

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

The GNSO New TLD Committee's Draft Final Report on the Introduction of New Generic Top-Level Domains

GNSO Policy Development Process (GNSO PDP-Dec05)

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GNSO Draft Report on Policies for New gTLDs Deeply Flawed, Reform Needed

NCUC continues to strongly object to the principles and recommendations in the GNSO New TLD Committee's Draft Final Report on the Introduction of New Generic Top-Level Domains (14 Nov. 2006)¹. In particular, the proposed selection criteria for strings² and dispute resolution processes over new gTLDs remain deeply problematic. The draft recommendations must be substantially reformed in order to promote competition and innovation and protect freedom of expression and non-commercial uses in the new gTLD space.

¹ GNSO Draft Final Report available at
<http://gns0.icann.org/drafts/GNSO-PDP-Dec05-FR-14Nov06.pdf>

² Proposed Selection Criteria for New Strings:

String Criteria [2.5.2]

The gTLD string should not be visually or phonetically confusingly similar to an existing TLD string. [2.5.2.1]

The applicant must warrant that the proposed string does not infringe the legal rights of any third party. [2.5.2.2]

The string should not cause any technical issues that have an impact on the stability and security of the Internet. [2.5.2.3]

The string should not be contrary to public policy or accepted principles of morality or be of such a nature as to deceive the public. [2.5.2.4]

The string should not be a reserved word. [2.5.2.5]

The GNSO Committee's draft proposal would have ICANN engage in massive and unprecedented censorship over the use words and ideas in cyberspace. The draft recommendations propose that ICANN mediate between competing standards of religion and morality to evaluate who is entitled to what words or ideas and how they may be used in new gTLDs. They essentially propose that ICANN be deputized the "word police" for the Internet.

The draft recommendations are also fundamentally flawed in that they propose freedom of expression in the new gTLD space be modeled on text from an out-dated 1883 European treaty on trademarks, hardly the appropriate standard for speech on the Internet. Besides the absurdity of using ancient 19th century language to regulate speech in the Information Age, trademark law is a highly deficient model to follow. Basing the introduction of new gTLDs on trademark law incorrectly assumes that speech on the Internet is only commercial in nature and the primary objective should be to protect trademark holders. The proposal would also give trademark holders special rights to take new gTLDs away from winning applicants and allow them to censor criticism. The draft proposal even gives trademark holders more rights in the new gTLD space than they would be entitled to under trademark law. The proposal's deference to trademark interests creates a significant threat to freedom of expression in the new gTLD space and must be substantially reformed.

Unworkable Due to Conflicting Standards of Morality, Religion, Free Expression

The proposal is also fundamentally flawed in that it falsely assumes there is a agreed-upon global standard of morality, religion, or expression that can be imposed on the entire world through ICANN policy. The draft recommendations would be practically impossible to enforce due to this fundamental, yet fictional, premise in the proposed policy. Besides being wrong for pure censorship reasons, the proposal is entirely unworkable on a practical level in the real world.

Burdens ICANN Board and Staff

The draft recommendations would place an enormous burden on ICANN staff and its board of directors to evaluate applications for new gTLDs. The proposal recommends that applicants submit business plans, financial data and other information that the ICANN staff and board will evaluate in a "beauty contest" style competition.

Creates Legal Liability for ICANN

Besides the tremendous workload and arbitrariness of this policy, it would create substantial legal liability for ICANN over its decisions for awarding new gTLDs. Losing applicants or anyone who disapproves of a new gTLD will sue ICANN for its decision.

Non-Commercial Uses and Innovators Discouraged

Proposal also favors large incumbents at the expense of small start-ups and innovators who cannot establish approval from ICANN business plan evaluators.³ Rather than allow the market to decide success or failure for business in the new gTLD space, ICANN would evaluate business plans and pick winners and losers, straying far from its narrow technical mandate.

The draft proposal also makes it virtually impossible to obtain a new gTLD for non-commercial uses or that is in any way risky. The proposal fails to take into account that many significant Internet innovations began as a risky venture.

ICANN Deputized “Word Police” and Forced to Engage in Censorship

One of the most troubling selection criteria proposed in the draft report is 2.5.2.4: “The string should not be contrary to public policy or accepted principles of morality or be of such a nature as to deceive the public”. This draft recommendation puts ICANN in a position of being the arbiter of public policy and morality on the Internet. ICANN will be forced to engage in censorship of any offensive words or ideas in the new gTLD space.

According to the draft final report, the new gTLD policy “must be consistent with ICANN’s limited technical coordination mission and be in line with ICANN’s Mission and Core Values”. But this proposal strays far from ICANN’s technical mission and core value of content-neutrality, and appoints ICANN, the “word police” for the Internet. Since when is the standard for speech on the Internet ‘polite dinner conversation’ as these recommendations would mandate? It seems nonsensical that the Internet can withstand a sex.com, but not com.sex.

Paragraph 22 of the draft report suggests that words relating to the following topics be banned in the new gTLD space:

- Criminal connotations
- Religious connotations
- Explicit/taboo sings
- Illegal drug terminology
- Offending accepted principles of morality
- Sexual connotation
- Sacred words
- Words “that undermine religious, family or social values”
- “General matters of taste and decency”

³ *“The applicant must provide a financial and business plan demonstrating that the applicant has the capability to meet its business ambitions.” [2.8]*

Most words take on religious, sexual, or criminal meanings in different contexts. It is absurd to propose ICANN should decide what words are truly sacred or offensive, and which applicant is entitled to .god or .gay or .herb.

The recommendations also fail to take into account that most words are trademarked some where for some thing and it is impractical to create a policy that does not allow for a word to be registered if it is trademarked some where for some thing. How can ICANN possibly decide who would be the legitimate owner of particular words and ideas?

Dispute Resolution Process Gives Trademark Holders Special Privileges

The draft's recommendation for a dispute resolution process over claims of trademark infringement significantly favors trademark owners, or complainants – since they are encouraged to “forum shop” among “independent” arbitrators to determine if the new gTLD is confusingly similar to an existing gTLD string.⁴ The proposal is also inadequate since it is self-referential in its definition of “confusingly similar”.

The proposal suggests that a new dispute resolution process be modeled on the existing Uniform Dispute Resolution Processes (UDRP). Unfortunately the UDRP is notoriously skewed in favor of complainants (trademark holders). In October 2006, the World Intellectual Property Organization (WIPO) announced that since the UDRP's introduction in 1999, 84% of the decisions have been in favor of the claimant trademark holders, and only 16% of decisions were in favour of the original registrant.

NCUC Supports Promotion of Competition through Minimal Technical Criteria

NCUC continues to argue that new gTLD applicants should meet minimal technical and operational criteria only, and that applicants should be processed in a first-come, first-serve basis. The proposed selection criteria relating to morality and business prospects are unquestionably outside the scope of ICANN's technical mission.

⁴ Proposed Dispute Resolution with respect to ICANN Accepting a New String [2.5.3]

ICANN must establish a dispute resolution process, using independent arbitrators, where existing registry operators could challenge a decision made by ICANN regarding whether a new gTLD string is confusingly similar, then no other operator may subsequently apply for it except in cases where affected parties mutually agree to terms allowing such registration. [2.5.3.1]

ICANN may establish a new dispute resolution process, using independent arbitrators, where existing trademark holders could challenge an ICANN decision regarding a string. This new dispute resolution process could be modeled on the existing Uniform Domain Name Dispute Resolution Processes (UDPR). [2.5.3.2]

NCUC supports opening up the process for introducing new gTLDs as quickly and as broadly as possible. But the draft recommendations create significant barriers to opening-up the process. Since promotion of competition is one of ICANN's core values⁵ ICANN should instead implement a market-driven process in the introduction of new gTLDs. ICANN should allow new names to be proposed by interested communities, entrepreneurial registry operators, or a combination of both.

Reform of New gTLD Policy Necessary to Comply with Core Mission and Values

In summary, the draft recommendations must be substantially reformed to comply with ICANN's core mission and values. ICANN's assessment of new gTLD applicants should be based on adherence to a minimal set of ICANN-defined technical specifications and conformity to established ICANN policies. The draft report gives short shrift to freedom of expression values and hinders competition and innovation in the new gTLD space. The recommendations are entirely unworkable from a practical stand-point, would burden ICANN staff and board with time and resource-consuming evaluations, create legal liability for ICANN over its determination, model speech on the Internet on archaic 19th Century language regulating trademarks, and give privileges to special interests in the introduction of new gTLDs.

NCUC remains deeply concerned about the numerous and fundamental flaws in the GNSO Committee's Draft Final Report and calls for change in the development of ICANN policy for the introduction of new gTLDs.

⁵ Section 2, Core Values No 5 and 6 in ICANN Bylaws