



**Intellectual
Property
Owners
Association**

March 2, 2011

Larry Strickling
Administrator
National Telecommunications
and Information Administration
1401 Constitution Ave., NW
Washington, DC 20230

Re: ICANN New gTLD Program

Dear Mr. Strickling:

Intellectual Property Owners Association (IPO) would like to take this opportunity to provide comments to the National Telecommunications and Information Administration (NTIA), and to you personally in your capacity as the U.S. representative to the Government Advisory Committee (GAC), regarding IPO's ongoing concerns about the generic Top Level Domain Name (gTLD) program.

IPO is a trade association, based in the United States, representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights. IPO's membership includes more than 200 companies, and approximately 11,000 individuals who are involved in the association either through their companies or law firms or as IPO individual members. Our members hold trademarks around the world. As such, IPO has a significant interest in the new gTLD introduction generally and, more specifically, the rules, requirements, and processes of applying for new gTLDs.

IPO is concerned that, despite years of deliberations and revisions to the Draft Applicant Guidebook (now the Proposed Final Applicant Guidebook, or "AG"), and despite hundreds of comments received by International Corporation for Assigned Names and Numbers (ICANN) regarding the importance of suitable rights protection mechanisms (RPMs) for intellectual property owners, both the AG and the proposed new gTLD program generally remain very much works in progress.

For the reasons outlined in the attached document, IPO strongly urges the NTIA and the GAC to exert influence to ensure that the several problems surrounding the new gTLD program are addressed by ICANN head on, in an efficient and transparent manner. Intellectual property rights and consumer protection are cornerstones of an efficient and profitable Internet and should remain fundamental considerations in any new gTLD regime.

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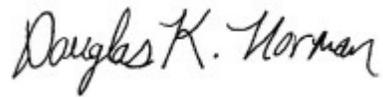
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INTELLECTUAL PROPERTY OWNERS ASSOCIATION

IPO appreciates the opportunity to comment and looks forward to working with the NTIA and GAC on this important issue.

Sincerely,

A handwritten signature in black ink that reads "Douglas K. Norman". The signature is written in a cursive style with a large initial 'D' and 'K'.

Douglas K. Norman
President

cc: Rod Beckstrom, International Corporation for Assigned Names and Numbers
(ICANN)

Since the inception of the Internet, the global economy has thrived thanks to the World Wide Web's ability to bring businesses and consumers together in a safe and secure environment. The stability of the Internet as a global platform for commerce is a core concern for businesses worldwide, and it is ICANN's mandate to ensure this stability. We submit these comments to you in light of these concerns, in the hope that both the GAC and the NTIA itself will assert their influence to ensure that ICANN's responsibilities to all of its constituencies are not forgotten in its rush to expand the domain name space.

ICANN's decision to increase the number of gTLDs has brought a number of issues to the attention of the international business community, many of which have not been addressed sufficiently by ICANN in its various AG revisions.

WHY THE NEW GTLD PROGRAM REMAINS OF CONCERN TO BUSINESSES

- New gTLDs Will Increase Business' Financial Burdens in Fighting Cybersquatting and Trademark Infringement. To protect their intellectual property, businesses may be forced to:
 - Secure their own gTLDs – with an application fee of \$185,000 each – for key business and product trademarks. Beyond this cost, funds must also be held in escrow at the time of application to support gTLD operation for three years. The minimum escrow will likely be \$100,000 per year, or \$300,000 or more for the total escrow. Further annual fees include an ICANN fee of \$25,000 and possible registry service provider fees;
 - Defensively purchase second-level domain names in each of the gTLDs to protect their trademarks – a daunting prospect with hundreds of new gTLDs planned. As of yet, no limit has been set as to what a new gTLD owner may charge for domain names; and
 - Police the newly created gTLDs to prevent infringement and misuse of valuable trademarks, an already costly and time-consuming task.
- New gTLDs Are Likely To Foster Trademark Confusion & Dilution. The widespread availability of gTLDs and second-level domains significantly raises the risk of confusion in the minds of consumers as to source, sponsorship, and affiliation. Also considering the value of lost leads and sales, costs of brand dilution, poor customer experiences and millions of lost unique visitor impressions each week, the cost for a single brand could be tens of millions of dollars.
- New gTLDs Are Likely To Encourage Online Fraud and Counterfeiting. Cybersquatters, phishers, and criminals harm consumers by using domain names to exploit the trust that consumers have in legitimate brands and trademarks.

These entities abuse that trust by infecting users' computers with viruses and malware, stealing personal information, and selling counterfeit goods. The practice costs brand owners worldwide over \$1 billion U.S. dollars every year as a result of diverted traffic, the loss of hard-earned trust and goodwill, and the ever-increasing enforcement expense.¹

IPO's concerns regarding the new gTLD program lie in three distinct areas: 1) protecting consumers across the new gTLDs; 2) protecting brand owners across the new gTLDs; and 3) the effect of the new gTLD program on ICANN and the Internet. Our comments below highlight these three areas. We recommend that before ICANN takes any additional action regarding the proposed gTLD program, it should:

- Perform an extensive evaluation of whether new gTLDs are needed in the first place given the speculative benefits and significant risks presented;
- Carefully consider the reports of the economic studies of the domain name marketplace that have been commissioned by ICANN thus far and, to the extent the results are inconclusive, undertake additional economic studies;
- Establish criteria for success of new gTLDs in the proposed first round before moving forward.

Once the study has been completed and criteria established, ICANN should modify the roll-out of the new gTLD program to include only "sponsored gTLDs" -- top-level domains sponsored by private organizations which are responsible for establishing and enforcing rules restricting eligibility for use. ICANN should also limit further roll-out of new gTLDs until sufficient safeguards are in place to protect Internet users, businesses, and brand-owners alike from any existing and expected acts of cyber-fraud.

Until these issues and recommendations can be adequately addressed, we respectfully suggest that ICANN continue to delay the launch of the new gTLD program.

PROTECTING CONSUMERS ACROSS THE NEW GTLDS

The Internet exists for its users, and it exists because of its users. Protecting users from harm is important not only for their sake, but also for the sake of all who create content, do business and facilitate the Internet's day-to-day operations on the network.

Preventing consumer confusion

ICANN continues to aggressively pursue the launch of the new gTLD program despite numerous delays due to various stakeholder concerns, and continues to justify its proposal by

¹ "The Real Cost of Cybersquatting." <http://www.cadna.org/en/issues/cadna-analysis/real-cost-of-cybersquatting>.

extolling the need for “competition” in the domain name space. This need for competition is illusory. Today, in existing top-level domains, hundreds of millions of domain names already offer significant choice and diversity to end registrants. ICANN’s proposed approach to introducing further gTLDs could lead to the creation of over 1,000 or more new gTLDs over the next three years. This course of action would significantly raise the risk of creating confusion in the minds of consumers as to where on the Internet they can find a business or desired product. By making it increasingly difficult for consumers to enjoy their Internet experience, frustrated consumers would be less likely to engage in commerce on the Internet – in a time when many businesses with online presences can ill afford reduced traffic.

Protecting consumers against cyber-fraud

With the increased number of gTLDs, the opportunity for increased cybercrime is significant. By using domain names to exploit the trust that consumers have in legitimate brands and trademarks, cybersquatters are able to harm consumers by creating confusion about which website is the legitimate brand owner’s site providing the goods or services that the user is seeking. Other serious problems exist when these illegitimate sites are used for abusive purposes, such as sending malware to infect users’ computers with viruses and software to steal personal information, as well as through the sale of unwanted counterfeit goods.

The magnitude of the problem is shocking. The overall number of domain names under existing gTLDs has more than doubled since 2003, and the growth of cybersquatting has exceeded that pace. According to MarkMonitor’s Brandjacking Index Reports, cybersquatting increased 248% in 2006 and 40% in 2007 and, as of Winter 2009, “remained the top tool in the brandjacking arsenal.”² This is of significant concern as cybersquatting is a tool that criminals use in phishing attacks against unsuspecting consumers. A study released by Gartner, Inc. in 2007 revealed that phishing attacks in the United States alone cost Internet users over \$3.2 billion.³ The problem is growing, with no signs of slowing down. The survey found that 3.6 million adults lost money in phishing attacks in the 12 months ending in August 2007, as compared with 2.3 million the previous year. With the projected number of new gTLDs created in the proposed program, the costs of fraud to unsuspecting consumers will undoubtedly eclipse that figure.

ICANN must consider the millions of Internet users who use the web for commerce and otherwise in their daily routines. Strong consumer protection starts with creating tools to thwart brand infringement, so as to protect against such potential and probable abuses in new gTLDs.

² MarkMonitor Brandjacking Index. <http://www.markmonitor.com/resources/brandjacking-index.php>.

³ “Gartner Survey Shows Phishing Attacks Escalated in 2007; More than \$3 Billion Lost to These Attacks.” <http://www.gartner.com/it/page.jsp?id=565125>.

PROTECTING BRANDS ACROSS THE NEW GTLDS

There is great concern in the business community that, despite some progress, ICANN has not adopted adequate safeguards against systemic brand abuse in new gTLD registrations prior to moving forward with the new gTLD program. The current system for addressing brand abuse is the Uniform Domain Name Dispute Resolution Policy (UDRP). Trademark owners are already compelled to engage in defensive registrations to prevent phishing, fraud, and trademark infringement.

As mentioned above, cybersquatting is not only a problem that impacts consumers and businesses. The practice is estimated to cost brand owners worldwide over \$1 billion dollars per year as a result of diverted traffic, the loss of hard-earned trust and goodwill, and the increasing enforcement expense of protecting consumers from Internet-based fraud.⁴ Adding new gTLDs without adding the proper tools to protect Internet users and brand owners will only exacerbate and already out-of-control problem.

ICANN claims that, after several revisions to the AG, “strong trademark protections and malicious conduct mitigation measures are now in place.”⁵ This is simply not the case. IPO and various other intellectual property organizations and stakeholders have provided ICANN with detailed advice and comments⁶ on developing balanced, effective measures for the protections of sufficient Rights Protection Mechanisms, much of which has been ignored. Further, while certain RPMs have been adopted in response to the outcry of the international business community and the recommendations of ICANN’s own Intellectual Property Constituency (IPC) Implementation Recommendation Team (IRT), some of these RPMs bear little resemblance to their original forms.

In recommending certain baseline RPMs, the IRT explained that, first, “even together, all of the [recommended RPMs] by no means present a panacea to all the overarching issues of trademark protection in connection with the introduction of new gTLDs,” and second, that its proposals were “designed comprehensively to balance in relation to one another and the removal of any proposal will likely require further strengthening.”⁷ Instead, while ICANN has adopted a comprehensive thick WHOIS requirement, it has also has rejected some of the recommended RPMs and proposed to implement versions that bear little resemblance to the

⁴ “The Real Cost of Cybersquatting.” <http://www.cadna.org/en/issues/cadna-analysis/real-cost-of-cybersquatting>.

⁵ gTLD Applicant Guidebook: Proposed Final Version. <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf>

⁶ IPO Comments to ICANN on the Draft Applicant Guidebook, Version 4, July 21, 2010, <http://www.ipo.org/AM/Template.cfm?Section=Home&CONTENTID=26364&TEMPLATE=/CM/ContentDisplay.cfm>.

⁷ Implementation Recommendation Team Report, April 24, 2009, <http://www.icann.org/en/topics/new-gtlds/irt-draft-report-trademark-protection-24apr09-en.pdf>.

initial IRT recommendations. The Trademark Clearinghouse concept, for instance, is missing a Globally Protected Marks List, and the current iteration of the Uniform Rapid Suspension is cumbersome and does not provide a compelling alternative to the existing UDRP procedure. Because the RPMs and other AG requirements have not been finalized, it is difficult to predict whether they will adequately protect the consuming public and TM owners. However, if they do not work together seamlessly, there could be grave consequences for intellectual property owners.

IPO, in response to ICANN's various AG revisions, has provided extensive comments to ICANN regarding the deficiencies in ICANN's proposed RPMs.⁸ As far as IPO can tell, most of the comments have been outright ignored. Indeed, IPO continues to be alarmed at what it believes to be a startling lack of transparency concerning the gTLD program and various revisions to the AG. Throughout the AG revision process, ICANN has continually made changes without adequate explanation, and has failed to address countless well-considered comments by its stakeholders. This lack of transparency undercuts ICANN's credibility as a "bottom up, consensus-based" policy-making organization, and contributes to an environment of distrust among ICANN's various stakeholder groups.

THE EFFECT OF THE NEW GTLD PROGRAM ON ICANN AND THE INTERNET

Concern over the need for new gTLDs

Given the unease over the unintended consequences for Internet users and brand-holders alike, the question remains whether new gTLDs are needed in the first place. ICANN's previous expansion of gTLDs has largely failed to increase the number of registrants that ostensibly justified the creation of new gTLDs. The .COOP, .AERO, .MUSEUM, and .JOBS gTLDs, for example, have no more than approximately 10,000 registrations each. Despite ICANN's aggressive insistence to the contrary, there has been no evidence to suggest a compelling demand for the expansion of new TLDs. In fact, the economic studies that have been conducted to date suggest the contrary.

The most recent ICANN-commissioned economic report, "Economic Considerations in the Expansion of Generic Top-Level Domain Names,"⁹ explored and evaluated the likelihood of six separate potential benefits from the introduction of new gTLDs, largely concluding that the alleged benefits are unlikely, and that problems new gTLDs are designed to combat are illusory. Based on this report, IPO believes that the new gTLD program is simply not justified from an economic standpoint.

Further, in viewing the new gTLD program in light of the existing system, observers have noted that ICANN may not have the ability to manage the new gTLD application process. In

⁸ IPO Comments to ICANN on the Draft Applicant Guidebook, Version 4, July 21, 2010, <http://www.ipo.org/AM/Template.cfm?Section=Home&CONTENTID=26364&TEMPLATE=/CM/ContentDisplay.cfm>.

⁹ <http://www.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf>.

fact, adding numerous TLDs to the Root System may actually produce the unwanted and unintended consequence of creating instability and insecurity in the Internet infrastructure.

Assessing the success of the new gTLD program

Given the scope and size of the current undertaking, there should be significant delays in between application rounds to understand a number of issues critical to the health of the Domain Name Service (DNS), such as:

- Whether trademark owners will be able to enforce their intellectual property rights given the introduction of any new gTLDs;
- Whether the costs associated with brand management and mark protection justify the benefits of the new gTLDs;
- Whether the new gTLDs, in fact, do yield any tangible benefits to the broader Internet community.

The impact of new gTLD new revenue streams on ICANN's non-profit corporation status

The proposed new gTLD program stands to increase ICANN's coffers significantly. Prior to issuing its 2007 annual report, ICANN maintained an \$18 million balance. As a result of its revenue streams in 2007, ICANN now maintains a \$35 million balance. There are serious concerns that ICANN is not fulfilling its charitable purposes under U.S. law by building up large reserves, far beyond the "Basic Cost Recovery Principle" set forth by ICANN ten years ago.¹⁰

IPO strongly believes that with the new revenue streams created by new gTLDs, ICANN should commit to expending additional resources to ensure the security, stability and integrity of Internet commerce. Such measures should include establishing mechanisms to ensure that trademark holders have adequate and effective tools to protect their intellectual property rights.

Given the concerns outlined above, IPO strongly urges the NTIA and the GAC to exert influence to ensure that these problems are addressed by ICANN head on, in an efficient and transparent manner. There is a pervasive sense among intellectual property owners that ICANN considers intellectual property protection to be a peripheral concern. As we have explained, intellectual property rights and consumer protection are cornerstones of an efficient and profitable Internet, and should remain fundamental considerations in any new gTLD regime – if the new gTLD program is in fact justified.

¹⁰ <http://www.icann.org/en/committees/tff/final-report-draft-30oct99.htm>.