new gTLDs, AT&T fully supports the Economic Framework Paper's recommendations that ICANN gather much more comprehensive data about new and existing gTLDs, and conduct several types of studies, *before* new gTLDs are introduced. This information will also help in understanding the costs created by malicious conduct and inform the decision making on security, stability and resiliency issues. *AT&T (21 July 2010). ABA (22 July 2010).*

Microsoft supports the Economic Framework study recommendations to ICANN in paragraph 117 (introduce new gTLDs in discrete, limited rounds) and paragraph 118 (require registries, registrars and registrants to provide information, including about trademark disputes, sufficient to allow the estimation of costs and benefits of new gTLDs). *Microsoft (21 July 2010).*

ICANN should not issue a final Applicant Guidebook before the case studies and further analyses called for in the Economic Framework paper are complete and before the community has a chance to comment on their incorporation in another Draft Applicant Guidebook. *News Corporation (21 July 2010). AIPLA (21 July 2010). BITS (22 July 2010).*

#### Introduce new gTLDs in discrete, limited rounds.

AT&T supports the Economic Framework Paper's recommendations that ICANN introduce new gTLDs in discrete, limited rounds with prioritization of IDNs. In this way, ICANN will be able to mitigate consumer confusion and make any necessary adjustments to the implementation plan based on learning from initial rounds. As the economic paper acknowledges, there is no way for ICANN to fully assess and understand all of the potential costs and implications of introducing new gTLDs. By prioritizing introduction of IDNs, ICANN will be facilitating new gTLDs that are likely to deliver new benefits to global Internet users. *AT&T (21 July 2010).*

Until we have achieved a rollout of a substantial number of domains there will be no evidence to study regarding competition in the name space. Therefore the BC recommends that ICANN continue its practice of introducing new gTLDs in discrete, limited rounds. *BC (26 July 2010).*

Certainty not realistic. There will never be certainty about future extensions of the domain name space. *dotZON (21 July 2010).*

#### Do not delay the new TLDs launch and proceed with the implementation plan.

Nothing in the economic study should cause further delay in introduction of new TLDs or change the implementation plan. ICANN is, in fact, recommending in DAGv4 that it introduce new TLDs in discrete, limited rounds: there will be a discrete window which will open and close; all applicants must pass a background check, meet qualifications, establish their technical ability and meet all financial criteria and will have to have about \$1 million to file a new TLD application. This round will thus be limited in duration to a discrete group of entities that can meet very limiting qualifications. Due to the nature of the evaluation, objection and approval processes, all of the names applied for in this round will, in practice, enter the root in batches or phases. ICANN could use the experience of this round and make any necessary adjustments prior to future rounds, as recommended in the economic study. *Domain Dimensions (22 July 2010).*

## **Analysis and Proposed Position**

These comments have been forwarded to ICANN retained independent economists for response. However, some response can be made now regarding the timing of the reports and the comments that this analysis should have occurred earlier in the process. The current study is the last in a series of many investigations as to whether new markets should be opened and gTLDs should be delegated in an open way.

This is not the first opening of markets by ICANN. ICANN has opened up competition and opportunity on the marketing/distribution end of the spectrum (registrars), with spectacularly good results for consumers and entrepreneurs. It has, in contrast, been very measured in opening the market on the manufacturing side (registries), because of technical and other concerns that have been addressed.

It has always been ICANN's mission, as defined in its founding documents, to open up competition in the DNS – that has been one of the principal reasons for ICANN's existence from even before its beginning. After two initial rounds and learning lessons on benefits and costs there, ICANN undertook an intensive policy development process where all the stakeholders groups in ICANN's GNSO endorsed the opening of this market – after extensive discussions regarding costs and benefits.

After the ICANN Board approved the policy, ICANN undertook several independent economic studies regarding: price controls, vertical integration and the possible benefits of the program.

The previous studies and community discussion indicated potential social costs in the program. As a result, ICANN has tried very hard to take into account input from trademark interests, resulting in a thorough program of trademark protections and malicious conduct mitigation measures built into the Guidebook.

After all of these, there was a call for additional analysis and this study was launched. The timing of the report is not due to a late realization but rather it is an additional undertaking of an ongoing effort.

## **MALICIOUS CONDUCT**

### **Key Points**

- Working Groups have developed two added methods to deal with malicious conduct in relation to the new gTLD program: the High Security Top Level Domain (“HSTLD”) and the Centralized Zone File Access (“ZFA”) programs. See updated HSTLD Snapshot published under separate cover.
- Liability for invalid or inaccurate Whois information may receive future consideration for inclusion within amendments to the RAA.

### **Summary of Comments**

Integrated approach to trademark protection and malicious conduct. ICANN should integrate its consideration of malicious conduct and trademark protections as they are directly related. Additional proactive measures are needed to keep deceptive gTLDs out of the system in the first place, and they

should be an essential component of ICANN's comprehensive plan for avoiding end user confusion and the associated harms resulting from malicious conduct. *AT&T (21 July 2010)*.

Mandatory baseline for registries. The main problem is the voluntary nature of many of the key safeguards that ICANN has proposed to deal with malicious conduct. At a minimum, ICANN should require registry operators of new gTLDs to implement basic procedures to help prevent, or to expedite response to, malicious conduct involving registrations that they sponsor. *Time Warner (21 July 2010)*.

Proxy and privacy registrations. Measures should be taken prior to the launch of new gTLDs to deal with the increased use of proxy and privacy registrations by bad actors for unlawful purposes. If this issue is not dealt with prior to the new gTLDs launch, the scale of use for unlawful purposes could spiral out of control. *Hogan Lovells (21 July 2010)*.

Liability for invalid or inaccurate Whois data. If a registrant is untraceable due to invalid or inaccurate Whois data, liability should be passed on to the Registrar or Privacy Whois providers. This could reduce the harm to Internet uses and be leveraged to improve the accuracy of Whois data. *HSBC (21 July 2010)*.

Built-in mechanisms and compliance efforts to combat malicious conduct. The rollout of new gTLDs and accompanying structures in DAGv4 should, where possible, build-in mechanisms to limit further criminal activity, including spam, malware, WHOIS abuse and other illegal activities. Ensuring strong contract compliance and increasing funding for ICANN compliance efforts will help in this regard. *USCIB (21 July 2010)*.

Additional measures for vetting registry operators. The background check is a positive addition to the process for vetting registry operators. Additional measures would decrease the likelihood of malicious conduct, including: (i) rendering denial of an application automatic as opposed to discretionary as suggested by the wording of the notes to question 11; (ii) extending the class of persons to include persons who operate, fund or invest in the registry operator; (iii) eliminating the temporal restrictions in (d) regarding disqualification by ICANN such that any disqualification at any time is relevant; (vii) revise (e) to read "is the subject of a pattern or practice of either liability for, or findings of bad faith in connection with, trademark infringement or domain name registrations, including." (viii) add a new category (f) that covers "has materially breached an existing registry agreement or the Registrar Accreditation Agreement." *Microsoft (21 July 2010)*.

Rapid takedown or suspension systems. It is extremely disappointing that ICANN has failed to take the opportunity to require registry operators to adopt and implement rapid takedown or suspension systems to combat malicious conduct. Microsoft reiterates the proposal it made for this in its version 3 comments, including being amenable to having one or more Microsoft employees with relevant expertise to work on an ICANN-convened expert group to develop a required rapid takedown or suspension system. *Microsoft (21 July 2010)*.

Support for malicious conduct efforts in DAGv4. I support and commend ICANN for its work on malicious conduct concerns in the DAGv4 and that this issue should be considered resolved. *Domain Dimensions (22 July 2010)*.

High Security Zone TLD Program—application-based incentives.

A specific evaluation question should be included to provide application-based incentives for applicants to protect the public by adopting the more rigorous protections spelled out in the High Security Zone

TLD Program. Applicants should be awarded one or more optional points for a positive response, or alternatively points could be deducted from the evaluation score of an applicant who declines to take these additional steps to protect the public. *COA (21 July 2010)*.

## Analysis of Comments

As stated in various comments, the issues of trademark protection and malicious conduct have some overlap, and while the progress on those issues has been discussed separately, the solutions generated work in tandem. Controls and processes for both are included in the current Applicant Guidebook. The issue of malicious conduct is addressed with nine separate measures designed to mitigate the potential increase in phishing, spam, malware, botnets, and other abusive activities. It is thought that all these measures will work for the protection of rights holders and all registrants.

Mitigation of malicious conduct issues, as they relate to the new gTLD space, was worked through the active participation of multiple expert sources, including the Registry Internet Safety Group (RISG), the Security and Stability Advisory Committee (SSAC), Computer Emergency Response Teams (CERTs), Intellectual Property Constituency (IPC), and members of the banking/financial, and Internet security communities.

As a result of this work, nine measures were recommended and included in the Applicant Guidebook for the benefit of registrants and users to increase trust in new gTLD zones:

- Vetted registry operators (background checks)
- Demonstrated plan for DNSSEC deployment
- Prohibition of DNS redirection of “wildcarding”
- Removal of orphan glue records to eliminate a tool of spammers and others
- Requirement to maintain thick WHOIS records
- Centralized method of zone-file access
- Documented registry abuse contacts and procedures
- Participation in an expedited registry security request process

Comments requested that ICANN place an emphasis on the accuracy of Whois information and suggested methods of enhancing Whois accuracy. In response to earlier public comment, the proposed registry agreement now contains a requirement for the maintenance of a thick Whois database. ICANN is actively reviewing the new gTLD program and its compliance regimes overall to consider where enhancements can be made to promote Whois accuracy or ease access to Whois information.

Liability for invalid or inaccurate Whois information may receive future consideration for inclusion within amendments to the RAA and is an issue for ICANN’s policymakers. Requirements for removal of malicious domains may address this issue in a more efficient fashion.

Several comments on malicious conduct described: the need for more stringent focus on the overall issue, support and questions for the High Security Zone TLD (“HSTLD”) program, contract enforcement, and suggestions for control activities. See the recently-posted explanatory memorandum on Malicious Conduct and HSTLD Snapshot Summary and Analysis for an additional report on all aspects of the Malicious Conduct Mitigation effort and results. Several changes were made to the Guidebook in relation to and in anticipation of the HSTLD program or one like it. High security designations are

encouraged for TLDs that raise an expectation of security, such as providers of financial services. As the launch of new gTLDs becomes imminent, ICANN is augmenting staffing in compliance, registry liaison, IANA, and other functions to provide a full suite of enforcement and other services to new gTLD registries and for the benefit of DNS users.

Implementation of some built-in mechanisms is underway, such as monitoring the availability of Whois services.

The processes for vetting of registry applicants have been further reviewed. Specific, significant changes have been made in background screening to make that tool more effective in preventing future potential abuse and to provide applicants and others with certain requirements.

Comments requested the development of a rapid domain name suspension process to address abusive domain names that host or support malicious conduct. Currently, the guidebook requires all applicants to establish and maintain a dedicated abuse point of contact responsible for addressing matters requiring expedited attention, and for providing a timely response. Although the specific policies and procedures might vary according to the needs of particular TLDs, all applicants are expected to have a well-developed plan for abuse prevention and mitigation in the TLD to pass the evaluation. Community work on standardizing or coordinating takedown or other mechanisms could take place in the policy space, or informally among TLD operators. In addition, significant work has been done by the IRT and STI (see Trademark sections) to develop a Uniform Rapid Suspension system for the takedown of names that are blatantly abusing trademark rights, where this type of behavior can be addressed.

## Background check

### Key Points

- The basis of the background screening was borne from public concern about potential for malicious conduct with the introduction of new gTLDs.
- The term “terrorism” has been removed from the background check criteria.
- The focus of background screening is now limited to general business diligence, criminal history, and improper domain-name-specific behavior.

### Summary of Comments

#### Background checks.

It is welcomed that the DAGv4 has added a background check for applicants, where a number of circumstances could disqualify a person or entity from running a new gTLD. *COA (21 July 2010). Hogan Lovells (21 July 2010). R. Tindal (21 July 2010). ABA (22 July 2010). BITS (22 July 2010).*

Instead of a case by case approach, we would prefer a more systematic approach to the background checks given the importance of mitigating the risk of participation in the new gTLD process by criminal actors. *BITS (22 July 2010).*

Section 2.1 details a reasonable background check process regarding individuals and entities applying for any new gTLD. The approach of a “case by case basis depending on the individual’s position of influence on the applying entity and registry operations” should alleviate fears that ICANN will look for any

connection to nefarious conduct, no matter how remote, to bring down a gTLD applicant. The background check language is also appropriate provided that ICANN will not be looking to exclude an applicant for anything but serial intellectual property violations that have been adjudicated in a court of law. We believe that ICANN will be reasonable in this aspect of the applicant review process. *Demand Media (22 July 2010)*.

CADNA welcomes the background check requirement but seeks more information about how high a priority background checks on past intellectual property violations will be. *CADNA (21 July 2010)*.

No basis was provided for the introduction of this additional step in the application process. The least intrusive check is one on the applicant itself in relation to its financial, technical and operational capabilities. If it is necessary to check the applicant's management, this should be limited to active officers, directors and possibly majority shareholders of the applicant. The word "partners" in this context is confusing as the legal meaning is different from the broader, more general meaning in ordinary use. In addition, some of the grounds upon which a background check is to be based appear overly vague or disproportionate to the objectives. While the scale of serious matters such as terrorism and war crimes cannot be denied, how would these affect the deployment of new gTLDs and the operation of the DNS? *M. Wong (21 July 2010)*. *R. Dammak (July 2010)*.

There is no provision for informing the applicant that it has triggered alarm bells in the course of its background check or even that it has failed because of a negative background check. There is no provision for appeal or review of a decision to disallow the application because of a failed background check. *M. Wong (21 July 2010)*. *R. Dammak (July 2010)*.

ICANN should remove the background check requirement unless community feedback indicates strong, substantiated and principled support for it. If the community supports a background check, it should be strictly limited to, at most, cases of proven financial irregularity or fraud, and possibly clear-cut proven cases of cybersquatting. *M. Wong (21 July 2010)*. *R. Dammak (July 2010)*.

The background check is inappropriate, prejudicial, and should be deleted. This was not something the GNSO recommended but is something that ICANN staff created. Preventing "terrorism" is widely outside of ICANN's scope and mission and there is no internationally agreed definition of terrorism. This policy will prejudice non-westerners. In addition, including "intellectual property violations" in the same category of harm as "terrorism" seems to be a gift to the intellectual property community that is not grounded in reality, proportionality or community support. *R. Gross (21 July 2010)*. *R. Dammak (22 July 2010)*.

#### Third party firm conducting background checks.

We are concerned about the standard and approach for selecting the third party firm that will conduct background checks according to the DAGv4. ICANN must select a neutral, authoritative organization as a third party through wide community consultations. An organization under the frame of the UN should be selected to undertake this job. *ISC (21 July 2010)*.

CADNA requests more information about the process of selection of the third party to perform the background check. *CADNA (21 July 2010)*.

#### Inclusion of the word "terrorism" without standards or definition.

Regarding the DAGv4's Section 1.2.1 "Eligibility" and 2.1 "Background Check" the insertion of the word "terrorism" so arbitrarily as part of the background check on applicants, and without providing any definition or criteria that would be measured against approving or denying an applicant for a new gTLD or IDN gTLD, causes deep personal concern. Background checks in this area of terrorism, as it is presented in the DAGv4 without any definition, are unacceptable to many people, language communities, and faith communities around the world. It is a surprise to see ICANN involving itself in the area of terrorism while its mandate is only being a technical coordinator. Clear and internationally recognized definitions and measures should be included in this section or it should be removed. *A. Al-Zoman (19 July 2010). A. Al-Zoman (21 July 2010).*

ICANN has arbitrarily added Terrorism verification checks to be conducted on all applicants for new gTLDs (including IDN gTLDs) in the DAGv4 with no definitions or standards whatsoever upon which these checks will be done, a clear indication that little thought was given to this matter, if any, or to its grave international implications. This requirement is offensive to many in the international community and some will boycott the ICANN process. If implemented it would clearly indicate that ICANN has gone well beyond its mandate. It suggests that ICANN is still operating in the shadow of the U.S. government, casting damage on the Affirmation of Commitment.

ICANN should urgently address this issue by either:

Option 1—retract "terrorism" as an area of verification checks in the guidebook; or

Option 2—if "terrorism" remains as an area of checks, ICANN must

(A) indicate how it intends to carry out such an evaluation and provide clear definitions of what type of terrorism (e.g., cyber, Islamic, state, etc.);

(B) adoption definitions congruent with international, local community and local jurisdiction accepted laws and standards on terrorism upon which fair and unbiased measurements of applicants can be conducted;

(C) if ICANN staff or "experts" cannot come up with appropriate definitions or protocols that meet the above criteria, ICANN would be better served to post a 30 or 45 day period Request for Comment for community feedback for definitions and advice on protocols, as it does for other issues.

(D) ICANN should provide an explanation as to how and why "terrorism" was added to the DAGv4 in the first place—i.e. on whose request? ICANN should indicate in which policymaking forum this request was made, when and by whom, for "bottom-up", transparency purposes.

If this offense of arbitrarily adding "terrorism" was unintentional, an apology by ICANN with a commitment to correcting it would go a long way to show how magnanimous ICANN can be when realizing it made a mistake. *Multilingual Internet Group (19 July 2010).*

Background check—clear terms needed. The background check section contains ambiguous terms prone to subjective interpretation. This could provide third parties seeking to interfere with, delay or block specific applications with attack vectors. Clear and internationally recognized definitions and measures should be included in this section. *Arab Team (21 July 2010).*

## Analysis of Comments

The term “terrorism” has been removed from the Applicant Guidebook. The term was not meant to single out or identify a group of potential applicants; rather, it was meant to provide some guidance on what could be checked and to indicate that ICANN must comply with certain laws.

Several comments welcome the addition of a background screening process, while others question the basis and necessity of such a review given the extensive analysis to be performed by the Evaluation Panels. Other comments are concerned with the definition of terms and the potential that the process could be prejudicial depending on how those terms are interpreted by who is providing the background screening service. These comments have merit and have been carefully considered in redrafting this section of the Applicant Guidebook.

The basis of the background screening was borne from public concern about potential for malicious conduct with the introduction of new gTLDs. There have been specific comments that allowing “bad actors” to own and/or manage TLDs would perpetuate malicious conduct on the Internet. As is explained in the next version of the Applicant Guidebook, the background screening process is part of an overall approach to mitigate such behavior. All Applicants have been and continue to be required to disclose any potential concerns about their background. However, the focus of background screening is now limited to general business diligence, criminal history, and improper domain-name-specific behavior. Specific criteria are provided in the guidebook.

The third-party organization conducting the background screening will check publicly available data to determine if the Applicant has made all disclosures. Gaps between Applicant disclosures versus the third party check may require clarification from the applicant.

## ROOT SCALING

### Key Points

- ICANN published two studies to inform the root scaling discussion.
  - The *Delegation Rate Scenarios for New gTLDs* <http://www.icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf>
  - The *Summary of the Impact of Root Zone Scaling* <http://www.icann.org/en/topics/new-gtlds/summary-of-impact-root-zone-scaling-06oct10-en.pdf>
- The Delegation Rate study describes a process-imposed limit that the delegation rate of new TLDs will not exceed 1000 new gTLDs per year, regardless of the number of applications.
- The planned delegation rate and other factors contribute to a conclusion that the new gTLD program will not pose root zone stability issues.

### Summary of Comments

Limit initial pool to community-based gTLDs and IDN gTLDs. MarkMonitor agrees with the root scaling study that a slow limited release of new gTLDs might be prudent until DNSSEC implementation is completed since there is no indication as to how many gTLDs will be introduced and ICANN has yet to

formally limit the size of the initial pool. The convergence of DNSSEC, IDNs, IPv6 and the new gTLDs could potentially destabilize the root. Given that potential negative effect to security and stability, ICANN should limit the pool of gTLDs (to allow ICANN to evaluate the potential pressure on the root) and significantly limit the initial round to community-based gTLDs (designed for and supported by clearly delineated, organized and pre-existing communities) and IDN gTLDs only. *Mark Monitor (19 July 2010). Red Bull (21 July 2010). BBC (21 July 2010). HSBC (21 July 2010). DuPont (21 July 2010). Carlson (21 July 2010). Comerica (21 July 2010). Sunkist (21 July 2010). Solvay (22 July 2010). LifeScan (22 July 2010). ETS (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*

The root scaling study concluded that more work was needed to fully understand the implications of the introduction of new gTLDs and develop effective responses to these concerns. The Root Scaling Team recommended a staged approach to new gTLD introduction as a way to help manage the risks to the root zone servers. *AT&T (21 July 2010).*

USCIB is eager for ICANN to finish and release the expected root scaling study that will provide insight into important security and stability considerations with respect to introducing a range of both ASCII and non-ASCII domain names and the impact on a single authoritative root. A focus on differentiation could help limit some of the potential negative consequences for a rapid introduction of new gTLDs into the root. *USCIB (21 July 2010).*

We suggest deferring the implementation of new gTLDs until the final root scaling study report is available and any issues it identifies are adequately addressed. *BITS (22 July 2010).*

## Analysis of Comments

Comments raised a concern regarding the impact of the new gTLD program on the stability of DNS. Specifically, comments focused on the introduction of “unlimited” new gTLDs to the DNS. It is important to note that the current “unlimited” status for new gTLD applications does not necessarily tie with an immediate and unlimited delegation of those new gTLD applications that are approved and contracted. ICANN has devised an appropriate plan for delegation rates of new gTLDs into the root zone as a component of the overall gTLD program. The plan was created with both the expected and maximum number of applications in mind.

In releasing the two reports related to Root Zone Scaling, ICANN states the proposition that the many of the issues raised have been addressed by:

- metered delegation rates;
- the fact that DNSSEC, IDNs and IPv6 are already deployed; and
- analysis of L-root behavior.

The analysis of the “Delegation Rate Scenarios for New gTLDs” seeks to address the concern that with many new TLDs being delegated, the stability of the root server and distribution system could be in question. It is calculated that the expected rate of new TLDs entering the root in the first round would be in the order of 200 to 300 annually - and not exceeding 1,000 delegations/year even if there were thousands of applications. As a result, no meaningful technical stability issues were identified and advice from the root zone operators indicated that delegation rates of up to 1000 could be accommodated. Based on this analysis, and taking into consideration the results of the studies into the effects of scaling the root summarized in “Summary of the Impact of Root Zone Scaling,” we have no evidence (reason to believe) that the root system will not remain stable. The report also recommends that monitoring of

root management systems as well as communications between the various stakeholders involved in root management should be improved to ensure that changes relating to scaling of the root management systems don't go unnoticed prior to those changes becoming an issue. This is not technically difficult given the relatively low delegation rates, and is currently under consideration.

## SECURITY AND STABILITY

### Key Points

- Contractual compliance will be staffed to effectively deal with audit and enforcement issues arising from the introduction of new gTLDs.
- Introduction of new gTLDs will be conducted in a manner consistent with ICANN's commitments to preserve the security, stability and resiliency of the DNS.
- Divergent views have been received on whether the High Security Zone Verification Program should be mandatory or voluntary. The program will continue to be pursued by ICANN; standards and program administration will be adopted by an independent agency.

### Summary of Comments

Compliance issues. ICANN already has substantial existing critical compliance challenges and per a recent report (KnújOn) ICANN is not devoting enough resources to them. Compliance issues are a serious red flag and specter over any planned expansion of the DNS. Serious questions remain about whether ICANN can effectively deal with security, stability or malicious conduct when it increase the number of registries, registrars and gTLDs operating on a global scale. The DAGv4 provides no assurance that the rollout of new gTLDs will not spawn further criminal and illegal activity or how ICANN will prevent and address these issues. *Verizon (20 July 2010).*

Trust and reliability of the Internet. The success of the Internet is based on its openness and constant adoption to users' needs. Consumers can rely on its availability and have trust in registrars and registries and the constant developments to accommodate users' needs. This achievement should not be put at risk. *dotZON (21 July 2010).*

High Security Zones Verification Program.

This program appears unlikely to materialize and, if it does, to be effective. The HSZ TLD program must be mandatory for all new gTLDs or, at a minimum, ICANN should subtract points from any applicant that does not state its intention to seek HSZ TLD certification. *Microsoft (21 July 2010).*

High security verification should be mandatory for financial services domains. *ABA (22 July 2010). BITS (22 July 2010).*

The HSZ program should remain voluntary so that consumers can make their own assessment of its worth. If there is real consumer value then market forces will drive its broader adoption. *R. Tindal (21 July 2010).*

### Analysis of Comments

## Compliance issues

With regard to compliance issues, ICANN will continue to aggressively enforce ICANN's registrar and registry contracts in the interest of protecting registrants and encouraging public confidence in the DNS. Additional resources are planned and will be secured to effectively serve the new gTLD registries.

## Trust and reliability of the Internet

ICANN acknowledges these comments, and recognizes that the introduction of new gTLDs should be conducted in a manner consistent with ICANN's commitments to preserve the security, stability and resiliency of the DNS. The application process and evaluation of new gTLD proposals is intended to follow a process to ensure that trust and reliability of the Internet's unique identifier system is not put at risk.

## High Security Zones Verification Program

ICANN received divergent views on whether the High Security Zone Verification program should be mandatory or voluntary.

In general, and in other sections of the Applicant Guidebook, comments suggested that the HSTLD program should be voluntary and that if there is perceived value in it, the marketplace will evolve to accommodate the demand. The HSTLD program is currently being explored and its viability is under review and consideration. On 22 September 2010, ICANN in coordination with its HSTLD AG issued a Request for Information (RFI) on the HSTLD Program. The purpose of the RFI is to assist the ICANN community in understanding potential frameworks and approaches for evaluating TLD registries against the HSTLD criteria, determine where improvements to draft criteria and the overall program may be necessary to ensure its success, and to assess the viability of the proposed HSTLD Program.

### Next Steps:

ICANN and the HSTLD AG agreed there is value in conducting a RFI on the program, and as noted above it was published on 22 September 2010. After the RFI period closes on 23 November 2010 and ICANN and the HSTLD AG have had adequate time to respond to questions and to summarize and analyze the responses, a determination about next steps will be made.

ICANN remains committed to mitigating malicious conduct in new gTLDs and supports the development of the HSTLD concept as a voluntary, independently operated program. Some in the community have taken ICANN Board Resolution 2.8 Mitigating Malicious Conduct<sup>1</sup> as a lack of support for the concept. While the Board said it will not be signing on to be the operator of such a product, it does support its concept just as it has other measures (e.g., URS, prohibition of wildcarding, centralized zone file access, etc.) to mitigate malicious conduct in new gTLDs.

## **VARIANT MANAGEMENT**

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<sup>1</sup> Board Resolution is viewable at <http://icann.org/en/minutes/resolutions-25sep10-en.htm#2.8>.

## Key Points

- It is understood that script cases and practices vary around the world, and that delegation of variant TLDs is critical to good user experience for a number of Internet users.
- ICANN continues to support study and development activities toward a variant management solution for the top level, including testing of DNAME, creation of policy, and other mechanisms, so that users around the world will be able to take advantage of increased opportunities in a secure and reliable DNS.

## Summary of Comments

Chinese characters. Variants must be treated fairly in the new gTLD process. The current policy where variants have to be blocked or reserved until there is a proper solution may advantage some variants over others and cause user confusion. In Chinese script strings of simplified and traditional form share the same meaning and are used equally among Chinese Internet users. Block or reservation of either form will deprive certain groups of Chinese users of the right to access the Internet in Chinese scripts. CNNIC appeals to ICANN to consider a proper solution to Chinese characters before launching new gTLDs. It may be that if applicants abide by similar requirements on “.China” that ICANN will approve the applications of the two string requests in a bundle. *CNNIC (21 July 2010).*

Delegation of Variants. Variant TLDs should be supported and delegated to the same TLD holder. Blocking or reserving them will deprive certain user groups of the right to access the Internet in their language using the available input device (e.g., keyboard). *A. Al-Zoman (21 July 2010).*

## Analysis of Comments

ICANN agrees that treatment of variant strings should occur according to a fair procedure. The current approach is designed to be uniform and avoid advantaging or disadvantaging any user group as compared to another. It is understood that script cases and practices vary around the world, and that variants are critical to good user experience for a number of Internet users.

It is expected in the long term that variant TLDs will be supported and delegated to the same TLD operator. The task is to define a clear and globally supported understanding of the definition of variant TLDs, and what policies and user expectations can attach to these.

It is noted that IDN ccTLDs involving the simplified and traditional Chinese scripts have been delegated, and it is expected that the experience gained through the IDN ccTLD Fast Track will inform these community discussions going forward and help enable a workable approach for the gTLD namespace.

In authorizing the delegation of these IDN ccTLDs, the Board resolution noted that the methodology to be taken by the IDN ccTLD manager to handle these particular instances of parallel IDN ccTLDs is, in the short-term, the only option available, but there are serious limits to where such an approach is viable in practice, so that it cannot be viewed as a general solution. Consequently, long-term development work should be pursued. The Board directed that “significant analysis and possibly development work should continue on both policy-based and technical elements of a solution for the introduction on a more general basis of strings containing variants as TLDs.” (See <http://www.icann.org/en/minutes/resolutions-22apr10-en.htm>).

ICANN continues to support study and development activities toward a variant management solution for the top level, including testing of DNAME and other mechanisms, so that users around the world will be able to take advantage of increased opportunities in a secure and reliable DNS.

## STRING SIMILARITY

### Key Points

- Whether exceptions should be made to rule excluding delegation of “confusingly similar” TLD strings is a complex issue requiring additional policy discussion.
- The policy work should examine whether there should be exceptions for “non-detrimental” similarity (e.g., cases of common ownership or in view of context).
- The diversity in the make-up of evaluation Panels will match the anticipated diversity of the new gTLD applications.

### Summary of Comments

Section 2.2.1.1. No changes were made to this section. Strings that may be judged similar but in a non-detrimental way should not be eliminated in the initial evaluation. In case that does happen, the opportunity for correcting the possible error could be provided. The focus should be on a good user experience; it is very possible that two strings could be similar but not create confusion and instead provide for a better user experience. *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Foreign language equivalents (1.1.2.8, 2.2.1). String contention should include foreign language equivalents of applied for names (e.g. “bank” and “banco” should be considered equivalent). *BITS (22 July 2010).*

Review methodology (2.2.1.1.2). I agree that a higher visual similarity score could be indicative of greater difficulty in passing the string similarity review. I support the DAG’s conclusion that “final determination of similarity is entirely up to the Panel’s judgment.” *R. Tindal (21 July 2010).*

String similarity—panelists. Panelists reviewing for string similarity should include both trademark practitioners and personnel experienced in the workings of not-for-profit organizations. *Red Cross (21 July 2010).*

String similarity review should include aural (sound) and commercial impression (meaning) as well as visual similarity. *Red Cross (21 July 2010).*

An extended review should also be available following the String Similarity Review process, at the Applicant’s request. *Red Cross (21 July 2010). V. Petev (Module 2, 21 July 2010).*

“Average, reasonable Internet user”. This term in Section 2.1.1.1.2 should be more clearly defined. *Red Cross (21 July 2010).*

Evaluation criteria for confusingly similar strings--IDNs. A major point ICANN is missing in their current evaluation criteria for confusingly similar strings is that they do not review the TLDs, especially IDNs, in the context they will be used in (e.g., Cyrillic). When reviewing an IDN in context, the evaluation of the string (and its alphabetical differentiation) becomes much easier. *V. Petev (Module 2, 21 July 2010)*,

## Analysis of Comments

The proposal to allow for exceptions for "non-detrimental" similarity is certainly worth consideration. Comments have requested that exceptions be granted from findings of confusing similarity. The reason for granting an exception would be that a string pair that has been found to be confusingly similar constitutes a case of "non-detrimental confusion", for example if the applicant/operator is the same for both strings or if there is an agreement between the involved applicants/operators that provides for improved user experience.

One result of the GNSO idea may be the delegation of variant TLDs – given that variant TLDs are very similar.

Similar strings should not be delegated absent an in depth policy examination of the issues. The suggested modifications raise a complex set of policy issues (similar to those discussed regarding variants). The proposal should not be considered as plain implementation matters.

This is a conservative approach. If appropriate, the outcome of the work listed above can be considered for implementation when completed. Policy work in this area should be encouraged.

The GNSO policy states that strings resulting in user confusion should not be delegated: avoidance of user confusion is a fundamental objective to protect end-user interests and promote a good user experience.

The criteria and requirements for operation of similar TLDs in a “non-detrimental” manner is not obvious or straightforward. The exact criteria and requirements for such a situation to be unequivocally fulfilled have to be defined and need to be agreed by the wider community.

The String Similarity review and the String Confusion objection provisions already protect delegated TLDs against applications featuring confusingly similar strings. To confer a right to delegated TLDs to use such strings themselves is a change in principle and of importance. Such rights can be used to introduce chains of successively similar TLD strings, potentially reaching far away from any direct similarity with the original TLD string. The appropriateness of such consequences, and any limitation to impose, need to be discussed and agreed by the wider community.

The actual operation of "non-detrimentally" confusingly similar strings raises issues regarding user experience and user expectations already identified in discussions about "equivalent" and "variant" strings. Operational requirements to safeguard such aspects need to be developed, introduced and enforced. For example, should they resolve to the same address or not?

If exceptions for "non-detrimentally" confusingly similar strings are granted, there must also be safeguards to guarantee that the necessary conditions remain permanently fulfilled, calling for particular

contractual conditions as well as for compliance measures. These need to be developed and agreed by the wider community. The requirements in this regard would be even more pronounced for any exception granted for strings to be operated by different operators under any particular agreement aimed at improved user experience.

The changes proposed by the GNSO deserve proper consideration and may ultimately prove to be beneficial. However, this is not a foregone conclusion and requires positive outcomes of all the investigations mentioned above. While the necessary investigations are taking place, such strings will not be delegated. In the meantime, the available protection against applications with confusingly similar strings will safeguard both user and operator interests, so there are no obvious justifications for haste in modifying the existing approach.

The requirement for diversity in panel expertise is well taken, especially in view of the ultimate decision power of the panel, and is already a foreseen criterion for the selection of service provider to populate the panel.

As to the requirement for a more precise definition of "average, reasonable Internet user", it deserves to be mentioned that diversity in the panel would include linguistic diversity to ensure familiarity with the scripts involved. This in order to avoid undue findings of confusing similarity, as for example two strings in Chinese may look visually confusingly similar to a Westerner but not be visually confusable at all for a Chinese. The "reasonable person" standard is commonly used and it is thought that adding detail might serve to denigrate the intent.

The requirements to increase the scope of string similarity assessment beyond visual similarity have already been addressed in earlier comment rounds and no new aspects have been put forward to consider. The Guidebook assessment in Initial Evaluation is limited to visual similarity only as a pre-screen for the objection process that covers all types of potential confusion (as detailed in earlier comment analyses and public statements).

## **STRING CONTENTION**

### **Key Points**

- Multiple comments refer to the scoring threshold for community priority evaluation, some arguing in favor of keeping it at 14 out of 16, some favor lowering it to 13.
- Multiple comments propose various changes in the scoring, notably: using a finer scale, extending scoring for community delineation, modifying scoring for nexus and uniqueness, adding points for policy-making/governance structure and adding points for early establishment.
- Some comments address the situation with two or more winning community applications in final contention, proposing alternatives to auction: a) highest scorer wins, b) await voluntary resolution, c) supplementary scoring system.
- One comment proposes a process change in view of a potential outcome of the discussions regarding Vertical Integration.
- One comment claims that legal rights should play a role in contention resolution
- One comment proposes separate treatment for not-for-profit organizations

## Summary of Comments

Existing legal rights. Existing legal rights should also be considered when resolving string contention. Where there are legitimate competing rights, a more sophisticated mechanism (than, e.g., an auction) should be adopted for allocating the relevant gTLD which reflects the nature, breadth and longevity of those rights. *BBC (21 July 2010)*

Community priority evaluation—revisit standards.

ICANN staff should revisit the community priority evaluation standard. Previous public comments overwhelmingly sided with the 13-point threshold. ICANN staff has not satisfactorily explained the basis for its insistence on a 14-point threshold, which will be almost impossible for most community applications to achieve. *COA (21 July 2010).*

In addition, to reduce the likelihood that the community priority evaluation process will be nothing more than anteroom to an auction hall, the criteria for a top score on the following evaluation criteria, as set out in DAGv4 Section 4.2.3, should be modified to read as follows (adding the underlined text)”

- Nexus: The string matches the name of the community, is a well known short-form abbreviation of the community name, or is otherwise strongly associated with the community.
- Uniqueness: String has no other significant meaning beyond identifying the community described in the application. (This criterion to be applied in the language associated with the described community, if applicable.) A meaning unrelated to any community would not be considered significant.

*COA (21 July 2010).*

Community priority evaluation--clarity of revisions. Notable clarity has been provided in DAGv4. *Big Room (21 July 2010). R. Tindal (21 July 2010).*

Community priority evaluation--support for 14 point threshold. I strongly support maintaining that an applicant must score at least 14 points to prevail in a community priority evaluation. Lowering the score can harm registrants. If the scoring threshold is lowered it will be easier for applicants to obtain community status on strings that should be available at the second level to a wide variety of registrants. The scoring only happens when there are two or more applicants for the string; in this situation a high scoring threshold is the best way to protect real communities because it will be more likely that the string is awarded to the applicant who most closely represents the community in question. A low score will allow successful objections to legitimate communities—it will be easier for groups who may not be closely associated with the community to object successfully and block the applicant—i.e. the standards for successful objection are based on the standards required to achieve the 14 point score. *R. Tindal (21 July 2010). Domain Dimensions (22 July 2010). D. Schindler (22 July 2010).*

The community priority evaluation scoring should be set at 13 of 16 points to allow one point for evaluator (subjective/human error). This would be a more fair and equitable approach. The narrow approach currently proposed will undoubtedly lead to a significant number of unfair and unnecessary auctions. *BC (26 July 2010). R. Andruff (Module 4, 21 July 2010).*

Community evaluation priority—clarifications requested. ICANN should more clearly delineate the notion of “clearly delineated community” and the scoring process. An applicant should not be penalized in the process for accidental similarity. If ICANN wants to keep the current scoring system, then eligibility rules should have an extended range allowing for more granularity and/or all registration policies should be examined together. There should be a wider range under community delineation bringing the total to 17 or 18. Under this system that somehow imposes double penalties (delineation and eligibility for non-membership communities, e.g.) and provides for accidental “fails” outside the control of the applicant (lack of “uniqueness” due to some coincidence or similarity in any other language), having the ability to miss a third point is critical even for most reasonable, responsible proposals. *A. Abril i Abril (Module 4, 21 July 2010).*

Community priority evaluation—change the scoring scale to tenths of a point. The evaluation procedure for community priority ratings should not use a gross integer measure that will miss nuances in these difficult and crucial criteria. The scale should be changed to allow for discrimination in terms of tenths of a point instead of whole points. Making this change will make the procedure more sensitive while still providing a bright line between those applications that merit community priority and those that do not. *A. Doria (Module 4, 22 July 2010).*

Community evaluation—Scoring based on accountability and transparency. If a scoring system is used, the largest number of points awarded should be based on the credibility of the TLD governance model with respect to accountability and transparency for community stakeholders. In addition, ICANN cannot handle all the policymaking. Community-based TLDs are precisely the kind where policymaking, policy oversight and policy enforcement must be delegated to the TLD’s own governance model. ICANN must evaluate the viability of delegating authority as the key criterion for recognizing a community-based TLD. *W. Staub (Module 4, 21 July 2010).*

Community evaluation—comparison of contending applications and limits of absolute scoring. If the use of a scoring system cannot be avoided, it is best to add a supplemental scoring mechanism to deal with contending community-based applications which should eliminate contenders that do not deserve to be treated at par (such as cases of blatant gaming). Criteria for comparing the contending community-based applicants between each other would include: relative relevance of: the supporting community institutions and the community (in cases of contention between communities; the relative ability for Internet users outside the community to understand the purpose of the TLD; the degree to which the TLD’s governance model ensures accountability and transparency to the underlying community. *W. Staub (Module 4, 21 July 2010).*

Community-based contending applications—avoiding auctions. Where both contending applications are found to be community-based, instead of an auction making the determination, non-delegation for as long as contention formally persists is a better solution. Applications subject to unresolved contention should remain open until the subsequent gTLD round unless agreement is reached. At that point, each applicant should be allowed to lodge an updated application at no charge. These updated applications would not be evaluated unless a modest re-evaluation fee is paid (e.g. \$5,000 per application). One party can be allowed to pay the re-evaluation fees for the other party as well. The result of re-evaluation may still be no delegation for the time being. *W. Staub (Module 4, 21 July 2010).*

Community evaluation and potential vertical integration exception. If a higher standard or threshold results from a Community-based exception to a general policy on Registry-Registrar Separation for delegated Registry Operators, the application of this standard should be limited to the exception

application, not the string contention outcome resolution. If the vertical integration working group process results in a second use of a Community priority evaluation, then community-based applicants that did not elect it at the time of application should be allowed to elect it at the time of application for exception so that it is not mandatory in fact at application time. *E. Brunner-Williams (Module 4, 21 July 2010)*.

GeoTLDs and Community Priority Evaluation Criteria (4.2.3). One extra point should be given in the Community Priority Evaluation if the organization of a GeoTLD applicant is based on a sound multi-stakeholder community of the GeoName concerned. *dotBERLIN (13 July 2010)*. *dotBayern (20 July 2010)*. *dotHamburg (21 July 2010)*.

Multistakeholder governance structure. One extra point should be awarded in the Community Priority Evaluation if the applicant/organization adopts a sound neutral multistakeholder governance structure to ensure fairness and representation of both commercial and non-commercial constituents. Multistakeholder governance is in the best interest of all stakeholders by providing a public service to both the community

Applicants established prior to 26 June 2008 or prior to March 2009. Given the long delays in launching the new gTLD program, and that recently emerged new gTLD applicants may take advantage of it by copying existing concepts and projects, one extra point in the Community Priority Evaluation should be given if organization of an applicant was already established before the approval of the new gTLDs program by the ICANN Board on 26 June 2008 or before the first communicated application window in March 2009. *dotBERLIN (13 July 2010)*. *dotBayern (20 July 2010)*.

Applicants established prior to March 2009. Two maximum points should be allocated in the Community Priority Evaluation section if the applicant/organization was established before the first communicated application window of March 2009 and has conducted a significant communication outreach public campaign that is considered beyond reasonable for the best interests of both the public and awareness of the ICANN gTLD program. Public proof must be provided in these cases to substantiate these claims. This would be a sound method of minimizing gaming and be fair regarding the public interest, transparency, accountability and business ethics. *.MUSIC (20 July 2010)*. *.MUSIC (21 July 2010)*.

Unfair participation in auction for highest scoring application. The highest scoring application in a contention set on the basis of the scoring system set out in the Attachment to Module 2 (or at least an application that scores significantly more than the other application it finds itself in contention with) should prevail. Currently it would seem that in the case of an application scoring very high that is in a contention set with another application scoring just above average that both applicants would ultimately have to participate in an auction. *Hogan Lovells (21 July 2010)*.

Auctions—disadvantage for not-for-profit organizations. The auction procedure will likely put not-for-profit organizations with limited budgets at a distinct disadvantage in acquiring new gTLDs that are desired by two or more parties. One solution is for ICANN to offer a third application category for not-for-profit organizations in addition to standard and community priority applications with consideration given to the not-for-profit's mission when the string is in contention. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Self-resolution (4.1.3). I support the new language that gives greater flexibility to applicants who may be in string contention. *R. Tindal (21 July 2010)*.

## Analysis of Comments

Regarding the comments expressing preference for 13 and 14, respectively (three each), as winning threshold on a 16 point scale, it is obvious that interests and opinions diverge. No new arguments for either solution have been raised in this comment round. Some previous concerns, regarding for example the risk of failing due to unfounded obstructionist objections, have been addressed in the explanatory comments in version 4. This discussion has resulted in considerable and intensive discussions with the community. The Guidebook will keep the scoring threshold at 14 out of 16 points.

The comments suggesting modifications in the scoring are addressed below

- To use a finer scale, with decimals instead of integer numbers as proposed in one comment, may appear to facilitate the assessment but goes against the grain of experience, where more granular criteria with fewer scoring steps for each criterion have proven to be more reliable in the sense of being reproducible when used by different panelists. Experienced assessment consultants have advised that we adjust the scoring granularity in the opposite direction, to use a pure binary scale for scoring each criterion. Based on experiences, this is something that may be considered for future rounds. The proposed position for the first round is to keep the scoring unchanged in this respect

- To modify the scoring for nexus (highest score also for "string is otherwise strongly associated with the community") and uniqueness ("meaning unrelated to any community would not be considered significant") as proposed by one comment would be equivalent to a considerable lowering of the winning threshold. These arguments are counterbalanced by other comments that these modifications increase the likelihood that community applications will capture generic words. While these issues are fairly close and either side can be argued, the current Guidebook scoring mechanism seems to strike the right balance between the goals to favor communities during string contention while assuring those communities are well established, identified and supportive of the application.

- To add points for a multi-stakeholder governance structure in general, or regarding policy development in particular, certainly has some merit but would add considerable complexity to the assessment and require additional compliance measures post-delegation. The proposed position for the first round is not to modify the scoring in this way. One consideration to keep in mind is the sTLD approach, which featured such considerations, and was not retained in the New gTLD policy development outcome.

- To add points for "early" (although post-New-gTLD-PDP-conclusion) establishment of applicants seems inappropriate from two perspectives. First, the crucial criterion regarding "pre-existence" is already included. Second, the "pre-existence" criterion relates to the community, not to the applicant per se. The community is the central concept of interest here, while the entity/ies representing the community may change over time for various reasons, without dates for such changes reasonably justifying any differences in scoring. The proposed position is not to modify the scoring in this regard.

The comments regarding alternatives to a forced auction in a case where multiple community applications in a contention set score above the threshold are well taken. In particular, the proposal to allow an extended time for voluntary resolution, as is currently contemplated in the Guidebook, could well serve the winning applicants in such situations, although other applications in the contention set would be on hold awaiting the outcome. The latter would be a drawback in the case where the strings of

the winning applications are not identical (but confusingly similar) and another application is only in direct contention with a winning string that's not the one of the finally and voluntarily selected application. That other application would become eligible for delegation, but have to wait before being able to proceed. The benefit of a voluntary outcome seems to outweigh that risk.

The other alternative proposals put forward, to select the highest scoring application among the winners or to add supplementary criteria in such cases, seem inappropriate since all community applications scoring above the threshold have reached a pre-determined level as validated for preferential treatment and should be considered equal in that respect for any subsequent process step. The proposed position is not to take score differences among the winners into account nor to introduce supplementary criteria.

The comment regarding potential consequences of the outcome of the Vertical Integration discussions is appreciated and will be taken into consideration in the light of the actual outcome of those discussions.

The comment requiring consideration of legal rights has been addressed in conjunction with earlier public comment periods. String contention resolution takes place after all legal rights objections for all applications in a given contention set have been addressed and resolved. It would be illogical to reopen any such claims during the string contention resolution phase. The proposed position is not to introduce any additional consideration of legal rights in string contention resolution.

The comment proposing separate treatment of non-profit organizations as applicants requests a similar preferential handling of such applicants in string contention resolution as provided for community applications. However, there is no policy ground for granting any preferential treatment in string contention situations based on the applicants' legal or organizational structures, might be subject to abuse, and the proposed position is not to modify the process in this regard.

## **GEOGRAPHICAL NAMES**

### **Key Points**

- Much of the treatment of geographic names in the Applicant Guidebook was developed in response to the GAC Principles regarding new gTLDs.
- Geographic terms not defined in the Applicant Guidebook can be protected through the community objection process.
- The definition of country and territory names appearing in the Applicant Guidebook has sought to ensure both clarity for applicants, and appropriate safeguards for governments and the broad community.
- Country and territory names are protected at the second level.

### **Summary of Comments**

#### Definition.

Geographical names should be defined in a broader sense, and all gTLD strings containing the geographical names listed in the ISO 3166-1 standard should also be considered geographical names. There are special cases in China where provinces, municipalities directly under the Central Government

and autonomous regions all have full name and abbreviation name. The abbreviation name should be handled as the full name consistently. *ISC (21 July 2010)*.

In Section 2.2.1.4.2, it should be added that not only an “exact match” but also a “representation” of a sub-national place is considered a geographical name. E.g., this will solve the issue for NRW (German state that stands for NordrheinWestfalne). *Bayern Connect (21 July 2010)*.

ICA remains concerned that Section 2.1.4 of the DAG concedes unwarranted authority to nations that already control their own ccTLDs by imposing an absolute bar on use of country or territory names at the top level and that applications for capital and other city names as well as sub-national place names (counties, states, provinces, etc.) will require endorsement or non-objection of government entities. ICA is gratified that ICANN has resisted past calls from the GAC to impose similar restrictions on geo names at the second level of new gTLDs and ICA urges continued adherence to that policy. *ICA (21 July 2010)*.

Country or territory names (2.2.1.4.1). I support the new protections for country or territory names and the rationale for their inclusion. *R. Tindal (21 July 2010)*.

City TLDs. Cases of string contention between two different cities of the same name, where both cities have the appropriate letter of non-objection and did not apply as a community applicant, should be clarified in the final guidebook: does it go to negotiations and auction, or would it remain with the parties to work out and if they did not, the name would not be assigned? The same would be true for a city name in contention with a non-city name. If such contention is not resolved through negotiations and auction, small cities with generic names could be used to “game” the system. *Domain Dimensions (22 July 2010)*.

English “short name”—Macedonia and Hellas (Module 2, Annex, p. 36). “Macedonia” must be removed as the record with the class B1 indication of the respective cell under the “separable name” column of the table. There is an ongoing dispute between the Hellenic Republic (Greece) and FYROM, the Former Yugoslav Republic, over the official name of FYROM, which has been discussed for many years in the U.N. without resulting in any conclusion so far. There is no official “short name” for this country and since we believe that the DNS should be kept outside of such sensitive issues, the word “Macedonia” must be removed. “Hellas” should be added next to Greece with the class B1 indication because this is a commonly used “short name” of our country, Hellenic Republic (Greece), which we believe should be equally protected. *P. Papaspiliopoulos (Module 2, 20 July 2010)*.

## Analysis of Comments

### Should there be a broader definition of geographic names in the Applicant Guidebook?

The exact match of sub-national place names such as states, provinces or territories, listed on the ISO 3166-2 list are afforded the protection of requiring support. There are almost 5000 names (many of which are shared or generic words) on the ISO 3166-2 list, and providing protection for a ‘representation’ or ‘abbreviation’ of the names on the list would multiply the number of names and the complexity of the process many-fold. Abbreviations or representations of names are protected through the community objection process rather than as geographical labels appearing on an authoritative list.

Throughout the process of developing a framework for new gTLDs the Board has sought to ensure a combination of: clarity for applicants; appropriate safeguards for the benefit of the broader community; a clear, predictable and smooth running process. A considerable amount of time has been invested in working through the treatment of geographic names to ensure these objectives are met, and also addresses, to the extent possible, the expectations of the GAC and the community. It is felt that the current definition of geographic names contained in the Applicant Guidebook, combined with the community objection process, provides adequate safeguards for a range of geographic names.

Geographic names were discussed during the GNSO Policy Development Process, and the GNSO Reserved Names Working Group considered that the objection process was adequate to protect geographic names. The Working Group did not find reason to protect geographic names. The GAC expressed concerns that the GNSO proposals did not include provisions reflecting important elements of the GAC principles and did not agree that the objection and dispute resolution procedures were adequate to address their concerns.

Much of the treatment of geographic names in the Applicant Guidebook was developed around many conversations and correspondence with the GAC on this issue that started following the Board's acceptance of the GNSO recommendations on the introduction of new gTLDs in June 2008.

On 2 October 2008, (<http://www.icann.org/correspondence/twomey-to-karklins-02oct08.pdf>) following a teleconference with the GAC on 8 September 2008, the then CEO & President, Paul Twomey, wrote to the GAC explaining proposed principles to guide a procedure for implementing elements of paragraph 2.2. Place names were split into two categories, as follows: 1) sub-national geographical identifiers such as countries, states, provinces; and, 2) city names.

During the teleconference of 8 September 2008, GAC members identified the ISO 3166-2 List, as an option for defining sub-national names. Accordingly, the Guidebook provides protection for all the thousands of names on that list. Also during this call the idea of the GAC creating a list of geographic and geopolitical names was discussed, however, it is understood that the GAC moved away from this suggestion because it would be a resource intensive effort for all governments to undertake.

Implementing protections for regional language or people descriptions was considered difficult because it would be difficult to determine the relevant government or public authority for a string which represents a language or people description as there are generally no recognised established rights for such descriptions.

As described in the 2008 letter, city names were considered challenging because a city name can also be a generic term, or a brand name, and in many cases no city name is unique. Therefore, where it is clear that an applicant intends to use the gTLD for purposes associated with the city name evidence of support, or non-objection is necessary. However, provision is made in the Guidebook to protect sovereign rights by requiring government approval for capital city names in any language, of any country or territory listed in the ISO 3166-1 standard.

### **Why are there protections for country and territory names at the second level?**

The existing protections for country and territory names at the second level were developed as a compromise between the positions of ICANN's policy making bodies. The compromise is that

protections are limited to a definite list of names and not the GAC request for all names with national or geographic significance.

In the new gTLD process, there is limited protection for country and territory names at the second level, that was developed as a result of consultation with the GAC regarding the implementation of paragraph 2.7 of the GAC principles regarding new gTLDs, states:

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 gTLDs.

At the Board's request, Paul Twomey (who was ICANN's CEO and President), wrote to the GAC on 17 March 2009 (<http://www.icann.org/correspondence/twomey-to-karklins-17mar09-en.pdf>), requesting the GAC's input on possible options to resolve the outstanding implementation issues regarding the protection of geographic names at the second level. The end result of this request was a letter from the GAC to Paul Twomey, dated 26 May 2009 (<http://www.icann.org/correspondence/karklins-to-twomey-29may09-en.pdf>), which proposed a solution, that was accepted by the Board and ultimately reflected in the draft Registry Agreement developed for new gTLDs.

### **Are the common names of countries protected in the new gTLD process?**

The definition of country and territory names, in the context of the Applicant Guidebook is consistent with the ISO 3166-1 standard and provides protection for the short and long form of a name appearing on the list including translations. Country and territory names will not be approved in the first round of the new gTLD process.

The treatment of country and territory names in version 4 of the Applicant Guidebook was developed specifically to adhere to paragraph 2.2 of the GAC principles on new gTLDs, i.e., the GAC view that governments should not be denied the opportunity to apply for, or support an application for, their respective country or territory name. However, the GAC's clarification of their interpretation of GAC principle 2.2<sup>2</sup> has resulted in a reconsideration of the treatment of country and territory names in the new gTLD process. This has resulted in a change of approach as reflected in the recently published draft version 4 of the Applicant Guidebook: namely, that country and territory names will not be available for delegation in the first round of the new gTLD application process.

With regard to the definition of country names, the Board has sought to ensure both clarity for applicants, and appropriate safeguards for governments and the broad community. A considerable amount of time has been invested in working through the treatment of country and territory names to ensure it meets these two objectives. Following discussion at the Mexico City meeting, the Board recommended that the Applicant Guidebook be revised in two areas regarding this subject: (1) provide

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<sup>2</sup> “The GAC interprets para 2.2 of the GAC gTLD principles that the strings that are meaningful representation or abbreviation of a country or territory name should be handled through the forthcoming ccTLD PDP, and other geographical strings could be allowed in the gTLD space if in agreement with the relevant government or public authority.”

greater specificity as to what should be regarded as a representation of a country or territory name in the generic space, and (2) provide greater specificity in defining the qualifying support requirements for continent names, with a revised position to be posted for public comment.

The resulting definition for country and territory names is based on ISO 3166-1 and other published lists to provide clarity for potential applicants and the community. It removes the ambiguity created by use of the term ‘meaningful representation.’ Therefore, the definition of country and territory names has not been amended in the recent Guidebook draft and remains consistent with the Board goals and resolution on this issue.

While the revised criteria may have resulted in some changes to what names are afforded protection, there is no change to the original intent to protect all names listed in ISO 3166-1 or a short or long form of those names (and, importantly, translations of them). In addition, the Separable Country Names List was developed to protect common names of countries derived from the ISO 3166-1 list, but not identified as the short name, for example, one such short name is “The Bolivarian Republic of Venezuela” for a country in common usage referred to as “Venezuela”. This level of increased clarity is important to provide process certainty for potential TLD applicants, governments and ccTLD operators – so that it is known which names are provided protections.

We acknowledge the comments from the GAC representative from Greece requesting the removal of Macedonia from the Separable Country Names List due to unresolved issues regarding the use of the name. An amendment has been made to the Separable Country Names List which continues to provide protection for the name “Macedonia” but recognizes that due to the ongoing dispute between the Hellenic Republic (Greece) and the Former Yugoslav Republic of Macedonia over the name, no country will be afforded attribution or rights to the name “Macedonia” until the dispute over the name has been resolved.

While Hellas will not specifically be called out as the commonly used “short name” for the Hellenic Republic (Greece) in the list of separable names, we believe it is provided protection through the ‘translation in any language’ as Greece translates to Hellas in Norwegian.

### **What process is applied for string contention of ‘city’ names not designated as a community application?**

An auction will not take place to resolve contention in the case where there are contending applications for a geographic name as defined in the Applicant Guidebook. In the event that two applications are received for the same geographic string, and the applications are considered complete (ie. they have the requisite government approvals) the applications will be suspended pending resolution by the applicants.

If an application for a string representing a geographic name is in a contention set with applications for similar strings that have not been identified as geographic names, the string contention will be settled using the string contention procedures described in Module 4 of the Applicant Guidebook.

#### *Capital city names*

Since the approval of the national government is required for capital city names, as defined in the Applicant Guidebook, contention is not expected. In the unlikely event that the national government of France supports two applications for .paris the applicants will be asked to resolve the issue.

### *Other city names*

In other cases where applications for the same city name, but representing two different cities (and most likely in different countries), which both have the documentation of support of non-objection from the respective relevant government or public authority, and the applications are considered complete, the applications would be suspended pending resolution by the applicants.

### *City versus Generic*

Applications for the same name, but one is being used to leverage a city name and has support of the relevant government or public authority; and the other is for generic purposes, they would undergo the “String Contention Procedure” contained in Module 4 of the Applicant Guidebook.

There is no priority given to an application for a city name with documentation of support or non-objection over an application for a generic or brand name with the same name, if both are submitted as standard applications. However, the ‘community’ designation for applications was developed to view such applications more favorably if the applicant can prove, through the community priority evaluation procedure, that it represents a defined community. Applicants intending to use the TLD primarily for purposes associated with the city name are encouraged to apply as a ‘community’ application, understanding that additional criteria applies.

## **MORALITY AND PUBLIC ORDER (M & PO)**

### **Key Points**

- ICANN will accept the Recommendation 6 Cross-Community Working Group recommendations that are not inconsistent with important objectives of the program,
- One suggestion for a new title for the objection (“Limited Public Interest Objection”) has been included in the current version of the Applicant Guidebook.
- ICANN has included several Working Group recommendations and plans additional consultations with the Working Group before and during the Cartagena meeting to achieve agreement in additional areas.

### **Summary of Comments**

M& PO Objections—procedure needs improvement. The procedure proposed by ICANN leaves much to be desired and would likely be inordinately costly. It requires a response and payment of a response filing fee before any “quick look” would occur, and postpone a “look” until any full complement of adjudicators had been empanelled. COA understands that the entire morality and public order objection process is likely to be revisited in light of strong objection from the GAC. This review should include developing a more expeditious and lightweight means of disposing of frivolous objections. *COA (21 July 2010).*

Current M&PO process is highly problematic. ICANN fails to understand the dangers that this provision will create and its impact on fundamental rights and liberties. Historically these issues have been associated with the right of sovereignty. ICANN seeks to assign an independent panel. The ICC is not the right entity for this process. M&PO issues cannot be determined according to business practices or

rationales—they are domains of national states. The criteria ICANN has proposed is also problematic. E.g. how can a domain name registration “incite” anyone to do anything? The only way to determine if a domain name registration incites people to commit an unlawful act would be to also check content. ICANN needs to produce for the wider community examples of names that incite users to commit unlawful acts. A review panel should provide recommendations that the applicant may use before the European Court of Human Rights or the International Criminal Court. Panels will have to be composed according to geography, cultural divergence and will not be associated with any business interests but will represent the interests of states/regions. The ICC is not the appropriate forum but international courts are—they are the bodies we can turn to for such delicate and controversial issues. *K. Komaitis (21 July 2010)*. *Blacknight Solutions (21 July 2010)*. *R. Dammak (22 July 2010)*.

Remove M&PO objection absent solution from GAC. ICANN should remove the morality and public order objection from AGBv4 absent a proposed solution being presented to the Board from the ICANN GAC. This would be consistent with ICANN’s bottom-up, community-driven approach and is in line with the Board’s approach to other challenging issues, such as registry-registrar separation. *Big Room (21 July 2010)*.

M&PO is out of scope. The ALAC echoes the At-Large Community in our disappointment with the retention in the Draft Application Guidebook V4 of the so-called Morality and Public Order (MAPO) language as part of the preparatory scope for new gTLDs. We reiterate our principled position: Even as we accept that there is no single definition of what is moral, determination of a moral string and a public order encroachment are not within ICANN’s competence and its remit in the Internet governance space. The ALAC’s disappointment is moderated with the knowledge that other support organizations are equally bothered and have proposed a cross-Community group to address and grapple further with this matter. *ALAC (September 2010)*

Delete the M&PO objection. The sooner that ICANN realizes that the only practical course is to throw out the M&PO objection, the sooner it can get on with introducing new gTLDs. The M&PO objection is illegitimate, outside of ICANN’s scope and chilling to free expression. It is strongly opposed by the NCUC. It is likely to expose ICANN to constant litigation. Issues of morality and public order are matters of national law to be decided in national legislatures and national courts. Creating an additional level of M&PO objections only invites arbitrariness, subjectivity and global censorship. ICANN has an obligation to respect the free expression rights of Internet users which are nearly universally guaranteed through various national constitutions and international treaties (e.g. Article 19 of the Universal Declaration of Human Rights). *R. Gross (21 July 2010)*. *R. Dammak (22 July 2010)*.

Need for GAC involvement. The M&PO issue threatens to be the major stumbling block to a successful and timely initiation of the new gTLD program. The GAC, with encouragement from the ICANN Board, should participate in a multistakeholder group to find a solution. *Minds + Machines (21 July 2010)*.

Need for an M&PO objection. It is unclear that an M&PO objection is needed. A joint AC/SO group has been formed to discuss M&PO issues; any further work should be taken only with reference to the work to be done by that group. *M. Wong (21 July 2010)*. *R. Dammak (July 2010)*.

Keep current options. ICANN should stay with the current options in the AGBv4 and not extend the M&PO discussion any further. A M&PO black list won’t solve problems. *dotZON (21 July 2010)*.

Legal standards. Compliance with the M&PO should be determined according to both the principles of international law and the laws of each sovereign state. If judged only by principles of international law, it is likely to approve some gTLDs which conflict with laws of some countries, which is unfair to those countries and even damages their national interests. *ISC (21 July 2010).*

ICC adjudication of M&PO objections—limitations. The grounds for an M&PO objection are in areas that contravene the concern, scope and expertise of the International Chamber of Commerce. Would the neutrality and global representativeness of the ICC be recognized by each country? The same problem exists with ICC adjudicating the community objection. Adjudications on M&PO and community objections involve a broad range of subjects and are of great significance. It would be unfair for a certain international organization in some business areas to perform adjudications. More representative and neutral organizations should be selected or at least added to complete this job. *ISC (21 July 2010).*

M&PO Objection fee—developing and undeveloped countries. The fee for an M&PO objection is set too high and would stifle the initiative of developing and undeveloped countries. *ISC (21 July 2010).*

“Denial of service” via duplicative M&PO objections. The lack of standing restriction for M&PO objection opens applicants to the equivalent of a distributed denial of service attack whereby a well-funded opponent or astroturf group could generate multiple complaints, delaying the application and taxing the resources of the decision forum. Along with quick dismissal of “frivolous or abusive” objections, the process should consider a means of speedy dismissal of duplicative objections. *W. Seltzer (21 July 2010). R. Dammak (July 2010).*

Board role. Since there is no objective standard for what is to be applied, the Board, after appropriate community input, must make what is essentially a political decision about the most suitable M&PO mechanism—e.g., current AGB provisions, some variation of that, or a scaling down/removal of the objection process. I support any reasonable approach by the Board. *R. Tindal (21 July 2010).*

Rapid resolution.

If the current M&PO objection process is problematic to the GAC and others, we need to work together as a community to reach a new resolution very quickly. *Domain Dimensions (22 July 2010).*

The M&PO issue needs to be firewalled from creating further delays in the gTLD program. *J. Frakes (22 July 2010).*

Incitement clause. The incitement clause of the MP&O objection, if it remains in the Guidebook, should be rewritten to include, at least, disability and actual or perceived sexual orientation or gender identity, and political or other opinion, and modified to read: “Incitement to or promotion of discrimination based on race, color, gender, disability, actual or perceived sexual orientation or gender identity, political or other opinion, ethnicity, religion, or national origin.” *A. Doria (Module 3, 22 July 2010). S. Seitz (22 July 2010).*

## **Analysis of Comments**

Since the closure of the public comment forum, recent events have dealt with several issues related to the treatment of the Morality and Public Order recommendation, and thereby addressing many comments above. In August 2010, a cross-community working group was formed with members of the

GNSO, At-Large and GAC communities to provide recommendations on how to improve the implementation of Recommendation 6. Many of the concerns raised in the public comment forum were evaluated and, where appropriate, addressed through this cross-community effort. A Report on Implementation of GNSO New gTLD Recommendation No. 6 (Rec6 Report) was published for [public comment](#) on 22 September 2010, and included several recommendations supported by a consensus of the members of the working group. This Report was [endorsed](#) by ALAC on 1 November 2010.

At its retreat in Trondheim the Board passed the following resolution with regard to the M&PO issue:

The Board acknowledges receipt of the Working Group report. This is a difficult issue, and the work of the community in developing these recommendations is appreciated. The Board has discussed this important issue for the past three years.

The Board agrees that ultimate responsibility for the new gTLD program rests with the Board. The Board, however, wishes to rely on the determinations of experts regarding these issues.

The Board will accept the Working Group recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD application round, and will work to resolve any inconsistencies. Staff will consult with the Board for further guidance as required.

The “existing process” as described in the Board resolution is interpreted as an objection process (such as described in versions 2, 3 and 4 of the Applicant Guidebook) that satisfies the following goals: (1) providing a predictable path for applicants; and (2) mitigating risks by having: (i) an independent dispute resolution process; (ii) dispute resolution panels with the appropriate expertise; and (iii) the clearest and most uniform set of standards possible.

The Applicant Guidebook published with this analysis in November 2010 incorporates several recommendations from the Rec6 Report, including:

- A suggested revision of the title of the objection
- Change of references to “principles of international law”
- A note encouraging applicants to pre-identify possible sensitivities related to M&PO
- A procedure for governments to send notifications with regard to national laws to applicants or through the public comment forum
- Inclusion of additional treaties as suggested by the Rec6 Report
- Additional elaboration on terms in the Quick Look Procedure, including the term “manifestly unfounded”

In addition, ICANN has encouraged further discussion and has scheduled a meeting with the cross-community working group to discuss how other recommendations found in the Rec6 Report can be incorporated into the Applicant Guidebook to the extent they are consistent with the existing process. Additional consultations are contemplated in Cartagena with the intent of coming to resolution on the material aspects of the dispute resolution process for this objection at the end of the Cartagena meeting,

Some principles reflected in the Rec6 Report are not included in the Applicant Guidebook as they are contrary to the goals described above. These largely relate to the Board’s desire to rely on the determinations by independent expert panels, and the role of the Independent Objector.

With respect to the use of independent expert panels, it has been suggested that the grounds for a morality and public order objection “contravene the concern, scope and expertise of the International Chamber of Commerce” and that it would be “unfair for a certain international organization in some business areas to perform adjudications”. However, it should be recalled in this context that the ICC International Centre for Expertise, as DRSP, would administer the dispute resolution procedure; it would not “perform adjudications” itself. It is the expert panel (appointed by the DRSP) that hears the dispute and issues an expert determination. ICANN considers that the ICC and its International Centre for Expertise, with their extensive experience in administering various types of international dispute resolution proceedings, are well qualified to act as a DRSP. The rules of the International Centre for Expertise are available at: <http://www.iccwbo.org/court/expertise/id4379/index.html>.

## OBJECTION AND DISPUTE RESOLUTION PROCEDURES

### Procedural Aspects

#### Key Points

- Multiple objections may be consolidated at the discretion of the dispute resolution provider.
- The deadline for filing an objection must be balanced with ensuring there are no unnecessary delays and providing some level of certainty of process for applicants.

#### Summary of Comments

DRSP access to public comments (1.1.2.7). It would seem appropriate to provide the public comments to DRSPs directly, particularly for applications already subject to active objections. *BITS (22 July 2010)*.

Time for filing objections too short (1.1.2.4).

ICANN set a reasonable period for filing objections by adopting a model similar to what is used for objecting to a new trademark application (e.g., two months). A two week window is too short for filing objections. With such a short timeframe objectors will have to do all the work in advance in preparing an objection, only to find that an application may fail at the initial evaluation stage. There also needs to be a provision for objection after an extended evaluation; currently the two week window for filing an objection will close before the outcome of an extended evaluation is known and there appears to be no opportunity to object to applications which fail initial evaluation but are subsequently successful in the extended evaluation process. *BBC (21 July 2010)*

An additional two weeks to file objections after the Initial Evaluation results are posted would help to address the shortage of adequate time for objecting in the current proposed process, so that a potential objector has a full month following the posting of the complete Initial Evaluation results to review those results and consider whether an objection is needed under all the circumstances. This additional two weeks will not unduly delay the application process. *Coca-Cola (21 July 2010)*.

Consolidation.

If there are two or more applications by a single applicant to which a single objector is objecting on the same grounds, these should be the subject of a single objection. If a single objector has two different grounds to object to an application (e.g., legal rights and community grounds) this should also be a

single objection, not two separate objections administered by different bodies and subject to two objection fees. *BBC (21 July 2010)*

If objections are consolidated before responses are filed, then the Applicant should pay one response filing fee. If objections are consolidated after responses are filed, the Applicant should be entitled to a refund of some of the response fees paid. In the latter case, the refund may not necessarily be all fees in excess of a single response fee if further administrative steps have occurred. *IBM (21 July 2010)*.

The many to one relationship between possible objectors and a single applicant is an inherent scaling problem in the application process that needs to be addressed with time limits and batch costing. The procedures could act as a Denial of Service or Distributed Denial of Service attack against an applicant (e.g. an applicant challenged by many similar objections, with no extension of time while they may be consolidated, or a very large number of similar but non-consolidated objections where it may be impossible for the applicant to respond to all of them, each one requiring a separate response and a separate fee). *A. Doria (Module 3, 22 July 2010)*.

Dispute resolution costs (3.3.7). Clarification is needed as to what costs paid by a prevailing party will be refunded, including whether the costs for the panel are refunded and whether fees for objections and responses (described as nonrefundable in 3.2.2 and 3.2.4) are in fact refundable as appropriate to a prevailing party. *IBM (21 July 2010)*.

Corrections to objection filings (3.2.1). Objectors should be given a brief opportunity to rectify any errors where their objection does not comply with procedural rules, especially if the window for filing is so unreasonably short. *BBC (21 July 2010)*.

Extensions of time (3.3.3). While negotiation and mediation is encouraged, parties should be limited to 30-day extension requests. Trademark proceedings could be used as a model also, where parties are encouraged to put the proceedings on hold in order to facilitate settlement. *BBC (21 July 2010)*.

Full and fair adjudication (3.3.5). Rapidity of resolution should not take priority over full and fair adjudication. The time limits throughout the dispute resolution procedures are very short. *BBC (21 July 2010)*.

#### Number of Panelists.

Three member panels should be available for all disputes if requested; additional costs could be covered by the party requesting three panelists. The number for both String Confusion and Community disputes is still restricted to one panelist. There is an option for 3 panelists for Legal Rights disputers and a requirement of 3 panelists for a M&PO objection. *RySG (10 Aug. 2010)*. *VeriSign (22 July 2010)*.

By definition we find it hard to understand how a “panel” can consist of only one person. Each panel should consist of at least two individuals. *BITS (22 July 2010)*.

Filing procedures (3.2). The “Rules for Expertise of the International Chamber of Commerce” to be used for the Community Objections appear to be missing from the Attachment to Module 3. *BITS (22 July 2010)*.

## **Analysis and Proposed Position**

It has been suggested that certain deadlines for objection be extended, in order to give potential objectors more time prepare their objections. They argue that the time for objection extends beyond initial evaluation by only 14 days. This is true. However, there are several months to object from the time the application is posted. This is much greater than the suggested time in the comment of two months. While that may require some preparation before one determines if the TLD application has passed evaluation, it must be balanced with need to not delay the process once initial evaluation is complete. Providing for objections beyond extended evaluation would be detrimental to the overall time line of the process.

The entire objection procedure is intended to be fair and has safeguards. Accordingly, the DRSP and/or the Panel have the discretion to extend certain deadlines. See Procedure, Art. 16(d) (possibility of extension of a deadline or suspension of the proceedings upon request of the parties); Art. 17(b) (possibility to grant a time limit for written submissions that is greater than 30 days); Art. 21(a) (possibility to extend the 45-day deadline for the expert determination). Note also that objectors do have an opportunity to correct errors that are found in the DRSP's administrative review of the objection and are given an additional five days to file the corrected objection, pursuant to Article 9(c) of the Procedure.

Several comments addressed issues arising from multiple objections or multiple applications and possible consolidation. As set out in Article 12 of the New gTLD Dispute Resolution Procedure (the "Procedure"), multiple objections may be consolidated at an early stage of the dispute procedure. In the event that a large number of similar objections were filed against a single application (a situation that has been compared to a "denial of service" attack), the objections could be consolidated, pursuant to Article 12. Moreover, multiple objections aimed merely at harassing or overwhelming an applicant might constitute an abuse of the right to object and thereby be subject to dismissal in the "quick look" procedure.

If an objector wishes to object to a single application on more than one of the four available grounds, separate objections must be filed, because there are different procedures for different objections (e.g., legal rights objections will be administered by the WIPO, while community objections will be administered by the ICC International Centre for Expertise). In addition, the qualifications and experience of the experts will relate to the nature of the objection. In addition to the consolidation of multiple objections against the same gTLD, it would be possible to consolidate multiple objections against similar gTLDs. This latter possibility is implicit in Article 12(a) of the Procedure and is explicitly stated in Article 7(d)(i) of the draft WIPO supplementary rules for gTLD Dispute Resolution.

Consolidation of multiple objections would normally occur before the Applicant has paid its filing fee(s). The DRSP will have discretion to refund a portion of the amounts paid as filing fees in the case of consolidation occurring later. See, e.g., Article 7(c) of the draft WIPO supplementary rules for gTLD Dispute Resolution.

Some have commented on the dispute resolution panels. The question whether to provide for three-member panels of experts for all dispute procedures has been discussed in the comments relating to previous drafts of the Applicant Guidebook. ICANN continues to favor a rule that would require all parties to agree to three experts for Legal Rights Objections, as provided by Article 13(b)(ii) of the New gTLD Dispute Resolution Procedure (the "Procedure"). For convenience of reference in the Procedure and elsewhere, the term "Panel" refers to one or three members, as appropriate. Further, as panel are

meant to have the appropriate expertise, to the extent any particular organizational structure is relevant to the objection, the dispute resolution provider should take that into consideration, as should the parties, when selecting panel members.

It would not be appropriate to provide public comments to a DRSP directly but the panel will have access to public comments through the TLD Application System and have the discretion to rely on them.

Providing free dispute resolution for governments, as suggested, is not contemplated at this time. The process is based on cost recovery. Relieving the requirement to pay fees by one would result in higher fees to others. How to do that accurately is problematic and the result is discriminatory.

## COMMUNITY OBJECTIONS

### Key Points

- After extensive review and consideration of public comments, the complete defense has been eliminated.
- However, in order to prevail against a defense that an applicant would have had standing to object, objector must prove an elevated level of likely detriment.
- The Independent Objector may choose (although would not be required) to file an objection upon the request of governments or entities that are unable to afford the costs of the dispute resolution proceedings.

### Summary of Comments

Legal rights objection—defenses. As is the case with the community objection, the fact that an objector has not chosen to apply for the same or any other string does not constitute any element of a defense to a legal rights objection. *BBC (21 July 2010)*

Community objections—standing.

The following should be added to Section 3.1.2.4: “Where more than one entity joins together to file a community objection, or where more than one community objection is consolidated pursuant to 3.3.2, the qualifications of the objectors shall be cumulated for purposes of determining standing. Business and trade associations, and membership/affiliate organizations, are eligible to demonstrate standing to file a community objection under the above criteria.” *COA (21 July 2010)*.

The requirement to support and/or endorse a particular community application may create the possibility of conflict of interest, whereby a supporter of one community-priority application could file a community objection against a competing community-priority application to assist the one they support, rather than for legitimate reasons. Therefore, any community institution/member organization that supports a particular community-priority application should not be given standing to file a community-priority objection against any other community-priority application for the same TLD. *Big Room (21 July 2010)*.

Community objection –definition (3.1.2.4). BITS believes that the text defining a community is well written. *BITS (22 July 2010)*.

Community objections—“detriment” standard.

In lieu of the first paragraph under “Detriment”, insert the following in Section 3.4.4: “An objector that satisfies the preceding tests shall be presumed to have established a likelihood of detriment to the rights or legitimate interests of its associated community. However, this presumption may be rebutted by the applicant. Ultimately, for an objector to prevail, the panel must determine that such detriment is likely if the objected-to application were approved. Factors that could be used by a panel in making this determination include, but are not limited to:” *COA (21 July 2010)*.

Community objections—complete defense.

In the same section (3.4.4) provision should also be made for defining the circumstances under which “satisfaction of the standing requirements for filing a Community Objection...by a community-based

applicant is a complete defense to an objection filed on community grounds.” An applicant asserting this defense should be required to affirmatively prove that the community it claims to represent is substantially identical to the community expressing opposition. While it should not be possible for a community-based applicant to assert the complete defense by claiming to represent a community that is not substantially identical to the one expressing the objection, proof of satisfaction of the standing requirements may also provide an element of a defense to the objection even if the complete defense is not available. *COA (21 July 2010)*

ICANN should qualify the complete defense with a “relative representativeness” requirement by which if the complainants are clearly more representative of the intended community than the applicants, the complete defense should not apply and the complaint should be examined on its merits. *A. Abril i Abril (Module 3, 21 July 2010)*.

ICC adjudication—limitations. The grounds for a community objection are in areas that contravene the concern, scope and expertise of the International Chamber of Commerce. Would the neutrality and global representativeness of the ICC be recognized by each country? Adjudications on M&PO and community objections involve a broad range of subjects and are of great significance. It would be unfair for a certain international organization in some business areas to perform adjudications. More representative and neutral organizations should be selected or at least added to complete this job. *ISC (21 July 2010)*.

Objection fee—developing and undeveloped countries. The fee for a community objection is set too high and would stifle the initiative of developing and undeveloped countries. *ISC (21 July 2010)*.

No fee for government objections. ICANN should not impose any fees to individual governments including local governments that intend to submit objections to individual applications. Such objections are based on the public interest and therefore should be exempted from general commercial practices. *JIDNC (21 July 2010)*. *A. Al-Zoman (21 July 2010)*.

Not-for-profit organizations concerns. Participation in dispute resolution procedures during the new gTLD application process would be burdensome on resources of not-for-profit organizations, increasing the likelihood that they will be subject to DNS abuses by bad actors. Factors considered by panels deciding legal rights objections should be clarified (e.g., “relevant sector of the public,” recognition of the “sign”, “intent”) and should not provide a “how to” guide for formulating arguments against accusations of infringement. “Experts” appointed to dispute resolution panels should include individuals well versed in the operations and specific needs of not-for-profit organizations. Fees for filing and adjudication of objections should be determined as soon as possible so that not-for-profit organizations will be able to budget adequately in advance for the new gTLD process. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

## Analysis of Comments

As stated in one of the comments, business and trade associations and other organizations are indeed eligible to demonstrate standing to file a community objection. The Objector is “one or more persons or entities who have filed an objection against a new gTLD for which an application has been submitted”. New gTLD Dispute Resolution Procedure (the “Procedure”), Art. 2(b). Entities that join together to file a single objection could cumulate their qualifications as a single “Objector”. However, it would not be

feasible to cumulate the qualifications for standing of multiple Objectors whose objections may be consolidated. Even when consolidated, multiple objections are considered on their individual merits.

Contrary to one commenter's suggestions, there does not appear to be any conflict of interest in a situation where the supporter of one community application files an objection against a competing community application. Indeed, it would be inappropriate to add a rule that an objector to a gTLD application must not have any interest in any other gTLD application. A person or entity with an interest in one application who objects to another application would still be required to satisfy all of the applicable rules for standing, and meet the standards for an objection.

The question whether the objector who files a community objection must prove that there is a likelihood of detriment to the rights or legitimate interests of its associated community has been raised and addressed in connection with previous drafts of the Applicant Guidebook. ICANN does not consider that the satisfaction of other elements of the community objection (community, substantial opposition and targeting, as set out in § 3.4.4) should create a presumption of detriment. The likelihood of detriment is an independent element of the objection that must be proven by the objector. If the objector cannot prove the likelihood of detriment, there does not appear to be any reason why the objector should be entitled to block the applicant's application. Simply not wanting another party to be the applicant or obtain the name is not sufficient to be deemed a detriment.

The complete defense to a community objection (§ 3.4.4 *in fine*) has also been raised and addressed in connection with previous drafts of the Applicant Guidebook. After extensive review and consideration, the complete defense has been eliminated. However, in order to prevail against a defense that an applicant would have had standing to object, objector must prove an elevated level of likely detriment.

The costs that the parties must pay in the dispute resolution proceedings continue to attract comments. It has been suggested that the costs are too high for developing countries and that governments should be excused from paying any costs, since their objections would be based upon the public interest. In considering this issue, it must be recalled that the costs paid by the parties cover the administrative expenses of the DRSPs and the fees and expenses of the experts. These costs must be paid by someone. If certain categories of objectors pay reduced or no fees, some other person or entity would have to pay in their place. In general, it is not unusual for governments to pay their respective shares of the costs of dispute resolution proceedings. In the specific instance of governments or other entities (including non-profit organizations) that may be unable to afford the costs of the dispute resolution proceedings, the Independent Objector may choose (although would not be required) to file an objection upon their request; that function is part of the IO's mandate. Of course, in that circumstance, the IO would remain independent and would be acting generally in the public interest and not on behalf of any particular entity or government. Finally, it should be recalled that the prevailing party will be reimbursed the full amount of the advance payments of costs that it paid during the proceedings, pursuant to Article 14(e) of the New gTLD Dispute Resolution Procedure.

It has been suggested that the grounds for a community objections "contravene the concern, scope and expertise of the International Chamber of Commerce" and that it would be "unfair for a certain international organization in some business areas to perform adjudications". However, it should be recalled in this context that the ICC International Centre for Expertise, as DRSP, would administer the dispute resolution procedure; it would not "perform adjudications" itself. It is the expert panel (appointed by the DRSP) that hears the dispute and issues an expert determination. ICANN considers that the ICC and its International Centre for Expertise, with their extensive experience in administering

various types of international dispute resolution proceedings, are well qualified to act as a DRSP. The rules of the International Centre for Expertise are available at:  
<http://www.iccwbo.org/court/expertise/id4379/index.html>.

## INDEPENDENT OBJECTOR (IO)

### Key Points

- An objection filed by the IO is subject to the same scrutiny by the experts as any other objection.
- The IO's status and rights will be no greater than those of any other objector.

### Summary of Comments

IO Accountability. There is a troubling lack of specificity in DAGv4 regarding the accountability of the Independent Objector. E.g. the potentially limitless renewable terms of the IO cause concern. There is no process by any person aggrieved or harmed by the IO's decisions and actions or inactions as the case may be to object or appeal. These concerns are magnified given the IO's mandate to file M&PO objections. At a minimum, specific provisions relating to an appeal and review process for the IO as well as either non-renewable tenure or a maximum number of terms ought to be included in the final applicant guidebook. *M. Wong (21 July 2010). R. Dammak (July 2010).*

Experience. In choosing the one IO, ICANN should consider the candidates' experience with not-for-profit organizations and the way they use the Internet. *Red Cross (21 July 2010).*

Malicious Behavior Vulnerability Objection needed. Some objection mechanism needs to be created to fill a significant, critical safeguard gap in the objection process—dealing with the situation where an application, while meeting baseline standards for successfully passing through evaluation, nonetheless would leave members of the public excessively vulnerable to risks of malicious activities (e.g., a .kids gTLD, where the applicant does not include a registrant vetting process before registration in order to have heightened security procedures for .kids). Because a concern could arise outside of the community context in some cases, it should be possible to raise a concern without having to meet the standards for standing to file a community-based objection. One approach could be to assign this duty to the Independent Objector who would be in a position to evaluate public comments that raise a concern, consult with relevant experts and then launch an objection if needed. Other approaches should also be considered. *COA (21 July 2010).*

### Analysis and Proposed Position

Two people comment on IO accountability. There is no question that accountability is extremely important. Thus, it should be remember that objections filed by the IO are heard by an expert panel the same as any other objection. For example, if the IO submits a Community-based objection that is manifestly unfounded or an abuse of the right to object, the objection will be dismissed. An objection filed by the IO is still subject to the same scrutiny by the experts as any other objection. In the dispute resolution proceedings, the IO's status and rights would be no greater than those of any other objector. The IO would not have a privileged position, or wield unchecked power.

ICANN agrees with the suggestion that experience with non-profit organizations could be a useful qualification for the position of IO. This will be a consideration in the tender.

The comment regarding the problem of malicious behaviour refers to actions and misuse of a gTLD that occur post-delegation. To the extent that such misuse of the gTLD could be discerned in the application for the gTLD, it could potentially support an infringement of rights objection. Otherwise, there are other remedies (including, post delegation dispute resolution and criminal prosecution) that are available post-delegation.

## POST DELEGATION DISPUTE RESOLUTION PROCEDURE (PDDRP)

### General Process Comments

### Key Points

- The Trademark PDDRP should be enforced to hold registries liable for their own (or their affiliate's) bad acts; it should not hold registries liable for acts of unaffiliated registrants.
- One implication of non-use is that the trademark holders have one more effective deterrent in place to protect their marks.
- Marks protected through the PDDRP, will meet the same test as those protected in URS and Sunrise protection.

### Summary of Comments

PDDRP fails to make registry operators accountable.

Registry operators have an inherent responsibility to ethically manage their domains; as it stands, the PDDRP relieves them of that responsibility. If registry operators fail to monitor their registration process, whether due to financial interests or simple negligence, they should be held accountable. *IHG (20 July 2010).*

The PDDRP needs to be revised to make registry operators accountable. The standards section now effectively relieves registry operators of an enormous amount of liability and gives them no incentive to monitor domain names being registered or those already within their registries for infringement. *CADNA (21 July 2010). Microsoft (21 July 2010). NCTA (Module 3, 21 July 2010).*

It is up to ICANN to take responsibility to police bad actor registries. ICANN should not shift this responsibility to users. *Nestle (21 July 2010).*

PDDRP as currently drafted will discourage any actual, widespread use by potential complainants. *Verizon (20 July 2010). CADNA (21 July 2010). INTA Internet Committee (21 July 2010). Rosetta Stone (21 July 2010). BC (26 July 2010).*

PDDRP and RRDRP should be combined. *Verizon (20 July 2010). CADNA (21 July 2010). AT&T (21 July 2010). INTA Internet Committee (21 July 2010). Rosetta Stone (21 July 2010).*

The PDDRP must apply to all gTLDs. *W. Staub (22 July 2010).*

Registrars not addressed. The PDDRP is not a full remedy because it does not address the bad faith, specific or otherwise, of registrars who inevitably will be involved in illicit activities working in collusion

with registries. This loophole will encourage black hat registries to set up arms-length relationships with registrars and other third parties to engage in bad faith conduct. *Verizon (20 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Rosetta Stone (21 July 2010)*.

The PDDRP is not adequate as currently drafted. ICANN should appoint a third party agency to conduct an annual audit of each registry operator including on-site visits. The accreditation agreements should specifically ban “warehousing” and other bad practices. A registry operator that breaches its obligations should face a heavy fine or a first offense and suspension for a second offense. *MARQUES/ECTA (21 July 2010)*.

Burdensome for not-for-profit organizations. AAMC values the PDDRP as a potentially more affordable and expedient means to resolve conflicts, but it requires improvement. As currently proposed, participation in the PDDRP is likely to be burdensome for not-for-profit organizations, increasing the likelihood that they will be subject to DNS abuses by bad actors. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

The PDDRP is premature and should not be adopted. It lacks the same level of multistakeholder process and it lacks mechanisms to ensure that the rights of legitimate registrants will be secured. It could potentially upset the whole registration culture. It raises issues of intermediary liability and directs the registration of domain names towards a more controlled system of content. Free speech and expression could be jeopardized. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Support for PDDRP as drafted in AGBv4. I support the PDDRP as detailed in ABGv4 and strongly endorse the principle that it should only be used against registries that are actively involved in cybersquatting. *R. Tindal (21 July 2010)*. *Domain Dimensions (22 July 2010)*.

Registered and unregistered marks. The PDDRP should operate like the Clearinghouse and make a distinction between registered and unregistered marks. The inclusiveness of the PDDRP as currently proposed poses danger because almost every word is or can be a common law trademark and that would give the trademark community the opportunity to turn against registries for every single word that is part of our vocabularies. *K. Komaitis (21 July 2010)*. *R. Dammak (July 2010)*.

Trademarks should not be required to have undergone “substantive review” to be eligible to be the subject of a PDDRP complaint. Under global trademark law there is no single standard for what constitutes “substantive examination”. For purposes of the PDDRP, a registration that is valid in the eyes of the sovereign nation that granted it should be a valid registration. The PDDRP should be amended to accept trademark registrations from any valid sovereign nation as a basis for a PDDRP complaint. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

## Analysis of Comments

Once again, thanks to all of those who have commented on the Trademark PDDRP. As can be seen from the differences between the most recent version and prior versions of the PDDRP, the public participation process has been extremely productive. This round of comments is no exception. While the changes to the PDDRP are much less voluminous in the newest version to be posted, they are no less important.

Although not all suggested revisions have or could have been included in the PDDRP, in that some were either or not implementable or were directly at odds with each other thereby requiring some middle ground to be proposed, they have all been carefully considered.

General comments about the PDDRP are highly varied. Some suggest that the PDDRP fails to make registries accountable, that it is premature, that it is burdensome and therefore will not be used. Still another states that the PDDRP strikes a proper balance and is an appropriate level of enforcement against registries because it only holds them accountable to the extent registries are involved themselves in cybersquatting. Some suggest that the PDDRP should make a distinction between registered and unregistered marks, and others assert that there should be no substantive review requirement for marks to be addressed by the PDDRP. Finally, one commenter states that the PDDRP must apply to all gTLDs and another states that it should apply to all registrars.

The Trademark PDDRP should be enforced to hold registries liable for their own (or their affiliates') bad acts; it should not hold registries liable for acts of unaffiliated registrants. If a trademark holder's rights are being infringed, there are other mechanisms already in place, such as the UDRP or judicial proceedings, in which they can seek redress from the direct source of infringement. Further, with the new gTLD Program, the avenues to take against a registrant have expanded to include the Uniform Rapid Suspension System (URS). Thus, the PDDRP is not an exclusive avenue to challenge trademark infringement.

In terms of the marks that can be addressed, the PDDRP does distinguish between registered and unregistered marks. Please see Section 9.2.1 in the latest version of the PDDRP, posted with the Applicant Guidebook in November 2010. Further, as the Board has clarified, in the new gTLD protection mechanisms (see <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6>), review for use of a mark in many circumstances is important to help diminish gaming. It makes sense that marks capable of being addressed through the PDDRP, will be equivalent to URS and Sunrise protection.

We again see a comment that, as written, the PDDRP will not be used very much and its effectiveness will be judged by its non-use. As noted in the last round of comment analysis, if this is the result, it may be an indicator of need for evaluation or of success. One implication of non-use is that the trademark holders have one more effective deterrent in place to protect their marks.

Finally, while expansion to existing gTLDs, as well as registrars, may be something to consider in the future, such expansion is not at issue here and will not be considered at this time.

## Standards

### Key Points

- Willful blindness is not enough to hold a registry liable under the Trademark PDDRP. There must be affirmative conduct on the part of the registry. To hold otherwise will lead to some incorrect results and irrevocable harms.
- The PDDRP was developed to prevent systematic abuse by the registry itself, and the standards are purposely written to do just that.

### Summary of Comments

#### “Willful blindness” standard.

Trademark owners should not be relegated to second-level enforcement tools in a digital age where registration authorities may choose to act as de facto registrants or turn a blind eye while facilitating and profiting from cybersquatting. The PDDRP encourages new gTLD registries to take root in countries with weak legal protection for IP (e.g., nations that lack theories of secondary liability or remedies for cybersquatting). The PDDRP should utilize a “willful blindness” standard and extend to registrars as well (see PDDRP, secs. 6 & 1). *IOC (21 July 2010)*.

The scope of the current PDDRP as limited to affirmative conduct undermines the intended effect of encouraging responsible TLD management and DNS credibility. Stakeholders have called for consideration factors to address the real possibility of willful blindness occurring in the course of management of new domains. *WIPO Center (16 June 2010)*.

The PDDRP, without explanation, fails to reflect a widely held position in the submitted comments regarding willful blindness, a position expressed not only by WIPO and the IPC, but also INTA and MARQUES/ECTA, which collectively represent a significant global share of trademarks. *WIPO Center (21 July 2010)*. *Hogan Lovells (21 July 2010)*. We support WIPO’s call for the PDDRP to be re-engineered. *JONAS (11 July 2010)*. *Com Laude (21 July 2010)*.

The “affirmative conduct” limitation discourages best practices by registries (including those who intentionally design their operations to engage in bad faith activities through passive mechanisms). The “affirmative conduct” definition should be broad enough to include both knowing and intentional bad faith conduct on the part of registries and registrars whether “affirmative” or otherwise. *Verizon (20 July 2010)*. *Rosetta Stone (21 July 2010)*.

The following clarifying definition should be added: “Affirmative conduct” may consist of affirmative steps taken by a registry operator to deliberately shield itself from full or exact knowledge of the nature and extent of infringing activity, after it knows or strongly suspects that infringing activity of the type contemplated by this PDDRP is occurring or is likely to occur. *INTA Internet Committee (21 July 2010)*

“Affirmative conduct” engaged in by the registry operator must be clarified; if the threshold is set too high then the risk is that the PDDRP’s effectiveness will be put in doubt. *C. Speed (21 July 2010)*.

As proposed by WIPO there should be “safe harbor” defenses to protect registry owners who are exposed by registrants. However, the PDDRP must address “willful blindness” if ICANN is serious about protecting consumers and IP owners. *MARQUES/ECTA (21 July 2010)*.

WIPO’s proposed amendments to the PDDRP relating to willful blindness should not be adopted. They are contrary to established laws of jurisdictions that have addressed this issue and are an expansion of international law. ICANN should not be creating dispute processes or even contractual requirements based on how intellectual property owners would like to see the law in the future. It is not for ICANN to pre-empt the state of existing law by incorporating this notion of willful blindness in to the PDDRP. *Neustar (21 July 2010)*.

The PDDRP as proposed does not offer realistic examples of what behavior, if any, may qualify as affirmative conduct by the registry operator. NCTA supports a somewhat less stringent standard than “willful blindness” which would require that the registry have first been put on express notice of abusive registrations. NCTA had previously provided examples that should suffice to make the required showing that a gTLD operator has been acting in bad faith—i.e. a failure to act after being put on express notice of abusive registrations of domain names; and a failure to require complete and accurate Whois information, either on a frequent or a regular basis. Reasonable persons would be hard-pressed to justify excluding, at a minimum, these situations, from those for which registries should take responsibility. *NCTA (Module 3, 21 July 2010)*.

Material harm. The definition of material harm may prove challenging. ICANN should provide information as to the interpretation of material harm. By using this term the PDDRP is recognizing abuse that does not require actual or threats of trademark infringement. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

“Clear and convincing” and bad faith.

The clear and convincing standard higher than that in most civil actions. It is unlikely that complainants, without access to the discovery available in full-blown litigation, will be able to meet this evidentiary standard. The bad faith standard is unreasonably stringent. It is unclear how a complainant could establish “specific” bad faith. This implies that a registry operating with general bad faith intent to profit is free to carry on its illicit activities. Moreover, a complainant must establish a “substantial” pattern of “specific” bad faith. *Verizon (20 July 2010)*. *AAMC (21 July 2010)*. *DuPont (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *IBM (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *BC (26 July 2010)*.

Pattern and Practices and Joinder.

The language that requires the complainant to prove that a pattern of registering domain names that specifically infringe one of the complainant’s marks should be deleted, revised to lower the threshold for harm to the complaining trademark owner, and/or that the proposal be revised to allow some form of joinder of class action status for aggrieved trademark owners. Under the current provision, despite the degree of abusive conduct, there would be no basis for a PDDRP complaint against a gTLD operator where no one trademark owner has one mark that is specifically affected by abusive registrations. *NCTA (Module 3, 21 July 2010)*.

Given the “substantial pattern” requirement, among other things, ICANN should consider whether the PDDRP would allow for joinder or class action status between aggrieved parties. This would allow parties

to share the cost of the PDDRP and to combine efforts to more efficiently gather and present evidence to the Expert Panel. *IPOA (21 July 2010)*.

Affiliated Entities. To take into account the issues of vertical integration and PDDRP liability, conduct of a registry operator should be defined to include: “Conduct by entities directly or indirectly controlling, controlled by or under common control with a registry operator, whether by ownership or control of voting securities, by contract or otherwise where ‘control’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether by ownership or control of voting securities, by contract or otherwise.” *INTA Internet Committee (21 July 2010)*

There is an imbalance between the stringent standard for complainants and the leniency toward registries that is troubling and difficult to justify. *DuPont (21 July 2010)*.

Reference to “infringement.”

The described standards should not necessarily involve trademark infringement as is the case for UDRP complaints. Also, since the parties may not be in the same jurisdiction, reference to the concept may raise conflicts of law issues. Instead, reference should be made to the breach of standards or a similar neutral term. *IPOA (21 July 2010)*.

The phrase “in fact infringes the trademark of the complainant” should be added to the sec. 6 second level complaint standard; this ensures that complainant proves actual infringement, as is required for cases of secondary liability in court. This is important because there may be no discovery and there is some uncertainty about the panel/arbitrator. *RySG (21 July 2010)*.

## **Analysis of Comments**

In terms of the standards, there has been much discussion and comment on whether registries should be found liable under the PDDRP for willful blindness to malicious conduct, i.e., the fact that there are infringing names in its registry. As set out in the last in the current version of the Trademark PDDRP proposal, and set forth in the last version of the PDDRP Comment Summary and Analysis:

willful blindness is not and properly should not be included as part of the standard under which the registries will be reviewed. The portion of the PDDRP that can hold a registry liable for infringement at the second level is a large step in providing trademark protections. It must be done carefully. Registries do not have a direct interface to customers, that happens at the registrar level. Registries maintain the database. In any large registry there will be a relatively large number of “infringers,” the registry may be aware of some of them but will also be unaware of others. To hold registries accountable for all instances of infringement would have unknown effects on the ability of the registry to conduct business. A standard to hold them liable for that cannot be implemented understanding all of the effects, including the interplay and renegotiation of agreements between and among, registries, registrars, and ICANN. In the meantime, it is reasonable to hold registries accountable for affirmative conduct with regard to second-level names. That is what this standard does; it hasn’t been done up to now; it is a substantial step.

<http://www.icann.org/en/topics/new-gtlds/pddrp-comment-summary-and-analysis-28may10-en.pdf>

One commenter request further explanation of “material harm.” Material generally relates to having consequence, but it is difficult to provide more explanation in the abstract. It will up to the Expert Panel to determine if something is material to the Complainant.

Some believe that the clear and convincing standard is too high because it is higher than most civil actions. Some also think the bad faith requirement calling for the pattern of registration of infringing domain names within a registry is too limiting because a complainant could not go after the registry for infringement of a single or a few trademarks or just their own marks. While both the requirements for clear and convincing evidence and a bad faith requirements are high, that is how they are intentionally crafted. The PDDRP was developed to prevent systematic abuse and thus the standards are purposely written to do just that. If there is just one or a few infringing names in a registry (or even many), the complaint can use other mechanisms available to it, the UDRP and the URS, as well as the judicial system. The suggestion of allowing joinder is certainly something that can be considered and will be included in discussions with the PDDRP provider(s); however, that will not eliminate the need for proof of a pattern and practice along with systematic registrations of one trademark holder’s names.

One commenter suggested that not only registries, but their affiliated and commonly controlled entities must be required to refrain from conduct that would lead to infringement of trademarks. We agree. This point is well taken and this has been incorporated into the version of the Applicant Guidebook posted in November 2010 with this analysis.

## Procedures

### Key Points

- ICANN shall refrain from determining whether to implement a remedy until conclusion of the appeal
- No member of the evaluation panel shall serve as an appeal panel member

### Summary of Comments

#### Fees and Costs.

The explanation of costs is vague and fails to mention any limit on the cost of PDDRP proceedings. ICANN's passing statement that costs will be reasonable does not mean that they will be. ICANN needs either to implement a maximum cost or provide the parties with more say in how the costs will stack up. Otherwise complainants will have no incentive to use the PDDRP and will look for alternative methods to solve their disputes. *CADNA (21 July 2010)*.

The rules should be altered to provide a cap on estimated costs, and the nature of such costs must be more fully defined. The requirement for a full complainant outlay in the initial stage should be replaced by policies requiring that no payment (beyond the filing fee) be required until after the Threshold Review is completed. *INTA Internet Committee (21 July 2010)*.

IBM agrees that if the complainant is the prevailing party, the registry operator is required to reimburse complainant for all fees incurred, but if the registry operator is the prevailing party, then the registry operator may recover its filing fees. *IBM (21 July 2010)*.

The PDDRP mechanism and its costs unfortunately seemed to have been passed to brand owners. *Hogan Lovells (21 July 2010)*.

Registry Operators should not have to pay to respond; the Registry Operator should only pay if/when it loses an entire PDDRP complaint. *RySG (21 July 2010)*.

Prior notice to registry operator of a potential complaint. We question the need for the proposed 30 day period of prior notice to registry operators by would-be complainants. The length of the notice period makes it likely that the bad faith actions will continue, and mark owners will look more seriously at litigation as the more expedient and effective enforcement route. The 30-day period should either be stricken or, at a minimum, shortened to a term sufficient to provide only notice, as opposed to an advantage, to registry operators. *INTA Internet Committee (21 July 2010)*.

#### Complaint.

Expected elements of a PDDRP complaint and evidence required to support it should be described in greater detail. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

The complaint should include a statement regarding the actual economic and other harms the registrations have caused to the trademark owner. *RySG (21 July 2010)*.

#### Appeals.

Section 21 reference to URS should be removed. In its place should be PDDRP or alternatively reference to either the URS or PDDRP should be removed altogether. In addition the nature of the appeal is not clear. Presumably, members of the Appeal Panel should not have been involved in the initial proceeding or perhaps other similar proceedings at first instance. There is also no indication of the timing of the appeal, discovery and Appeal Panel decision except for the deadline for the initial appeal. Basic dates should be incorporated into the PDDRP itself. *IPOA (21 July 2010)*.

The registry operator has multiple and possibly redundant avenues of appeal. The registry operator may either appeal the Expert Determination through the provider's process; initiate a separate dispute resolution procedure under the provisions of the Registry Agreement; or both. Neither of these two additional avenues of appeal is necessary. *INTA Internet Committee (21 July 2010)*.

RySG would modify the appeal provision in sec. 21 to provide: Either party shall have a right to seek a de novo appeal of the Expert Determination of liability or recommended remedy based on the existing record within the PDDRP proceeding for a reasonable fee to cover the costs of the appeal. If an appeal is sought, ICANN shall refrain from determining whether to implement a remedy until conclusion of the appeal. *RySG (21 July 2010)*.

New evidence should be allowed to be introduced at appeal stage. Later facts may be highly relevant to any remedy recommended by the Panel. Also because the appeal is de novo, there is no reason to restrict the timing of the evidence. *RySG (21 July 2010)*.

#### Threshold Review.

INTA Internet Committee supports the threshold review concept but the current proposal is unacceptable in several ways. If the Threshold Review panel determines that the complainant has not met the threshold review criteria, then the provider should state the grounds of the determination. The complainant should be allowed to amend the complaint at the threshold review stage without the need to file an additional filing fee. By contrast, the current process would require forfeiting the filing fee and a second process of procedures which is punitive and a waste of resources. The parties should have the capacity to suspend the Threshold Review process by joint stipulation (e.g., for settlement discussions). *INTA Internet Committee (21 July 2010)*.

Generally, the RySG believes that (1) the Administrative Review and the Threshold Review can be conducted by the same or related parties; and (2) The Threshold Review and the Expert Panel should be separate parties. The rationale for (2) is to avoid the appearance of impropriety and to remove the financial incentive of the Threshold Review automatically approving complaints. *RySG (21 July 2010)*.

The Threshold Review should include considering the factor of whether the Complainant has asserted that there is no current or previous PDDRP for the same asserted facts. RySG would like to avoid multiple review of the same facts and proposes to have joinder of similar complaints. *RySG (21 July 2010)*.

#### Default.

RySG recommends change of the language of Default (which under the UDRP in practice leads to a finding in favor of the complainant) to Failure to Respond. Failure to Respond will still allow the case to proceed to an Expert Determination on the merits, but without the stigma of a Default. *RySG (21 July 2010)*

Default cases should not be decided on the merits as this will stretch out the process unnecessarily. Registries are sophisticated businesses that can avoid this result simply by filing a response. *NCTA (Module 3, 21 July 2010)*.

#### Expert panel.

To make consistent with the URS, add that PDDRP panelists within a Provider shall be rotated so as to avoid selection of Providers that are thought to be likely to rule in a certain way. *RySG (21 July 2010)*.

Three member expert panels should be the default rule given the importance and seriousness of PDDRP disputes. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

#### Joinder of complaints against the same registry.

A mechanism should be added that will provide for complainants who file similar complaints against the same registry to request that the matters be joined into a single proceeding. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Reply opportunities for the trademark holders (paragraph 11). ICANN needs to explain why the PDDRP gives the trademark holder two opportunities for a reply. This seems not to follow the paradigms of the URS and UDRP. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Discovery (paragraph 16). Discovery should not be discretionary but should be an option that operates irrespective of panels. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Suspension of Proceeding. Parties should be able to jointly stipulate that the PDDRP proceeding be suspended at any point. *INTA Internet Committee (21 July 2010)*.

## **Analysis of Comments**

Several comments have been received relating to procedural aspects of the Trademark PDDRP. Fine-tuning of a newly developed procedure is always appreciated and some are already included in the current version of the PDDRP posted in November 2010 simultaneously with this analysis.

Many have commented on the uncertainty of costs and the payment or refundable nature of fees. While costs at present are somewhat uncertain, that is unavoidable given that this dispute resolution procedure will be based on administrative costs of providers and hourly rates of selected panelists. The fees should be within current standard practices of dispute resolution providers deciding cases with the same amount of complexity. As there is flexibility as to whether one or three panelists will be chosen and given the broad range of possible evidence that could be presented, in any given matter, estimating would be difficult at best. One can look to the broad range of fees and costs estimated for community based or other objections for guidance found in Module 1 of the Applicant Guidebook. With respect to fees, it has now been clarified that registry operators need not pay unless and until the trademark holder is deemed the prevailing party, and all fees will be refunded to the prevailing party.

Some suggest that the elements of a complaint are not sufficiently stated and one group thinks a statement of harms should be required. With respect to the elements of a complaint, there is no suggestion as to what is not sufficient and the elements have been reviewed for sufficiency by experts in

dispute resolution. In agreement with one suggestion, there will be an inclusion to state that the complainant has been harmed, although it will not require the precise level of harm.

In terms of appeals, some suggest:

- more clarity in terms of timing and panelists who may preside over an appeal,
- when ICANN will implement a remedy,
- whether evidence can be presented.
- there are too many avenues of appeal or that they are redundant with the dispute resolution term in the registry agreement.

Revisions will be made to the appeal section of the PPDRP to clarify issues about timing and scope of an appeal, the timing of the imposition of a remedy, as well as which panelists may preside over an appeal. The nature of appeals, however, are not redundant as one commenter suggests. An appeal of the Expert Determination is about the panel statements, while the invocation of dispute resolution via the Registry Agreement is about ICANN actions with respect to imposition of remedies.

With respect to the Threshold review, one group suggests that if Administrative review finds a complaint deficient, that the Complainant should have an opportunity to amend without forfeiting a filing fee. Another group suggests that the Threshold Review Panel and the Expert Panel should not have the same panelists. We agree with both these suggestions.

Allowing for a short time to amend a Complaint for procedural deficiencies seems reasonable and has been included. So too has the indication that no member of the Threshold panel shall serve as an Expert Panel member.

One group suggests changing the term Default to Failure to Respond, to avoid the stigma of the word Default. Another suggests that no determination on the merits should be made if a party defaults. No changes will be made to the default section with respect to these comments. While a failure to respond should be considered a default, the party that failed to respond should still be given the opportunity to prevail on the merits.

One group's suggestion that panelist should be selected on a rotating basis will be incorporated. Two have suggested that a three-member panels should be the default position, but since a three member panels can be requested by either party, the current position seems sufficient and more economical unless one of the parties makes an affirmative request.

Other comments discuss joinder, reply opportunities, discovery, and suspension of the proceedings. Joinder, when appropriate, is always encouraged, but will be left to the Providers to make that determination. If the facts and circumstances are sufficiently similar, it is anticipated that the Provider will have rules in place to address such circumstances. In those cases, those rules should apply, although Providers will be encouraged to consolidate matters to the extent consolidation is appropriate. As for reply opportunities, the trademark holders should have the right to ensure each of their points is heard. In terms of discovery, because the parties are incented to provide as much information as they cans, it should be left to the panel to determine more information is required, but this dispute resolution mechanism should not be an opportunity for parties to conduct discovery for any particular purpose. As for suspension in connection with settlement discussion, there is no reason that, in a post-delegation mechanism, that the panel should not consider a stay pending such discussion. That, however, will be left up to the relevant panels.

## Remedies

### Key Points

- Panels' Determinations will be given great deference, however, ICANN is in the best position to understand the effectiveness and effect of recommended remedies and will make the final determination.
- While a remedy shall not be inconsistent with those available under the Registry Agreement, there must be flexibility that it can be one not referenced in the Registry Agreement.

### Summary of Comments

#### Advisory nature of panel conclusions.

Widespread use of the PDDRP is seriously undermined given that ICANN can treat panel conclusions as merely advisory with no obligation on ICANN's part to take any action against a registry. If a finding of specific bad intent, including even that established by a *substantial* pattern of misconduct, does not result in serious consequences for the registry operator, what else is required to trigger ICANN taking action? At a minimum, such a finding should trigger immediate action by ICANN against the registry, to provide certainty to all ICANN stakeholders and justify the legitimacy of the PDDRP/RRDRP process. *Verizon (20 July 2010)*. *IPOA (21 July 2010)*. *CADNA (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *BC (26 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

Why is ICANN afforded such discretion especially given that ICANN is not a party of the dispute? This raises issues of privity of contract that we have raised with ICANN but to which we have not received any response. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Decisions by a PDDRP expert panel should be considered final in most cases. ICANN's discretion to make its own determination on what remedies to impose should be limited to cases where the panel decision contradicts or falls outside the scope of the substantive terms of its Registry Agreements. Otherwise, the Registry Agreement should include a provision that parties must abide by the decision of an expert panel in the case of a PDDRP. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Deletion of domains names. The expert panel adjudicating a PDDRP complaint should have discretion to delete domain name registrations in certain cases (e.g. where the registrant is the registry, or where a relationship can be shown between the registrant and the registry at issue) and thereby prevent the domains in these cases from remaining with the registrar. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *Microsoft (21 July 2010)*.

Panel authority. A panel should not be able to influence the adoption of a remedy that a court cannot order or that ICANN cannot implement under the terms of an applicable Registry Agreement. *RySG (21 July 2010)*.

Determining Malice. "Malice" is a term which ranges in meaning across UK and US jurisprudence and may not have meaning at all to those in countries without the common law. Further, its definition ranges from actual intent to disregard. RySG strongly recommends defining the term clearly so that its meaning is clear and unequivocal. Also, we advise that in the extraordinary remedy of terminating the

Registry Agreement, the value of the gTLD to the community and the existing registrants be considered and weighed (e.g. revised language: "the clear and unequivocal intent to cause great economic harm to the trademark owner and provided no value to the Internet community or the domain name registrants independent of this intended harm" and that in making its recommendation of the appropriate remedy, the Expert Panel will consider the ongoing harm to the Complainant, as well as the harm the remedies will create for the registry operator and other, unrelated, good faith domain name registrants operating within the gTLD). RySG (21 July 2010).

#### Challenge to remedy.

Under Sec. 22 the registry operator may challenge ICANN's imposition of a remedy. This means that the initial determination may be subject to both an appeal and a challenge relating to the remedy, both of indeterminate length. This seems unpalatable from the complainant's point of view. IPOA (21 July 2010).

RySG would move the language about ICANN waiting to impose a remedy to the "challenge to remedy" section (sec.22) and requests clarification on how the 10 day period in this section interacts with the 20 day appeal timeframe in sec. 21. RySG (21 July 2010).

RySG suggests the following language added to sec. 22 to create consistency with the provision that the Expert Determination shall be reviewed de novo and so that the registry operator should receive the same protections for alleged violations and claims of termination under the PDDRP that it has for alleged violations of the Registry Agreement: "Any arbitration shall be de novo and determined in accordance with the parties' respective rights and duties under the Registry Agreement. Neither the Expert Determination nor decision of ICANN to implement a remedy shall serve to prejudice the registry operator in any way in the determination of the arbitration dispute. Any remedy involving a termination of the Registry Agreement must be according to the terms and conditions of the termination provision of the Registry Agreement, including any and all provisions providing for notice and an opportunity to cure breaches of the Registry Agreement." RySG (21 July 2010).

Availability of Court or Other Proceedings (sec. 23). For consistency with the UDRP, RySG proposes that Sec. 23 be amended to read:

"Trademark PDDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability. Neither an Expert Determination or other proceedings under the PDDRP shall operate in any way to prejudice or otherwise affect the position of any party to a court proceeding, which shall be conducted independent of the PDDRP and according to the standards of trademark law.

In those cases where a Party provides the Provider with documented proof that a Court action was instituted prior to the filing date of the Complaint in the post-delegation dispute proceeding, the Provider shall suspend or terminate the post-delegation dispute resolution proceeding. In all other cases in which a Court action is instituted before the conclusion of the PDDRP proceedings, the Provider shall determine whether a stay is consistent with the interests of justice, including considering whether there is a possibility of inconsistent findings or results if a stay is not granted, the presence of any third parties in the Court proceeding and the scope of the claims and relief sought in the Court proceeding." RySG (21 July 2010)

## Analysis of Comments

The imposition of remedies following an expert determination in a Trademark PDDRP has been the subject of many comments. Indeed, there is a great appreciation for the difficult nature of potential remedies and a concern that legitimate registrants not be harmed in the process. Such concerns are the most important and are taken extremely seriously in the development of the PDDRP available remedies.

Some question why ICANN should have so much discretion to impose remedies recommended in the Expert Determinations. Protection of registrants is precisely the reason for such discretion. The Expert Panel is in place because of its expertise in dispute resolution and fact finding. The Panels' Determinations will be given great deference during the imposition of remedies against the registries. However, ICANN is in the best position to understand whether those recommended remedies might harm legitimate registrants in some fashion. Thus, for the protection of those legitimate registrants, it is important to maintain discretion.

The protection of registrants' rights, is also the reason why deletion of names is not a remedy, although some suggest it should be. Registrants are not a party to the Trademark PDDRP. The trademark holder can always use the URS or UDRP to prevail in having a domain name suspended or transferred.

The current PDDRP model requires a finding of malice in order to recommend a remedy of termination. Inclusion of malice was an earlier recommendation of the RySG. Another member of that stakeholder group now recommends alternative language ("intent to harm the trademark holder and failure to benefit the Internet Community") now. We elect to retain the original recommendation of the RySG.

Finally, comments have been made suggesting revisions to the language regarding the ability and timing to challenge remedies and availability of court proceedings. Some of the additional language will be adopted and some will not as it is felt it provides too much protection to the registry operator or improperly imposes requirements on courts or arbitration panels. The suggestions involving timing of when ICANN will implement remedies will be incorporated, as will the fact that a remedy is not intended to prejudice the registry appointed arbitrator in an arbitration. Others will not be incorporated. In particular, the fact that a decision on imposition of a remedy will be heard de novo if an arbitration is filed. ICANN is not qualified nor is it appropriate to have ICANN re-argue the Complainant's case in the PDDRP proceeding. Further, while a remedy shall not be inconsistent with those available under the Registry Agreement, there must be flexibility that it can be one not specifically referenced in the Registry Agreement.

## REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE (RRDRP)

### Key Points

- Instituting a RRDRP is not intended to replace ICANN’s contractual compliance responsibilities.
- While an Expert Determination will be given great deference, ICANN must have discretion to impose remedies because ICANN is in the best position to understand whether recommended remedies might harm legitimate registrants in some fashion.

### Summary of Comments

#### Standing.

The RRDRP should be available to any interested party to enforce the requirements agreed to in a community gTLD in its registry agreement. The standards of “defined communities” in Section 5 and “strong association” in Section 6 may preclude legitimate claimants from having standing who are outside these definitions. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

ICANN should delete the standing requirement or adopt the same threshold used for oppositions under the Lanham Act, namely “any person who believes that he would be damaged by” the ultra vires actions of the registry. Section 7 should also be amended to add a requirement that the complaint include a statement of standing. *INTA Internet Committee (21 July 2010)*.

Registry protections. The PDDRP processes and procedures have evolved more than those of the RRDRP. Each of the protections for registries in the PDDRP should also be applied to registries under the RRDRP, including those related to review and appeal of RRDRP decisions. *RySG (21 July 2010)*.

PDDRP and RRDRP should be combined. *Verizon (20 July 2010)*. *CADNA (21 July 2010)*. *AT&T (21 July 2010)*. *INTA Internet Committee (21 July 2010)* *Rosetta Stone (21 July 2010)*.

Evidentiary standard lower than PDDRP. It is unclear why the RRDRP has the lower “preponderance of the evidence” standard—i.e., why is one stakeholder group allowed a reasonable standard of proof for one set of bad faith registry abuses over another stakeholder group with an equally valid set of claims. *Verizon (20 July 2010)*. *AAMC (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *BC (26 July 2010)*.

#### Use of Experts.

The discretion to add experts to RRDRP proceedings, in addition to the already-appointed expert panel, should be eliminated or greatly curtailed to extraordinary cases pursuant to strict limitations. It is unfair to add testimony from an expert or experts that neither party has solicited nor which neither party will have a chance to cross-examine, and for which the parties must shoulder the unknown expense. The strict limitations under which a panel would have discretion to select an expert would be: a predetermined scale of fees for experts so that parties can assess costs in advance; the panel’s intention to appoint an expert should be communicated to the parties at the earliest possible stage so that parties can lodge objections; and any appointed expert should prepare a report summarizing their conclusions which is provided to the parties in sufficient time to allow them to present contrary arguments and evidence, possibly including a rebuttal from another expert. All of these materials should be part of the

record presented to the panel for its consideration. Further, Section 13 should be revised to provide that disputes under the RRDRP will usually be resolved on written submissions and without appointing experts and that if the panel believes that appointing an expert is appropriate, the panel will not appoint more than one expert without the stipulation of the parties to the proceeding. *INTA Internet Committee (21 July 2010)*.

#### Remedies.

Decisions by an expert panel should be considered final in most cases, without ICANN setting aside the decision in favor of a different determination. ICANN's discretion to make its own determination on what remedies to impose should be limited to cases where the panel decision contradicts or falls outside the scope of the substantive terms of its Registry Agreements. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

The expert panel adjudicating the RRDRP should have discretion to delete, transfer or suspend domain name registrations in certain cases (e.g., an affiliated registry and registrant). *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Suspension of accepting new domains as provided in Section 16 should be permitted to include registry operators that acted in bad faith, with gross negligence, with malice, or that are repeat offenders of the agreement restrictions. *INTA Internet Committee (21 July 2010)*.

Fees. The potential expenses and outcomes of the RRDRP are highly unpredictable. Expert panels can appoint experts at their complete discretion and over the parties' objection. There are no caps on expert fees and the potential expenses of the proceeding are highly uncertain. These factors are likely to drive potential complainants away from using the RRDRP and toward litigation. *INTA Internet Committee (21 July 2010)*.

## **Analysis of Comments**

The RRDRP has attracted comments with respect to standing. Some suggest that anyone who can claim harm should have standing, and not just those who are associated with the community. Standing is limited because the nature of the claim is limited to when a registry fails to comply with its own restrictions and there is harm to the community or community member. If, for example, trademark holders believe a domain is infringing its rights, there are several avenues for redress, including the URS, the UDRP and the Trademark PDDRP.

Furthermore, it should be remembered that instituting a RRDRP is not intended to replace ICANN's contractual compliance responsibilities. ICANN will continue to pursue its contractual compliance activities and enforcement for all of its contracted parties. A robust RRDRP will, however, be an additional avenue for protecting the interests of legitimate and eligible registrants within community-based restricted TLDs who otherwise could see their interests in their registrations tarnished by registrations made in violation of the promised restrictions associated with the TLD.

Some think that the RRDRP should be combined with PDDRP, and that the provisions under both should be the same, including the evidentiary standard. While the current versions of each posted in November 2010 with this analysis are now quite similar, there are some distinctions given the nature of the claims and therefore are set out separately. Indeed, because the RRDRP addresses limitations

specifically placed on the registry operator, it makes sense to have a lower evidentiary standard. In practice, it is possible that the same providers will administer both dispute resolution processes.

One group suggested placing some limitations on the ability of a Panel to appoint independent experts. Some of those suggestions are appropriate and will be incorporated into the RRDRP.

The imposition of remedies following an expert determination in a RRDRP has been the subject of comments. Some question why ICANN should have so much discretion to impose remedies recommended in the Expert Determinations. Protection of registrants is precisely the reason for such discretion. The Expert Panel is in place because of its expertise in dispute resolution and fact finding. The Panels' Determinations will be given great deference during the imposition of remedies against the registries. However, ICANN is in the best position to understand whether those recommended remedies might harm legitimate registrants in some fashion. Thus, for the protection of those legitimate registrants, it is important to maintain discretion.

The protection of registrants' rights is also the reason why deletion of names is not a potential recommended remedy in most circumstances, although some suggest it should be. Registrants are not a party to the RRDRP. That said, the suggestion that such a remedy be permitted if the registrants are affiliated with the registry operator is appropriate and will be incorporated.

## REGISTRY AGREEMENT

### Vertical Integration

#### Key Points

- The community continues to be significantly divided on the proper approach to vertical integration of registrars and registries;
- The Vertical Integration PDP Working Group has submitted a Revised Initial Report on Vertical Integration Between Registrars and Registries (available at <http://gnso.icann.org/issues/vertical-integration/revised-vi-initial-report-18aug10-en.pdf>), which sets out several potential approaches to this issue;
- No consensus at the GNSO has been developed on this issue;
- The ICANN board of directors has directed the ICANN staff to remove restrictions on registry-registrar cross ownership, subject to certain safeguards.

#### Summary of Comments

The 2% figure in the DAGv4 is unreasonable. CORE proposes the following: a general rule limiting cross ownership (and control) between registries and registrars with a 15% limit makes sense. We also propose a presumptive acceptance of greater than 15% cross-ownership (up to 100%) provided that the entity/group does not act as both a registry and registrar/reseller under the condition that they have relatively low market relevance (well below market power standards). There might be a need for an exception to the principle, allowing a registry to act as a registrar for its own TLD and we would propose a mechanism and guidelines for such exceptions (in some cases not just for the vertical separation rule but also for the need to use ICANN-accredited registrars). *A. Abril i Abril (Module 1, 21 July 2010).*

It is worth noting that the DAGv4 language does not prevent ICANN registrars from owning an entity that applies for a TLD as long as not more than 2% of their shares in the applying entity are not “beneficially owned.” If there is no consensus on the cross ownership issue, ICANN has an obligation to approve a position that ranges between the Nairobi resolution (strict separation up to 2%) and the status quo for the majority of existing contracts (strict separation up to 15%). Choosing a position outside that range would represent policy making by the Board without community support. *R. Tindal (21 July 2010).*

ICANN should consider exemptions from the restrictions on registrar cross-ownership as currently discussed in the Vertical Integration Working Group, such as SRSU scenarios, small community TLDs, and orphan registry operators. The proposed 2% threshold for cross-ownership appears unduly low. *eco (21 July 2010).*

Exceptions to the vertical integration policy are needed. It is not fair to mandate no vertical integration especially for non-commercial, registrar-based TLDs. We propose an open market with full competition. Vertical integration protects small registries who serve specific customer groups (like government organizations and public interest organizations). They may focus on perfecting the pre-check rules and procedures for registrants’ equity and authority, rather than fight for their market share. *CONAC (22 July 2010).*

Barring ICANN-accredited registrars from assisting new gTLD applicants or from applying for their own TLD is discriminatory and bad policy. The heavily restrictive language of Article 1.2.1 of Module 1 and Articles 2.9a-c of the proposed new gTLD agreement arbitrarily discriminates against ICANN-accredited registrars in preventing them from providing assistance of any kind to prospective new gTLD applicants. This restriction seems to contradict the goals of the new gTLD program to foster diversity, encourage competition and enhance DNS utility. The language in Article 1.2.1 of Module 1 and in the proposed new gTLD agreement should be amended to delete this prohibition. INDOM (7 July 2010). Key-Systems (21 July 2010). eco (21 July 2010). EuroDNS (22 July 2010). TLDDOT (22 July 2010). A. Abril i Abril (Module 1, 21 July 2010).

Single user or corporate TLD—exception.

There is little need to relax the strict prohibition on common ownership of new gTLD registries and registrars that the ICANN Board adopted in Nairobi. The main significance of the debate on vertical integration concerns single user or corporate TLDs (sometimes referred to as “.brand”) for which different treatment is appropriate. There is no evident reason why TLD registries in this category should be barred from controlling their own accredited registrar; from entering into exclusive arrangements with an independent accredited registrar; or from dispensing with accredited registrars altogether and allocating second level domains as they see fit. Defining the contours of this category is challenging and whether ICANN meets it successfully could have a major impact on the viability of the new gTLD launch. COA (21 July 2010).

Concerns over common ownership of registries and registrars in the open domain market do not apply to private registries (such as a .brand for private use). IBM is pleased that this concern has been noted and ICANN has not foreclosed the issue as to whether one entity may act as both a registry and registrar in all circumstances. IBM (21 July 2010).

At a minimum, the vertical integration issue should be clarified so that individuals who control an accredited registrar for purposes of managing their own domain and who do not offer registrar services to the general public are in no way barred from playing a major role in a new gTLD applicant entity. ICA (21 July 2010).

Not-for-profit organizations—exception. ICANN should offer an exception to the limitations on vertical integration/cross ownership that provide a single registrant TLD or single registrant/single user TLD to meet the needs of not-for-profit organizations that might register a new gTLD strictly to execute a public service mission and not for commercial purposes. Not-for-profits also should not be prohibited from acquiring the services of an ICANN registrar to fulfill registry services, as this will unduly limit the pool of qualified registry service providers for consideration. Red Cross (21 July 2010).

Community-based organizations—exception.

Vertical integration exceptions should be granted to community-based organizations with a structure that ensures that registry data cannot be abused and used to raise prices and make valuable, premium domains unavailable to the public (e.g. organizations that do not require the assistance or the marketing distribution channels of current registrars). Newcomer/new entrants with no prior business in the registrar/registry business and with innovative business models and technology should be allowed to vertically integrate in order to help level the playing field and compete with the likes of VeriSign, Afilias or GoDaddy, who are primed to most benefit from new gTLDs with or without vertical integration. We

strongly oppose any proposal which ensures advancement of the existing large registries and registrars with market power. *.MUSIC (20 July 2010)*.

The DAGv4 “default” position should be amended and exceptions should be put in place to allow for specific categories (e.g. a TLD based on a brand or a specific language community may want to have stronger ties with a specific registrar to ensure its acceptance and growth). *EuroDNS (22 July 2010)*.

A hybrid approach under which a registry can act in a limited fashion as a registrar could be beneficial to community-based gTLDs both in terms of costs and in terms of ability to manage registrants. *BITS (22 July 2010)*.

Some form of vertical integration would be beneficial or even necessary for some of the new gTLD initiatives. Giving new registry operators the opportunity to run an affiliated ICANN accredited registrar, even if restricted to no more than 100,000 names under the TLD, would greatly help them to have exposure to their target audience. Even more relevant strategically is to provide nondiscriminatory access to registry services to all ICANN accredited registrars because they are the key to a successful TLD. The registry operator would use a uniform agreement with all registrars. The registry operator could be evaluated in 1 or two years to assess its performance regarding the provision of equal and nondiscriminatory access to all ICANN accredited registrars so the limits on the number of allowed domains could be increased or completely removed. With this model, the registry operator can design a business model that can help all registrars be successful, while achieving sustainability and economic stability for the TLD. *NIC Mexico (21 July 2010)*.

Vertical integration requirements should be removed. The addition of vertical integration rules to the DAGv4 may have negative consequences on applicants who seek to hire third parties to provide backend registry services. The effective choice becomes extremely limited. To avoid this problem, the requirements on vertical integration should be removed. *A. Al-Zoman (21 July 2010). Arab Team (21 July 2010)*.

Full registry/registrar cross ownership should be allowed and would be beneficial to stimulating growth and innovation, especially in small and specialized TLDs. Cross ownership should not prohibit a registrar from selling domains from a registry in which it holds shares, provided equal access to registration is guaranteed and does not discriminate against other registrars. Some ccTLD registry operators have been acting as registrars for years. New gTLDs will likely reach a market penetration comparable to ccTLDs, especially new geoTLDs. It therefore makes sense to allow similar business models and models of integration in the sales channel. Any potential harms can be more effectively handled through enforcement. Compliance will be monitored through ICANN mechanisms as well as through competitors in the market. By contrast, a quota on ownership limitation is arbitrary and will not in itself prevent any harm. No cap should be implemented on cross ownership between a registry service provider (registry tech provider) and a registrar but similar levels of limitations of control should be required. With strong and flexible rules and a strong and empowered enforcement scheme, the provision of registry services by registrars as well as cross ownership of registries and registrars would pose no greater risk of harmful action or abuse than any other setup. ICANN and its staff need to make a decision to allow greater innovation and freedom of choice and to building a strong compliance framework. The restrictive policies of DAGv4 have served the interests of hardliners and incumbents to refuse any compromise. *Key-Systems (21 July 2010). Blacknight Solutions (21 July 2010). EuroDNS (22 July 2010)*.

The vertical integration language in DAGv4 is unfair, biased, and anticompetitive and potentially violates antitrust and consumer protection laws. ICANN has given no justification for the wholesale exclusion of ICANN accredited registrars from participating in the new gTLD marketplace. *Demand Media (22 July 2010)*.

#### JN2 proposal support.

In the spirit of reaching consensus on this issue, Neustar urges the Board to adopt the so-called JN2 proposal. It allows registrars and their affiliates to be registry operators provided they agree not to distribute names within a TLD for which they or their affiliates serve as the registry operator. It allows exceptions for single registrant TLDs, community TLDs and orphan TLDs. For the first 18 months, certain restrictions apply toward back-end registry service providers, after which they may petition ICANN for a relaxation of those restrictions. *Neustar (21 July 2010)*.

If the Vertical Integration Working Group does not reach consensus, then regarding Section 2.9 of the registry agreement, Neustar recommends: (1) de minimis exception should be at least 5%, which is consistent with federal securities reporting and provides a clear public method of verifying ownership; and (ii) the beneficial ownership definition lacks critical elements needed to define it to include other indicia of indirect control (these critical elements are currently found in Rule 13-d of the rules under the Securities and Exchange Act of 1934), without which there will be loopholes leading to gaming. *Neustar (21 July 2010)*.

Free Trade Model support. We support the Free Trade model. Cross ownership and vertical integration restrictions are artifacts of 1999 conditions and should be abolished in their entirety short of an actual showing of market dominance by specific players. We are also concerned about the current working group process—i.e., registries and registrars deciding together to shape the competitive landscape is harmful to the Internet, to ICANN and the participants in the group. Competition authorities in the U.S. and Europe are the right entities to examine and control issues of anticompetitive behavior on the Internet. We strongly oppose the Afilius/PIR proposal (aka RACK)—it mainly advances the interests of the proposers. The CAM model, among other problems, is liable to serious unintended consequences, up to and including wholesale governmental intervention in ICANN accreditation processes. We also will not support any proposal that includes an arbitrary percentage threshold of either ownership or control (e.g., JN2), just because it is less bad in other ways, or because the proposers seem less motivated by self-interest. If we are asked to choose between the various proposals other than the Free Trade model, we prefer that outlined in the DAGv4. *Minds + Machines (21 July 2010)*. *.MUSIC (22 July 2010)*.

Clarify the terms “registry services” and “Registry Services” as used in the guidebook. The use of both lower case and upper case for these words is confusing and requires clarification. We believe the upper case “Registry Services” is intended to create a specific definition to the list of “Registry Services” outlined at Question 23 of the Evaluation Criteria and within <http://www.icann.org/en/registries/rsep>. It is not clear if the lower case usage assumes the same meaning. In some sections the usage may be interpreted in a manner which is not ICANN’s actual intent—e.g., Module 1, Restrictions on Registrar Cross-Ownership, point 3 (page 1-18). *AusRegistry (20 July 2010)*.

## **Analysis of Comments**

Vertical integration has been the subject of substantial study and review. The Vertical Integration PDP Working Group has submitted a Revised Initial Report on Vertical Integration Between Registrars and Registries (available at <http://gnso.icann.org/issues/vertical-integration/revised-vi-initial-report-18aug10-en.pdf>), which sets out several potential approaches to this issue. The GNSO has indicated that no consensus has been reached on this issue. As a result, the ICANN board of directors, following extensive and careful review of input from legal advisors, economic experts and the community has directed the ICANN staff to remove many restrictions on registry-registrar cross ownership in the draft registry agreement being posted as part of AGBv.5.

Although restrictions on cross ownership have been removed, the Board determined that the registry agreement should contain restrictions on any inappropriate or abusive conduct arising out of registry-registrar cross ownership, including without limitations provisions protecting against:

- a. misuse of data; or
- b. violations of a registry code of conduct;

The Board also directed that these provisions may be enhanced by additional enforcement mechanisms such as the use of self-auditing requirements, and the use of graduated sanctions up to and including contractual termination and punitive damages.

As a result of this directive, the registry agreement will now require that future Registry Operators comply with a Code of Conduct (a suggested form is set forth in new Specification 9), designed to prevent abuses that could result from registry-registrar cross ownership. Violation of this requirement is a breach of the new Registry Agreement.

In addition, ICANN will have the ability to refer issues raised by cross ownership to the relevant competition authorities.

Finally, Specification 1 to the draft registry agreement being posted as part of AGBv.5 has been amended to provide that ICANN will have the ability to cross-ownership issues through the consensus and temporary policy process.

## **Whois**

### **Key Points**

- Searchable Whois is supported by certain members of the community interested in the protection of third party intellectual property rights;
- While such a service may offer some benefits, the potential costs to other community members should be further studied.

### **Summary of Comments**

Support for Searchable Whois. The special arrangement approved by the Board on an explicitly non-precedential basis for the tiny .name registry is basically irrelevant. The registry agreements ICANN recently signed for .asia, .mobi and .post go well beyond what is proposed in DAGv4 and represent

current best practice for gTLD registry agreement. They require fully searchable Whois services at the registry level and for all registrars sponsoring registrations in those domains, and also call for registrars to adhere to a compliance review policy. These reasonable and practical requirements should be carried forward in the base registry agreement for new gTLDs. Given that more accurate Whois data is an essential tool in combating malicious and illegal behavior online, ICANN has provided no cogent reason why it should not take a more proactive role in setting the ground rules for the new gTLD space. *COA (21 July 2010)*. Microsoft strongly supports the proposed requirement for a fully searchable Whois service (Spec. 4, Section 1.8). The benefit would be even greater if registries were required to require their registrars to also provide fully searchable Whois. ICANN must improve Whois compliance efforts; otherwise the searchable Whois requirement is likely to be of less value. *Microsoft (21 July 2010)*.

Opposition to Searchable Whois. Specification 4 contains a new Section 1.8 that is highly problematic. It presents technical, policy, privacy, security, and legal issues for the wider ICANN community. The DAG process is insufficient for understanding those issues and making informed, fact-based decisions about them. The RySG requests that 1.8 be deleted for the following reasons:

1. Policy: By making the service mandatory, ICANN would make gTLD policy unilaterally via the contract process. And it would circumvent a current GNSO policy-making effort. This WHOIS service is currently under review at the GNSO via its “Inventory of WHOIS Service Requirements” effort (<http://gnso.icann.org/issues/whois/whois-service-requirements-draft-final-report-31may10-en.pdf>) The technical experts who reviewed the service via the GNSO process noted that it presented a variety of technical, privacy, and social issues that needed further examination.

2. Technical: it is unknown if such services can be provided within the contract’s WHOIS SLAs. Such a service is not technically easy to provide. To our knowledge, a service of this nature has never been attempted on a large scale. The requirement “without arbitrary limit” means the service must allow extremely large, broad searches, which could swamp or stall the service. They might also require cookie tracking, which is not even possible for port 43 queries.

3. Cost: the service will impose new, significant, and unknown costs on registry operators.

4. Legal: The service is not required to establish bad faith under the UDRP. Many adequate resources and tools exist to do that, and have been used successfully for the past ten years.

5. Technical: Specification 4 deals specifically with Port 43 and Web-based WHOIS. Those may be inappropriate mechanisms to perform such searches.

6. Privacy: the service presents some obvious issues that members of the wider ICANN and Internet community may be concerned about. The privacy issues should be examined carefully, and more attention should be brought to them than the DAG4 affords. The phrase “subject to applicable privacy policies” is confusing, and the RySG does not know what it might mean.

7. Security: The DAG process is insufficient to quantify the possible malicious uses of such a service. The issue deserves greater study.

8. Technical / Security: it is unknown what “control structure” may be sufficient “to reduce the malicious use of the searching capability itself.” It is impossible for Registry Operators to build compliant control solutions since no one seems to have defined the problem.

9. Security: there are other, existing tools that provide cross-identification of domain names during professional investigations of malicious conduct. The proposed WHOIS service is not yet justified on the basis of security because no one knows if the service’s drawbacks outweigh the supposed security benefit.

10. Security: the SSAC has demonstrated that WHOIS is mined by spammers (See SAC023: <http://www.icann.org/en/committees/security/sac023.pdf>) The service above could make this even easier for spammers and other bad actors.

11. Legal and cost: The parenthetical comments in 1.8 DAG4 misunderstand existing contracts. Existing contracts say that such WHOIS access may optionally be provided by “a participating registrar, at the registrar’s expense”— not provided by the registry, or at the registry’s expense, as DAG4 requires. *RySG (21 July 2010)*.

This paragraph poses both substantive and procedural problems. The bracketed language proposes additional requirements for exposure of WHOIS data. The requirement would place unwarranted additional burdens on registries and registrants without corresponding benefits to the community at-large. Bracketed text buried deep in DAGv4 is not the appropriate place to make WHOIS policy. *W. Seltzer (21 July 2010)*. *R. Dammak (July 2010)*.

Thick Whois should be required by the Registry Agreement, as recommended by the IRT.

The DAGv4 requires registry operators to provide a publicly available WHOIS service but fails to emphasize the importance of providing accurate and accessible registry information. ICANN should educate registries regarding the importance of providing reliable registrant contact information that is available to users in a fair manner. This is particularly important for not-for-profits with limited budgets and resources. *AAMC (21 July 2010)*. *IPOA (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Thick Whois lookup—inapplicable to government and military. The specification 4, the data disclosure pursuant to a thick Whois model obviously is not applicable to TLDs for government and military use as the security of that data is of great importance and should not be fully disclosed. The best solution is to make some exceptions and make the Whois lookup service available to the public within proper range. *CONAC (22 July 2010)*.

Whois data quality policy disclosure. ICANN should require applicants to disclose their policies for Whois data quality—i.e. spell out how they will require registrars who sponsor registrations in the new gTLD to ensure the accuracy and currency of Whois data that they collect. The best approach is to include Whois data quality requirements in registry agreements with new gTLD operators, but disclosure in the application is a worthwhile fallback. ICANN should be able to use contract compliance tools to pursue registries that misrepresent their plans on critical issues such as improving Whois data quality. *COA (21 July 2010)*.

## Analysis of Comments

A requirement to provide searchable Whois data is strongly supported by certain members of the community. However, the RySG has raised a number of technical and legal impediments to the implementation of such a service. The ICANN board of directors has referred this matter to its working group on data/consumer protection, which has not completed its review. For the purposes of the draft registry agreement being posted as part of AGBv.5 contemporaneously with this summary and analysis, the draft requirement has been removed pending further ICANN board direction. Among other options, the working group will consider a proposal that the searchable Whois be retained in the Guidebook as optional – that an added point would be awarded for the commitment to implement this tool; community comment is also invited on this – please refer to the evaluation scoring criteria being posted for public comment as part of AGBv5.

The Whois model in the draft registry agreement is intended to be universally required but exceptions for government and military TLDs might be considered.

Whois requirements are spelled out in the draft registry agreement, and failure to maintain the prescribed records is a breach of the registry agreement entitling ICANN to take action to ensure accuracy. The question of whether to impose additional Whois verification or accuracy obligations on registries would be best addressed through GNSO policy processes, which can be made applicable to all gTLD registrars and registries and not just new gTLD registries.

## Rights Protection Mechanisms

### Key Points

- Registry-registrar agreements should act to bind registrars to the RPMs contained in the draft registry agreement;
- The draft PDDRP contains procedures for delaying the imposition of ICANN imposed remedies.

## Summary of Comments

### Section 2.8 Protection of Legal Rights of Third Parties.

1. The RySG notes that while the Registry Operator is required to include the RPMs identified in Specification 7 (including presumably the URS) in their registry-registrar agreements, ICANN should also endeavor to require registrars in their ICANN accreditation agreement to also abide by such RPMs. In addition, Registry Operator shall be entitled to require that registrars in their agreements with registrants require registrants to: (i) also abide by such RPMs (including the URS); (ii) specifically acknowledge that the Registry (and Registrar) has the right to take action with respect to a domain name as provided for under such RPMs and (iii) the Registry shall have no liability to either Registrar, Registrant or any other person for any action taken in accordance with the terms of any RPMs (including in particular the URS).

2. The language requires Registry Operators to “comply with all determinations made by ICANN pursuant to Section 2 of Specification 7.” The RySG notes that a strict reading of this language may imply

that a Registry Operator may be in breach even if it is exercising its right to appeal or review decisions of the PDDRP or RRDRP panels. Therefore it should state: “Subject to any right to appeal or review under the applicable policies, Registry Operator must comply with all determinations and decisions made by ICANN pursuant to Section 2 of Specification 7.”

3. Finally, Specification 7 allows ICANN to amend the RPMs at its discretion. It should be made clear that Specification 7 (and each of the RPMs contained therein) may only be modified through the consensus policy process as it falls within the “picket fence” under Section 1.2.5 of Specification 1. *RySG (21 July 2010)*.

RPMs (5-11). CORE favors pre-launch and post-launch RPMs. These should not prevent the applicant from forming community-based registration eligibility criteria which obviate the necessity of the RPMs ICANN proposes. *E. Brunner-Williams (Module 5, 21 July 2010)*.

## Analysis of Comments

The registrar accreditation agreement with ICANN was recently amended following significant input from Internet stakeholders. Further revisions of that agreement can be made through that process and enforcement of new RPMs introduced by the new gTLD implementation will be added to that agenda. In any case, a requirement to comply with RPMs in the registry-registrar agreement is sufficient to bind registrars.

The draft PDDRP contains procedures for delaying the imposition of ICANN-imposed remedies. Agreeing with the RySG comment, the form registry agreement posted with the new version of the Guidebook will be amended to clarify that ICANN imposed remedies are subject to Registry Operator’s rights under the relevant dispute resolution procedure.

Applicants are free to form community-based registration eligibility criteria in accordance with the applicant’s application for the TLD. However, all registry operators will be required to comply at least with ICANN mandated RPMs. For certain community TLDs, this implementation should be straightforward and not onerous due to the registration restrictions in place.

## Pricing

### Key Points

- The RySG wants flexibility to be able to offer short-term marketing plans;
- Uniform renewal pricing is necessary to prevent predatory pricing, but different pricing models are available with proper disclosure and consent of registrants;
- Hard price caps are not necessary or appropriate for the new gTLD program.

## Summary of Comments

### Section 2.10 Pricing for Registry Services.

The language contained in the parenthetical that would require 30 days notice in the case of new registrations and 180 days with respect to renewals for the “elimination of any refunds, rebates,

discounts, product tying or other programs which had the effect of reducing the price charged to registrars” would unduly and unnecessarily restrict the ability of registries to engage in seasonal or short-term and targeted marketing programs and/or respond to changes in market conditions with the potential effect of actually reducing the ability of registries to compete on price. The proposed language would not provide new registries with the flexibility in pricing and marketing needed to compete in what is likely to become a crowded marketplace. The 180 day notice requirement when applied to the elimination of refunds, rebates, discounts, product tying or other programs is likely to discourage the introduction of innovative products and services.

Similarly, the requirement that a Registry Operator offer all domain name registration renewals at the same price, unless, the registrant agrees in its registration agreement with a registrar to a higher price at the time of the initial registration also fails to take into account the realities of the marketplace and the true nature of the relationship between Registries, Registrars and Registrants. Registrants enter agreements with Registrars, and the price they pay for a domain name is dependent upon a multitude of factors including term length, number of domains registered, and services purchased that are outside the control of the Registry. Registrars, not Registries, set the price charged and renewal terms to Registrants. Furthermore because of the many different registrar business models, the type of “conspicuous disclosure” of the renewal price contemplated by Section 2.10 is often not practical or realistic, particularly if the price is bundled with other services.

The proposed language would also effectively prohibit Registries from offering marketing programs, refunds, rebates, discounts, product tying or other programs directed at renewing registrants or in any way takes renewal registrations into account. The proposed language could also be deemed to limit the ability to up sell registrants or engage in marketing directed at particular markets.

The RySG recommends that (i) the notice period for the elimination of any refunds, rebates, discounts, product tying or other programs be the same 30 days for both new and renewals of domain registrations; (ii) that language be added to make it clear that nothing in this section prevents a registry from offering rebates, discounts, product tying or other programs of limited duration provided that the duration of such offering rebates, discounts, product tying or other programs is disclosed up front; and (iii) delete the second to last sentence of the section.

In addition, the RYSG repeats its comments from DAG3 which asked in the final sentence, what does “public query-based DNS lookup service” mean? Does that sentence mean that alternative models are not allowed, such as free registration with fees for resolution?

In light of the above, the RySG recommends that the text of Section 2.10 be amended as specifically recommended in RySG’s comments.

*RySG (21 July 2010).*

ICA appreciates Section 2.10 renewal pricing clarification. ICA appreciates the clarifying language that “registry operator shall offer all domain registration renewals at the same price, unless the registrant agrees in is registration agreement with a registrar to a higher price at the time of initial registration of the domain name following clear and conspicuous disclosure of such renewal price to such registrant.” This will assure that registries cannot tax domain registrants on the economic success of their domains by arbitrarily imposing higher renewal charges. *ICA (21 July 2010).*

Section 2.10—clarification. The phrase “at the same price” is unclear as it has no qualifier (i.e., the same price as what?). The following underlined language should be added to clarify this: “Registry Operator shall offer all domain registration renewals at the same price as the price charged for the initial registration of that name, unless...” *R. Tindal (21 July 2010).*

Price caps should be imposed. To show that ICANN is acting to protect consumers, it is imperative that there be hard price caps embedded in the agreements. Section 2.10 of the base agreement and specifications contains no hard price caps. Registries will be free to charge \$1,000/year per domain or \$1 million/year per domain, for example, to maximize their profits. Because of the “equitable treatment” clause, by not putting in price caps ICANN opens the door for VeriSign and other registry operators to have unlimited price increases. ICANN is not promoting competition but is perpetuating an abusive monopoly –i.e., why is every other technology going down in price, but .com costs are going higher? If ICANN is suggesting that competition will lead to lower prices, there is no good reason that the hard price cap should be any higher than that for .com. *G. Kirikos (1 June 2010).*

Price caps should not be imposed. Imposing price caps will have a detrimental effect on competition and increased diversity of services. Companies that focus on smaller, niche markets like .museum and .pro and which cannot benefit from economies of scale will be unable to exist since they would not be able to cover their costs if they could not charge more than .com. *M. Iqbal (9 June 2010).*

## Analysis of Comments

ICANN understands that the current language with respect to special programs that have the effect of reducing the price charged to registrars may be unduly restrictive on registry operators’ ability to conduct short term marketing programs for initial registrations and to respond to fast changing market conditions. ICANN has amended this language in the current draft of the form registry agreement posted with AGBv.5 to address this concern.

The requirement that each renewal registration be offered at the same price as all other renewal registrations is intended to require that all renewal registrations be priced identically. The provision is not meant to require a specific renewal registration be priced at the same price as its initial registration. The intent of this provision is to prohibit discriminatory pricing in the case of successful registrations that cannot easily change names upon renewal. The exception to this provision allows registry operators to operate “premium name” programs that can be renewed at higher prices so long as the registrant agrees to the higher renewal pricing at the time of initial registration and provides documents that evidence that agreement to Registry Operator. It is recognized that the registry operator does not have direct contractual privity with the registrant, but it is intended that this requirement could be satisfied by the registry operator through the registry-registrar agreement. In accordance with the RySG comment, the provision has been clarified to require that if a registry operator wishes to implement a premium pricing program for any of its domains, then it must receive documentation from the registrar (which may be required through the RRA) demonstrating that notice of the premium pricing has been provided to registrants and such registrants have given informed consent to the pricing scheme.

The final sentence of the pricing provision in the form registry agreement posted new Guidebook was modified to make clear that Registry Operator may not charge additional fees for a public query-based DNS lookup service.

After significant discussion and study, it has been determined that price controls would be inappropriate for the new gTLD program. The proposed registry agreement includes price notice provisions, but a general system of price controls would not be workable due to the expected diversity of registry business models and the need for registries to be able adapt their business models to changing environments and competition. Registries should not be restricted from offering a higher level of service or security if that might entail charging a higher price for their services. It is expected that new registries will compete vigorously with each other and with existing registries, both on price and services, to attract new customers and new initial registrations. (The renewal price provisions in the base registry agreement are intended to protect against discriminatory pricing on renewal.) There is no need for a centralized and uniform price control mechanism across all gTLDs, particularly where market power is not an issue. Nor could such a program be effective considering the number of innovative and different business models anticipated. Controls would shackle that innovation. However, if market power were to develop and be abused, then governmental consumer protection and competition authorities will have all powers available to them under law to ensure that consumers and competition are protected. Also, protections have been put in place in response to community comments in order to prevent certain abuses that might occur relating to renewal pricing. For additional discussion please refer to the reports posted at <<http://www.icann.org/en/announcements/announcement-06jun09-en.htm>>.

## Other Registry Operator Covenants

### Key Points

- ICANN will implement reasonable parameters on its abilities to conduct operational audits;
- Although disfavored by certain members of the registry community, the continuing operations (financial) instrument is a vital tool in ensuring the security and stability of the DNS and the Internet;
- ICANN technical staff has refined the emergency thresholds that could potentially trigger an emergency transition of a registry;
- Registry operator will be expected to cover the costs associated with an emergency transition as it ultimately would be at fault for the registry failure.

### Summary of Comments

Section 2.1—the process for adoption of consensus policies is not specified. The second sentence should be changed as follows: “as such policy may in the future be modified in accordance [with] ICANN’s Bylaws applicable to Consensus Policies.” *RySG (21 July 2010).*

Section 2.11—Contractual and Operational Compliance Audits. The RySG accepts that ICANN has the right to conduct contractual and operation audits up to 2 times per year. However, ICANN should understand that these audits are disruptive to normal business operations and they should commit to conducting these audits in a manner that does not disrupt the normal operations of the registry. *RySG (21 July 2010).*

The RySG also notes that 3 business days is way too short of a notice period in that key personnel for registries that must be present during these audits plan their schedules much further in advance than 3

business days. Perhaps at least 5 business days may suffice to ensure that any key personnel are able to make themselves available to ICANN. *RySG (21 July 2010)*.

Continued Operations Instrument – opposition. The requirement for a financial instrument that will guarantee at least 3 years of operation of essential registry services in the event of business failure is an unnecessary drain on the resources of prospective registries already damaged by the long delay of the new gTLD program. The requirement is especially punitive for small registries and will tie up important resources. It will discourage deserving applications and contribute to the failure of others. The goal of protecting registrants can be met by different means. Instead, continuity can be assured through cooperative agreements between registries and/or registry service providers who agree to provide these services in the failed registry. This sort of arrangement, already contemplated by ICANN in its Registry Transition Process document, should be extended to the application evaluation portion of the DAG. ICANN should provide for alternative, non-financial means of guaranteeing registry service continuity, either wholly or in part. *Minds + Machines 21 July 2010*. *NIC Mexico (21 July 2010)*.

Continued Operations Instrument – support. Neustar supports the financial instrument requirement. ICANN has done a comprehensive job to deal with situations where a registry operator is also the back-end registry services provider. A financial instrument is appropriate in such a case since there is no third party to continue the registry operations and therefore ICANN could incur significant costs for transition. The current language does not adequately address the situation where the registry operator does not operate the registry services itself but outsources it to a back end registry services provider. In such cases failure of the registry may not result in loss of critical services if the back-end provider continues operations in the event of an applicant failure. This approach would not require a financial instrument. Neustar notes that ICANN has already addressed the issue of the back-end registry service provider failure by requiring contingency planning and submission of a transition plan. *Neustar (21 July 2010)*.

Section 2.13—Emergency Transition. Taken together, 2.13 and 6.5 say that if a registry operator misses a single escrow deposit, or takes allowed maintenance periods for certain services, ICANN may remove the TLD from the registry Operator’s control. We do not believe this was the intent, but these issues must be fixed so the contract is reasonable and not in conflict with itself. These provisions should be modified for the following reasons:

- DNSSEC: it is unknown what “DNSSEC” means here; the term must be defined. Note that registries are allowed SRS downtime, which means the ability for registrars (registrants) to update keys will occasionally and allowably be offline.
- Data escrow: currently the contract says that missing even one escrow deposit is an emergency and is cause to transition the registry. Such is not an emergency, especially since issues beyond the control of a registry operator (such as Internet transit issues and problems at the escrow provider) may occasionally prohibit the completion of a deposit. The contract should specify that a number of missed deposits in a row should constitute a breach, perhaps at least a week.
- DNS: As per 6.4, registries are allowed to have a DNS name server down for as many as 432 minutes (7.2 hours) per month. Four-hour downtimes would therefore be perfectly allowable. If ICANN is saying that “DNS service” for the TLD should always be 100% available through at least one nameserver, that should be made clear.

In addition, the RySG notes that the requirement that a Registry Operator pay ALL costs incurred is the equivalent of requiring the Registry Operator to write a blank check to ICANN and the designated Emergency Operator. There must be an element of reasonableness, a monetary cap, and an ability for

the Registry Operator to review (and even audit) those expenses as well as an opportunity to dispute the fees. *RySG (21 July 2010)*.

Cost of continuity of operations. Determining the cost for registry continuity requires a discussion of what “functions” are “critical.” Continuity activity is a sufficiently minimal capital reserve element and care should be taken that unnecessary cost is not created. ICANN should make commercially reasonable estimates of the reasonable minimal function cost and publish that for further comment. *E. Brunner-Williams (Module 5, 21 July 2010)*.

Registry operator obligations to a TLD community (Module 5, sec. 2.14—transition to delegation). The requirement that the registry operator operates the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD provides a critical, long-term safeguard for any Community that chooses to delegate authority to a particular TLD operator. *Big Room (21 July 2010)*.

“Relevant community that must be consulted” (p.4, gTLD Registry Transition Process Model). This reference provides assurance that a TLD operator will not change without input from the community under which the current and/or prospective TLD operator would derive authority. *Big Room (21 July 2010)*.

## Analysis of Comments

Section 2.1 has been clarified to require that changes to the RSEP process only be made pursuant to ICANN’s Bylaws and the process for adoption of Consensus Policies.

ICANN has implemented reasonable parameters on its abilities to conduct operational audits in the draft registry agreement included in the Guidebook. The parameters seek to balance the desire for effective contractual compliance with the need to provide a predictable operating environment for registry operators.

The continued operations (financial) instrument that is required before a new registry launched operations is a vital tool in ensuring the security and stability of the DNS and the Internet. It will ensure that the financial resources are in place to operate and transition a failed registry. Additional costs imposed on registry operators are outweighed by the benefits to the Internet community and registrants as a whole. The presence of an independent back end registry services provider may not provide adequate safeguards against a failed registry if the services provider lacks the ability to recoup the costs of operating the registry. The continued operations instrument will provide for these costs.

In response to comment, the emergency thresholds that could potentially trigger an emergency transition of a registry have been modified. Revised thresholds are included in the specifications to the draft registry agreement included with this 5<sup>th</sup> edition of the Guidebook.

Registry operator will be expected to cover the costs associated with an emergency transition, as it is essentially the cause for the registry failure. ICANN recognizes that these costs must be reasonable under the circumstances and that documentation of the costs should be provided to registry operator (both of these issues have been addressed in the draft registry agreement included with the new Guidebook. Because of the wide variety of business models that may be introduced in connection with

new gTLDs and because the size and sophistication of each registry will differ greatly, ICANN is not in a position to make reasonably accurate predictions as to what the costs of transitioning a failed registry may be.

## Covenants of ICANN

### Key Points

- ICANN will consider any specific proposals to enhance its operational covenants.

### Summary of Comments

Article 3—Covenants. The RySG still notes that the covenants in Article 3 are still worded differently and in many cases less favorably to gTLD Registries than the language contained in the proposed ccTLD Fast Track Agreements. Can ICANN please explain why such different wording is warranted? *RySG (21 July 2010)*.

### Analysis of Comments

Different agreements require different contractual terms that ICANN believes to be appropriate given the context.

ICANN included the specific language that the RySG requested for the ICANN covenant with respect to the root. If there are additional specific recommendations, ICANN will consider those as well.

## Termination

### Key Points

- ICANN has implemented the edits to subparagraph (d) regarding termination recommended by the RySG as they provide additional safeguards and therefore promote stability.
- Registry operator would no longer have the rights to operate the registry in the event of any termination of the agreement.
- ICANN has requested that the RySG provide more detail on what a Service Level Agreement with ICANN would cover and how it would be enforced.

### Summary of Comments

ICANN discretion. ICANN should be able to terminate the agreement in appropriate circumstances. *MARQUES/ECTA (21 July 2010)*.

Sec. 4.3 Termination by ICANN.

The RySG appreciates the changes added in Section d, however recommends that the following language be added: “With respect to proceedings described in this subparagraph (d) (i-v) that are involuntary proceedings commenced or instituted against Registry Operator, Registry Operator shall have the opportunity to contest such proceedings, and ICANN’s right to terminate shall not take effect if such proceedings are dismissed within thirty (30) days following Registry Operator’s receipt of notice of their institution.”

The RySG understands why Section e was added, but remains concerned that the language above would supersede the rights to review and/or appeal decisions under the PDDRP. Therefore the RySG requests that ICANN make it clear in the language that this termination would only apply after all reviews and appeals under the PDDRP and this agreement are exhausted. *RySG (21 July 2010)*.

Section 4.4. Termination by Registry Operator. The RySG repeats its comments from v3, as they are still relevant. More specifically, we would like a better understanding of what it would mean to terminate a contract with ICANN for ICANN’s breach, considering that ICANN presently has the sole authority to grant gTLDs. Would the relevant registry get to keep the ability to continue operating the registry for that particular TLD? In any event, termination is not a sufficient remedy in the event of a breach by ICANN, as it provides a Registry Operator with no ability to recover any losses. *RySG (21 July 2010)*.

In addition, RySG believes that ICANN should have Service Level Agreements with the registries to provide for an additional meaningful remedy to a breach by ICANN. Monetary penalties and sanctions (which are not subject to the limitations of liability) along with a right to be awarded Specific Performance may be the only potential meaningful penalties as opposed to termination by the Registry Operator. *RySG (21 July 2010)*.

## Analysis of Comments

ICANN has implemented the edits to subparagraph (d) recommended by the RySG in the draft registry agreement included with the Guidebook.

Registry operator is free to challenge ICANN’s determination to terminate the agreement pursuant to Section 2 of Specification 7 during the 30-day notice period provided by the agreement. The PDDRP also provides that any remedy imposed by ICANN will be stayed in the event that registry operator initiates an arbitration proceeding pursuant to Section 5.2 challenging the PDDRP determination. The draft registry agreement included with the Guidebook will clarify the ICANN’s right to terminate is subject to Registry Operator’s rights under the applicable dispute procedure.

In addition to the right to terminate the agreement in the event of a fundamental and material breach by ICANN that is uncured, registry operator may bring a claim in arbitration for damages. In the event of a termination by registry operator, ICANN would have the right to re-delegate the TLD pursuant to Section 4.5 of the agreement. Registry operator would no longer have the rights to operate the registry in the event of any termination of the agreement. The draft registry agreement included with the Guidebook clarifies that the Registry Operator would lose the right to operate the registry for the TLD in the event of a termination of the agreement or expiration of the term of the agreement.

The ability to challenge, as suggested by the comments, we believe will provide for less disruption and softer landings in cases of termination.

ICANN has requested that the RySG provide more detail on what a Service Level Agreement with ICANN would cover and how it would be enforced.

## Re-delegation of TLD

### Key Points

- Alternative provisions for a “.brand” TLD have been addressed in the registry agreement to the extent feasible in a manner to provide appropriate protections.

### Summary of Comments

#### Draft Base Registry Agreement—section 4.5 redelegation alternatives.

COA is pleased that ICANN provided an alternative version of section 4.5 under which a TLD cannot be redelegated over the reasonable objection of the original delegate. This provision could be an important safeguard for brand owners who may be interested in experimenting with a .brand registry, since such new TLDs will not be applied for if there is a risk that the TLD might be redelegated to a third party. *COA (21 July 2010).*

The alternative Section 4.5 and the gTLD Registry Transition Processes model are helpful, but further clarity is needed. As written Section 4.5 is not clear whether the registry operator’s ability to reasonably withhold consent applies to ICANN’s transition of the TLD to a successor registry operator or to providing ICANN with the registry data for the TLD. If it is the former, the problem appears to be solved. If it is the latter, it would still be possible for a .brand TLD registry operator to decide to terminate the TLD and, subject to the terms of the registration agreement for its TLD, cancel the second-level registrations. In that event, there would be little useful registry data to transition, but ICANN could still transition the TLD to another registry operator not affiliated, connected or associated with or sponsored or approved by the brand owner registry operator. On its face, and subject to the alternative Section 4.5 ambiguity, the gTLD Registry Transition Processes Model would allow ICANN to launch an RFP to transition a .brand TLD to another registry operator where the .brand registry operator decided to terminate operation of the TLD and did not identify a prospective successor. It would be highly undesirable for an RFP process to result in transition of a .brand TLD to another registry operator not affiliated, connected or associated with or sponsored or approved by the brand owner registry operator. If that is not ICANN’s intent, the appropriate clarifications and revisions should be made. *Microsoft (21 July 2010).*

Registry Transition Process Model. Hogan Lovells welcomes introduction of a new Registry Transition Process model which includes provisions for emergency transition in the case of prolonged Registry technical outages. *Hogan Lovells (21 July 2010).*

### Analysis of Comments

The alternative Section 4.5 is derived from the .POST registry agreement and was originally contemplated to apply to those TLDs operated by intergovernmental organizations or government entities because it is likely there is no suitable successor operator. This scenario may also be applicable to certain (but not all) community TLDs, TLDs used for infrastructure purposes only, or other types. That

is why the agreement states that the decision to redelegate will be undertaken with discretion. Significant work to identify TLD types or criteria for deciding when delegation is always appropriate or inappropriate did not result in the development of criteria. There is too much uncertainty in anticipated TLD types. ICANN recognizes that delegation of a .brand TLD might not be necessary or appropriate in the event that the registry operator of such a TLD elected to voluntarily wind down the registry. The agreement affords discretion as to whether or not a TLD is re-delegated in order to protect registrants in the TLD and parties that might be negatively affected if a gTLD were to be inappropriately re-delegated or not re-delegated.

## Dispute Resolution

### Key Points

- ICANN has proposed a compromise with respect to the number of arbitrators in the draft registry agreement included with AGBv.5.

### Summary of Comments

Section 5.2 Dispute Resolution—Arbitration. The RySG continues to object to the language on the number of arbitrators insisted on by ICANN. Although ICANN added language to allow 3 arbitrators, it is ONLY if both parties agree. This is not acceptable because it gives ICANN the unilateral right to always insist on 1 arbitrator. This is especially disturbing in light of the fact that ICANN continues to insist on punitive and exemplary damages. Given the seriousness of the remedies, the registry should have the right to sufficient safeguards, including the right to 3 arbitrators if it so elects. *RySG (21 July 2010)*.

### Analysis of Comments

As stated during the consultation held with the Temporary Drafting Group on 8 September 2010, ICANN has proposed a modified provision in the draft registry agreement included with AGBv.5 that provides for the three arbitrators in the event that ICANN is seeking certain remedies in the arbitration.

## Registry Fees

### Key Points

- The uniform registry fees proposed by ICANN in the registry agreement represent a good faith effort by ICANN to estimate the costs to ICANN of providing services to new gTLDs.
- The costs of the RSEP process will be borne by registry operator in an effort to match benefits to costs, (ICANN may elect to pay a portion of the fee);
- In line with past practice, collection of the registrar fee from registries is necessary in the event that registrars fail to approve the variable accreditation fee; registry operator will be able to recoup the cost of the fee from registrars.

### Summary of Comments

Section 6.1 Registry-Level Fees. RySG repeats the comments it made to the v1, v2 and v3 Registry Agreements: “The GNSO policy on new gTLDs recommends that ICANN take a consistent approach to registry fees, but in no way mandates that ICANN impose a one-size-fits-all model. Registry operators strongly reject this model. The proposed mechanism seems to abandon any cost-recovery obligations and, in the end, amounts to a revenue share.” *RySG (21 July 2010).*

Section 6.2 Cost recovery for RSEP. RySG urges ICANN to reconsider this provision in light of the strongly negative affect it could have on innovation in the TLD space as detailed in RySG’s earlier comments on versions 1, 2 and 3 of the registry agreement. In addition, the RySG notes that no changes have been made to the amount of the fees recommended for the RSEP panels. We believe the level of fees seems extremely high. What are the individual cost factors that make up this estimate? The RSEP process was implemented several years ago when there was no historical basis that could be used to develop a cost model. There are now a few actual RSEP cases that have been processed. The cost model should be re-evaluated and made more cost effective. *RySG (21 July 2010).*

Section 6.3 Variable Level Registry Fee. RySG repeats is comments regarding v2 and v3 also objects to the notion of registry operators being forced to act as guarantors for registrars, especially in light of ICANN’s role in accrediting these registrars, including vetting and due-diligence regarding financial qualifications of such registrars. At this point in time, registries have no ability to select the registrars they do business with. If ICANN were to revisit the obligation of registries to use all registrars accredited by ICANN that elect to do business in a TLD, then we can revisit this obligation as it would allow the registries to perform due diligence. If ICANN accredits registrars who can’t or won’t pay, this should not become an obligation of registries. RySG repeats the comments it made regarding the v3 Registry Agreement, which suggests additional language: “Registry Operator shall only be required to remit to ICANN the fees described in this Section ...that it actually receives from registrars after submitting invoices for such fees. Registry Operator shall not be deemed in any way to be a “guarantor” for registrars, and has no obligation to make affirmative collection efforts beyond those made in its sole discretion in the ordinary course of business. Registry Operator’s failure to collect any such funds from registrars shall not be deemed a material breach of this Agreement.” Finally, as more of the burden of payments to ICANN come from the registries, the registries believe that it should have a similar approval right to the ICANN budget as currently enjoyed by the registrars. *RySG (21 July 2010).*

Different fee models for different types of TLDs. Given the high fees and costs associated with applying for and operating a new gTLD, ICANN should consider setting up different fee models for different types of TLD applications to alleviate the costs on applicants. A sensible fee model will greatly enhance the chance of success for the new gTLD process. *CNNIC (21 July 2010).*

Reduced Not-for-profit organizations. ICANN should reveal and detail its actual costs for reviewing each new gTLD application and consider setting a lower cost pricing structure for not-for-profit organizations that will allow ICANN to recover its costs without imposing additional overhead on the not-for-profit applicants. This transparency and pricing consideration should also apply to extended evaluation fees, objection filing and proceeding fees (in objection proceedings fees should be capped, or at least the initial fees that must be paid as a “deposit” on the proceeding). ICANN should consider a two-tiered cost structure to separate commercial uses of the new gTLDs from the informational, educational and lifesaving functions served by not-for-profit organizations. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

#### Reduced fees for small cities, small cultural and linguistic community TLDs.

Special consideration, including reduction of the \$185K application fee and \$25K annual fee, should be given for small cities and small cultural and linguistic communities which do not intend to compete with general commercial TLDs such as .com or new brand TLDs and for whom the current level of fees is not affordable. It is understood that a lower but appropriate application fee is still needed in order to prevent excessive applications. *JIDNC (21 July 2010)*.

Reduced fees for developing country applicants. Special consideration regarding technical requirements and fees for developing country applicants representing cultural, linguistic and geographical communities is appropriate and consistent with the advice of the GAC in its Brussels communication. A. Al-Zoman (21 July 2010). Arab Team (21 July 2010).

## Analysis of Comments

The uniform registry fees proposed by ICANN in the registry agreement represent a good faith effort by ICANN to estimate the costs to ICANN of administering the new gTLD program. As such, fee reductions for different types of TLDs are not possible and would result in potential shortfalls in funding for the gTLD program.

The cost for RSEP will be the responsibility of the registry operator seeking to benefit from the proposed new service. Given the potential volume of new gTLDs and the multitude of potential services that could impact the security and stability of the DNS and the Internet, ICANN cannot agree to absorb this cost as there are not the resources available to do so. Alternatively, ICANN could raise fees in other areas but because there would not be a one-to-one match between effort and cost, the increase in fees would probably be set higher than necessary in order to mitigate risk. The current agreement provides the flexibility for ICANN to cover some of the RSEP costs in appropriate situations at its discretion. ICANN will seek to make the RSEP process as cost effective as possible.

The mechanism for the collection of the Variable Level Registry Fee (i.e., registrar fees) is based on all current registry agreements and is necessary in order to ensure that ICANN collects sufficient funds to perform its obligations. In the event that registrars fail to approve this fee, registry operator will be invoiced to cover the fee and may include it as part of the invoiced fees to registrars. Registry operator's registry-registrar agreement should contemplate this possibility and require registrar to agree to the increased fee in the event registrars fail to approve the fee.

## Indemnification

### Key Points

- With regard to risk sharing among ICANN and its contracted parties, the risks of TLD operation should be borne by registry operator;
- ICANN has agreed to consider certain limitations on registry operator's indemnification obligations.

## Summary of Comments

Section 7.1 Indemnification of ICANN. The RySG repeats the concerns expressed in v3, namely, that this indemnification obligation remains uncapped and overbroad. Not only has ICANN ignored the comments made by the RySG, it decided to go the opposite way and add additional overbroad categories of indemnities in favor of ICANN. Not only does ICANN now require the registries to indemnify for everything that arises out of the operation of the registry or the provision of services, it now requires registries to indemnify for everything “arising out of or relating to intellectual property ownership rights with respect to the TLD” and “the delegation of the TLD to Registry Operator.” This violates fundamental fairness, and the notion that indemnification is a risk-transfer mechanism to be used in allocating responsibility for a specific and identified risk of loss. In addition, most of the potential claims relating to or arising out of the delegation of the TLD relate to actions or omission by ICANN and not the Registry Operator. There is no reason for the Registry Operator to be indemnifying ICANN for actions or omissions beyond the control of ICANN. ICANN needs to stand behind its process for the delegation, including everything that is in Applicant Guidebook, dispute processes, etc. None of these were created by, or performed by, the Registry Operator. It is unconscionable to make the Registry Operator indemnify for these types of claims.

Therefore, the RYSG makes the following recommendations:

1. Eliminate the added language in DAG 4 regarding indemnifying for IP claims and claims arising from the delegation of the TLD;
2. Make the indemnity section mutual, limiting the indemnity section to material breaches of representations and warranties, and to gross negligence and willful misconduct of either party.
3. As stated in the RySG comments to v3, delete, “Registry Operator’s operation of the registry for the TLD or Registry Operator’s provision of Registry Services” and replacing it with “Registry Operator’s material breach of any representation or warranty specifically identified as such in the Agreement, or the gross negligence or willful misconduct of Registry Operator, its employees, agents, or contractors in the performance of this Agreement.”
4. As stated in the RySG comments to v3, the RySG requests to insert “reasonable” before “legal fees”.  
*RySG (21 July 2010).*

Regarding Section 7.1(b)-- The RySG repeats its v3 comments, namely, that the RySG advocates that the following sentence be deleted, “For the purposes of reducing Registry Operator’s liability under Section 8.1(a) pursuant to this Section 8.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN’s reasonable satisfaction, such other registry operators’ culpability for such actions or omissions.” There is no way the Registry Operator would know that information or have access to the information to make such a demonstration. *RySG (21 July 2010).*

## Analysis of Comments

The risks of operating the TLD are appropriately borne by registry operator. Pursuant to the consultation held with the Temporary Drafting Group on 8 September 2010, ICANN has agreed to consider certain

limitations on registry operator's indemnification obligations in the event of claims related to matters that are completely outside the control of registry operator. ICANN staff has invited the RySG to propose language more precisely defining the exceptions to registry operator's indemnification obligations.

The indemnity limitation provisions introduced in Section 7.1(b) were included in response to comments of the RySG. If a registry operator wishes to avail themselves of this protection, it is appropriate that the registry operator bare the burden of demonstrating the relative culpability. If it is unable to do so, it is appropriate for registry operator to take on the full liability.

## Definition of Security and Stability

### Key Points

- ICANN staff has reviewed the use of the defined terms in the agreement and found that they are not inappropriate in the context in which they are used.

### Summary of Comments

#### Section 7.3 Defined Terms.

In addition, the v3 (now v4) Registry Agreement language seems to come from the Registry Services Evaluation Policy (RSEP) definition of an "effect on security" that is found in all Registry Agreements. The RSEP discusses how new registry services should not negatively impact security, and that new registry services should be compliant with applicable relevant standards. That context is missing in the Guidebook. Without that context, the language has become more expansive and open to interpretation. Both ICANN and the RySG desire that registries function within applicable standards, and that current or future registry services not be the genesis of security problems. *RySG (21 July 2010)*.

Regarding Section 7.3(b) -- The RySG believes this section is over-broad, and conflicts with Specification 6 section 1 ("Standards Compliance"), which refers only to IETF standards.

We also repeat our DAG3 comments: This language is unacceptable: "authoritative and published by a well-established, recognized, and authoritative standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments ("RFCs") sponsored by the Internet Engineering Task Force". ICANN should not leave the language open-ended and make contracted parties subject to any and all standards bodies. ICANN needs to more explicitly enumerate the standards and name the authoritative body, which we believe is the IETF. Application of additional standards should be considered via the Consensus Policy process instead. *RySG (21 July 2010)*.

Moreover, the v3 Registry Agreement definitions misunderstand IETF practices and definitions. The contract language must be revised to adhere to proper terminology. The inclusion of "Standards-Track" [sic] is inappropriate, since only some documents on the "standards track" are authoritative. IETF Internet specifications go through stages of development, testing, and acceptance. Within the Internet Standards process, these stages are called "maturity levels." These maturity levels include "Proposed Standard", "Draft Standard", and "Standard" Specifications.<sup>1</sup> Documents at lower maturity levels are not Internet Standards, do not enjoy enough development or vetting, and registries should not be required to follow them.

Contracted parties should not be required to adhere to IETF Best Practices or “best current practice RFCs”. By definition, best practices are *not mandatory*, and the IETF chose to make them Best Practices for a reason. Nor are IETF BCPs considered technical standards. They tend to deal with processes and procedures rather than protocols -- they represent a consensus of a way to do something because it is recognized that a user experience can be enhanced when there is an agreed-upon way to complete a task. However, interoperability is not usually applicable. As long as the user experiences standards-compliant behavior, ICANN does not need to say more about how that behavior is achieved. *RySG (21 July 2010)*.

## Analysis of Comments

ICANN staff has reviewed the use of the defined terms in the agreement and found that they are not inappropriate in the context in which they are used. ICANN must retain the right to act in response to certain threats to security and stability even if those threats are not caused by registry operator or affect systems other than registry operators' systems. ICANN is open to further discussion regarding specific proposed changes to "security and stability" definitions and related provisions, but a wholesale redefinition of stability to focus only on the stability of registry systems would not be appropriate or consistent with other ICANN agreements and policy.

### Change in Control of Registry Operator

#### Key Points

- The new version of the agreement has implemented reasonable parameters for providing consent to proposed change in control transactions.

## Summary of Comments

Section 7.5 Change in Control. The RySG repeats its v3 comments, namely, that:

a) In the second sentence, after “organized” insert the text, “in the same legal jurisdiction in which ICANN is currently organized and”. This is in keeping with ICANN’s recommendation 1.11.1, in its February 26, 2009 Implementation Plan for Improving Institutional Confidence, that ICANN retain its headquarters in the United States “to ensure certainty about ICANN’s registry...agreements.” This is also consistent with ICANN’s promise in Section 8(b) of the Affirmation of Commitments that ICANN “remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community.” RySG is concerned that ICANN’s unwillingness to make the change it requested in its v2 Registry Agreement comments suggests a desire to evade these cited commitments by a re-organization. *RySG (21 July 2010)*.

b) The RySG remains concerned about the impact of this section on securities laws as possibly requiring notification prior to public disclosure. Accordingly, the RySG recommends saving language, potentially as follows: “Under no circumstances shall Registry Operator be required to disclose any event to ICANN earlier than Registry Operator is required to publicly disclose such event under applicable securities laws.”

In addition, the RySG believes with the additional language inserted, this section has become impractical and not feasible for public companies. There are absolutely no timelines imposed on ICANN, nor are there any real objective standards, which leads to unpredictability and instability. We believe a discussion needs to be had with the legal working group on the Operational and legal aspects of the entire process. We do not disagree that it is appropriate for ICANN to have a consent right, but commercially it needs to be a more stream-lined predictable approach to enable businesses to get loans, approval from shareholders, etc. Most regulators do this within 30 or 60 days. ICANN should adhere to a strict timeline as well. *RySG (21 July 2010)*.

## Analysis of Comments

ICANN has revised this provision in the draft of the form registry agreement posted with AGBv.5 to provide that no consent will be required for a reorganization assignment by ICANN only if such reorganization results in a similar entity within ICANN's current jurisdiction.

Potential securities law problems have not been adequately explained by the RySG and the suggested additional sentence is unworkable as many transactions are never required to be disclosed under applicable securities laws.

To provide business model predictability for gTLD registries, ICANN has implemented reasonable parameters for providing consent to proposed change in control transactions, including a 60-day total review period.

## Amendment Process

### Key Points

- As requested, ICANN will include a wide cross section of the community in future amendment working groups;
- For clarification, the revision of registry level fees is meant to be included within this process.

## Summary of Comments

Amendment Working Group composition (registry agreement 7.6(e)(iv)). As all members of the wider GNSO community, particularly registrants, may be affected by amendments to registry agreements, each GNSO stakeholder group should be guaranteed representation in the working group convened to consider amendments. The addition of members beyond registries should not be left to ICANN's discretion. *W. Seltzer (21 July 2010)*. *R. Dammak (July 2010)*.

### Section 7.6 Amendments and Waivers.

The RySG is very happy with the changes made in this section and we appreciate all of the work done by ICANN staff in conjunction with the legal working group. The only comments we have would be to add the notion of the determination of fees to pay to ICANN under the agreement as a "Restricted Amendment". We do not believe this is the appropriate process for the determination of how much a Registry Operator pays ICANN. If, however, this is left to the amendment process, then if a request were

made by ICANN to change the fees, then the Registries should have an approval right on ICANN's overall budget. We cannot be subject to a possible amendment of fees, without having any right to get an accounting and approval right over where those fees are spent. *RySG (21 July 2010)*.

## Analysis of Comments

ICANN will engage a wide cross-section of the community as part of the working group that will consider uniform amendments to registry agreements. However, it would not be appropriate or necessary for every GNSO stakeholder group to be represented in the group.

The negotiated uniform amendment provision provides ICANN with the ability to make important changes to the agreement without having to negotiate what could be hundreds of contracts separately. Raising fees is a key provision that ICANN intends to be within this process. The provision itself provides multiple safeguards against arbitrary and capricious increases in fees. In order to obtain the approval of registry operators to raise fees, ICANN will inevitably have to demonstrate the need for the those fees and the manner in which they will be spent.

## Escrow Specification (Specification 2)

### Key Points

- Technical comments have been considered by ICANN technical staff and implemented as appropriate;
- ICANN will not be a party to escrow agreements for new gTLDs;
- Amendments to specification 2 (Data Escrow) must be agreed upon by the escrow agent or an alternative escrow agent must be engaged.

## Summary of Comments

### Part A --Technical Specifications.

Care must be taken to properly define all terms. For example, "Registry Data", "Registry Database" and "Escrow Records" are never defined. "Deposits" is also not really defined, but is used throughout this Specification 2. In 1.2 reference is made to "full or incremental deposit", but these should follow the capitalized, defined terms.

Part A, 4.8 Detailed File Formats: This is missing the transaction file format for incremental feeds.

Part A, 4.8.1 Domains. #5 says "Registrar Handle for the initial sponsoring registrar". Infinitely reporting a domain's initial sponsoring registrar seems to serve no purpose, and is unduly burdensome.

Part B now says: "Registry Operator will be provided with the right to designate a third-party auditor to audit Escrow Agent's compliance with the technical specifications and maintenance requirements of this Specification 2 no more than once per calendar year." ICANN should not prohibit Registry Operators from auditing their escrow providers more frequently. Registry

Operators are basically held liable for the performance of escrow, and should have the right to look into problems responsibly. The base agreement allows ICANN to audit Registry Operators multiple times per year--ICANN should not prohibit similar diligence by Registry Operators.

Part B, #3 Ownership. A limitation on the "ownership" right must be placed as follows: "for the limited purpose of maintaining operation of the registry." This limitation should apply both during and after the term of the Registry Agreement.

Part B, #5: Copies. Should be amended to read: "... Registry Operator shall bear the expense of such duplication "if the escrow agreement so specifies".

Part B, #6: Release of Deposits. Amend to read: "... or receives one of the following written notices by ICANN, along with evidence that ICANN has so notified Registry Operator in writing," stating that...'

*RySG (21 July 2010).*

Data Escrow Technical Comments. For the specific reasons outlined in Demand Media's comments, Demand Media believes that use of an Incremental data extract process in the Registry Escrow process will increase complexity, development cost and lead-time to loading data. *Demand Media (22 July 2010).*

Escrow Agent (sec. 1.1). To avoid a significant technical bandwidth burden on the Escrow Agent, this section should state that the Full Deposit will reflect the state of the registry as of time (UTC) on each day as mutually agreed on by Registry Operator, ICANN and Escrow Agent. *Iron Mountain (22 July 2010).*

Deposit transmission mechanism (sec. 2). This section disagrees with Section 4.13(5) of Part A. Iron Mountain recommends that the Specification requires electronic escrow unless approved by ICANN. It is difficult to manage the timing and receipt of deposits which are submitted physically. It is a best practice to reduce the number of touch-points in order to increase speed and security. *Iron Mountain (22 July 2010).*

Escrow deposit format (sec. 4.4.). It appears that ICANN is giving the option to registry operators to submit their escrow deposits in either XML or CSV format. This section is ambiguously worded and needs to more clearly state the option. It is important to state that having multiple file formats can slow down ICANN's or another registry's ability to utilize the escrowed data. *Iron Mountain (22 July 2010).*

Field order in the record (sec. 4.8). Section 4.8 needs to be edited to say that the order in "which fields are presented is the order in which they must be in the respective record." If registry deposits have different data in different order, it is almost impossible to perform automated or partially-automated verification. The more manual any part of the escrow process is, the more expensive it will be to the registry operator. Inconsistent ordering of fields could also cause integration problems if a registry fails and escrow files are given to a new registry to be integrated. *Iron Mountain (22 July 2010).*

Depending on what is truly required to meet the verification requirement discussed in Sec. 7 of both Parts A and B, there needs to be a way to identify which syntax is being used (IPv4 or IPv6). Iron Mountain suggests changing the file type from "NSIP" to "NSIP4" or "NSIP6", depending on the syntax. *Iron Mountain (22 July 2010).*

Algorithm; verification (sec. 4.13). Section 4.13(4) states a “suggested” algorithm for Hashes is SHA256. To promote consistency across registry escrow deposits with quicker utilization, reduced cost and higher quality of verification, Iron Mountain recommends requiring a singular Hash algorithm with SHA256 being preferred. There should also be more detail regarding HASH implementation. Also, in Section 4.13(4) it is not clear exactly what needs to be validated. By not specifying what verification means, how can ICANN ensure consistency across all Escrow Agents? A suggestion for what Verification could be is: the Deposit file will be split into its constituent reports (including the format report prepared by Registry Operator and appended to the Deposit), check its format, count the number of objects of each type, and verify that the data set is internally consistent. This program will compare its results with the results of the Registry-generated format report, and will generate a Deposit format and completeness report. *Iron Mountain (22 July 2010).*

Data Escrow Agreements—ICANN should be a party to every agreement. The current DAG departs from best practice and merely requires ICANN to be named a beneficiary of a registry data escrow agreement. This will prevent ICANN from amending, modifying or terminating the agreement and will lead to tremendous variances among registry data escrow agreements that will ultimately make it difficult for ICANN to ensure that a minimum level of expectations are met and to ensure compliance. If there is one Registry Agreement with ICANN and the registry operator, then it also makes sense and is in the best interest of stability and registrants to have one Escrow Agreement with ICANN, the registry operator and the escrow agent as parties. ICANN should be included as a party to every registry data escrow agreement. *Iron Mountain (22 July 2010).*

In addition:

- It seems imprudent that the escrow agent for the registry operator does not require ICANN approval. Per Specification 2 anyone can be named as the escrow agent.
- Requiring the escrow agent to deliver all the contents in its possession within 24 hours may not be technically feasible depending on volume, location and method of delivery.
- There is no description of how ICANN would like released data delivered –e.g., electronic? On physical media?
- Regarding 7.2 addressing verification procedure failure by the registry operator, there needs to be a more specific timeline for the registry operator to fix issues with its deposits.
- The intent of Section 8 is unclear, but the result is that it holds the escrow agent hostage. It is inappropriate to require the escrow agent to amend its escrow agreement with the registry operator based on any amendment to Specification 2 when the escrow agent is not a party to Specification 2. Ten days is not enough time for the escrow agent to consider whether it is willing to make these changes. If the escrow agent decides not to accept the changes, then ten days is definitely not enough time for the registry operator to find a new escrow agent, contract with them and begin depositing data. *Iron Mountain (22 July 2010).*

## Analysis of Comments

All technical comments from the RySG and Iron Mountain were taken into account by ICANN technical staff and are reflected, as appropriate, in the specifications to the draft of the form registry agreement posted with AGBv.5. Specifically, a number of technical requirements have been removed from Specification 2 in favor of a reference to the Domain Name Data Escrow Specification (development still in progress) available at <http://wwwtools.rfc-editorietf.org/rfchtml/rfc5731.txt> draft-arias-noguchi-registry-data-escrow.

For ease of administration, ICANN will not be a direct party to escrow agreements for new gTLDs. ICANN is required to be a named third party beneficiary and as such will have certain rights to enforce the agreements in appropriate circumstances. If the minimum level of protections mandated by the specifications to the registry agreement are not met in the escrow agreements, ICANN can take action against registry operator directly to remedy such deficiencies.

The draft form registry agreement posted with AGBv.5 will include a requirement that ICANN approve the proposed escrow agent and any amendments to the escrow agreement.

Amendments to Specification 2 that registry operator agrees to must be implemented into the escrow agreement. If escrow agent is unwilling to make conforming changes, registry operator will be required to seek an alternative escrow agent or risk being found to be in breach of the registry agreement.

## Functional Specifications (Specification 6)

### Key Points

- All required specifications will be either in the body of the registry agreement or in the specifications, both of which can only be amended as specified in the Registry Agreement or upon mutual agreement;
- The appointment of an emergency back up registry operator is an important requirement for the continuity and stability of the registry;
- ICANN technical staff has considered all technical comments and implemented appropriate changes.

### Summary of Comments

Functional and Performance specifications. All functional performance specifications should be included in the body of the agreement (or specifications) and should not reference a link on the web that may be modified by ICANN. If ICANN insists on a hyperlink it should have a date certain and it should be made clear that any changes must be mutually agreed to by the parties. *RySG (21 July 2010).*

#### 6.2: Registry Services and Continuity

As per the RySG's objection to DAG3, Section 6.2 requires that a registry operator designate a back-up or successor registry operator-- before even beginning operations. This may be an impossible obligation for some registries to meet. It is unclear whether another registry would even promise to serve as a continuity provider, nor is it clear that the successor registry continuity provider would be compensated. Finally, if a registry fails, a reason for such failure could be due to a failed business model of the original registry. In such an event, no one should be forced to continue to operate a failed registry. Finally, requiring registries to back each other up in advance presents some business issues. *RySG (21 July 2010).*

RySG notes that registrars are not obligated to designate back-up or contingency successors. ICANN has a process for providing continuity when registrars fail, involving an EOI and bidding process. *RySG (21 July 2010).*

The RySG believes that Section 6.2's sentence should be replaced with: "Registry Operator shall have a business continuity plan." *RySG (21 July 2010)*.

#### 6.4 Performance Specifications

In general, Section 6.4 continues to contain a variety of critical problems, and RySG did not see that its DAG3 comments were worked into DAG4. Section 6.4's current contents:

- 1) are sometimes confusing,
  - 2) discourage registry stability and security, and
  - 3) depart from proven measurement and reporting practices that have served everyone well in the past.
- These departures from industry practice have been made without explanation. RySG therefore requests that ICANN work on a thorough review of section 6.4. A (non-exhaustive) list of examples is provided below (see our DAG3 public comments for additional). *RySG (21 July 2010)*.

A general problem is that ICANN has created new SLA, measurement, and reporting regimes that do not always work well with the realities of registry operations. In the existing gTLD registry contracts, registries are allowed scheduled and unscheduled downtimes for their various services. Scheduled downtime allowances encourage regular maintenance, which strengthens registry security and stability. The requirement to report unscheduled maintenance is an indicator of unexpected problems and therefore contributes to registry security and stability. *RySG (21 July 2010)*.

As we mentioned in DAG3, the new base agreement does not distinguish between scheduled and unscheduled downtimes, instead lumping them together. And the new agreement allows less total downtime than the existing contracts, which seems overly aggressive. Further, there are no longer any allowances for extended annual downtimes. Those are sometimes needed to comply with new requirements (such as new RFCs), moves to new data centers, etc. Together, these changes may discourage registry security and stability, rather than encouraging them. *RySG (21 July 2010)*.

#### RySG's Non-exhaustive list of examples of where Specification 6 is confusing, or technically problematic.

##### DNS name server availability (page 54):

With regard to "DNS name server availability" of "432 min of downtime (99%)": Does this imply that one server with more than 432 minutes of downtime violates the SLA? Or is a server considered unavailable for the month if it had greater than 432 minutes of downtime? Say that a TLD has 10 servers globally dispersed and each had non-overlapping 45 minutes of downtime over a calendar month. Therefore 9 were operational at any point in time. What is the final DNS service availability for the month?

This may have an unintended consequence of favoring a 100 percent anycast solution, so that no single site is unavailable. Best practice currently is to have a combination of anycast and unicast for security and stability purposes, but this SLA may drive to all to anycast.

##### DNS, WHOIS, and SRS RTT (pages 54-57):

For these, is the registry expected to monitor RTT from the client? This would be confusing, costly, and an unnecessary departure from past proactive. Recommend that this be revised to measure from receipt and response of a query/transaction at the registry's gateway. If truly measured from the client, especially for EPP, the registry SLR is at risk from poorly connected registrars located in geographically regions distant from the registry. The registry has no ability to select registrars and therefore has no control over meeting this SLR. Why not just use the CNNP test for resolution services?

The SLAs conflate port 43 and Web-based WHOIS SLAs. Port 43 and Web are two completely different services. RTT for Web WHOIS is not really applicable and should be deleted.

#### Measuring EPP parameters (page 57)

Probes should query domain names, *not* IP addresses. The requirement will not allow registry operator to move or upgrade data centers or migration to new IP ranges. Registries require registrars to connect using the EPP domain name. Some IP addresses will be inactive at any point in time, such as those for alternate data centers or disaster recovery sites. This comment may also apply to DNS and WHOIS.

#### “DNS Update Time” (page 56):

With respect to “all the name servers”, this is likely to result in the unintended consequence: discouraging deployment of DNS servers in developing regions where bandwidth limitations may create update delays. The logical response would be for registry operators to avoid deploying services in certain regions of the world. in order to make sure all servers can be updated within the required time. Is DNSSEC data included in “DNS information”? Seems likely from the context. A delay in updating DNSSEC data may be more probable than other updates. *RySG (21 July 2010)*.

## Analysis of Comments

All required specifications will be either in the body of the registry agreement or in the specifications, both of which can only be amended as specified in the Registry Agreement or upon mutual agreement. The referenced link would be to the page on the ICANN website that contains the specification attached to the agreement.

The requirement to appoint a back-up operator has been replaced with the requirement to maintain a business continuity plan.

ICANN technical staff will work with the technical community to ensure that the technical requirements in Section 6.4 comport to current best practice, are technically feasible and will promote security and stability across the DNS and the Internet. Several suggested changes are reflected in Specification 6 to the draft form registry agreement posted with AGBv.5

### Miscellaneous/Other

## Key Points

- Approval of the ICANN board will not be required for each new gTLD but the Board retains ultimate responsibility and oversight for the program and will consider individual applications in certain, limited circumstances;
- The current form of the agreement contains the requisite flexibility for multiple types of registry operators;

## Summary of Comments

Board approval of each registry agreement. The explicit requirement for Board approval of each new registry agreement will add delay and uncertainty to what should be made a routine process. The Board is able to request informational updates and to intervene against a harmful decision without this procedural step. *W. Seltzer (21 July 2010). R. Dammak (July 2010).*

Role of not-for-profits. Language preceding the draft Registry Agreement refers to commercial purposes envisioned for new gTLDs and does not take into account the way in which some new registries may be used, such as to further a not-for-profit mission. *Red Cross (21 July 2010).*

Different forms needed. ICANN should develop agreements that address specific variations of application types rather than pursuing a one-size-fits-all approach. *E. Brunner-Williams (Module 5, 21 July 2010).*

Representation and warranties (sec. 1.3). Subsection (iii) should read: “Registry Operator has duly executed and delivered to ICANN...” The phrase “and the other parties thereto” appears to be a typographical error. *RySG (21 July 2010).*

## Analysis of Comments

The ICANN Board has recently resolved that it will approve a standard process for staff to proceed to contract execution and delegation on applications for new gTLDs where certain parameters are met, but that the Board reserves the right under exceptional circumstances to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.

ICANN recognizes that new gTLDs will be used for a variety of purposes including non-commercial purposes.

The current draft of the registry agreement includes certain alternative provisions for different applicants and contains the requisite flexibility to apply to a variety of different types of gTLDs that are operated under differing business plans.

The reference to the “other parties thereto” is intentional and is meant to apply to the third party financial institution or other provider of the continuing operations instrument that will be responsible for funding the registry operations in the event of a registry failure. The draft form registry agreement posted with AGBv.5 will clarify that Registry Operator will be required to deliver a duly executed instrument.

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