

TESTIMONY

OF

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“ICANN GENERIC TOP-LEVEL DOMAINS (gTLD) OVERSIGHT HEARING”

BEFORE THE

**SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION AND THE
INTERNET
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**

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Good morning Chairman Goodlatte, Ranking Member Watt and Members of the Subcommittee. Thank you for this opportunity to present the views of intellectual property owners on the Internet Corporation for Assigned Names and Numbers or ICANN and the issues related to its planned introduction of an unlimited number of Internet generic top-level domain names (gTLDs) to the Domain Name System (DNS) of the Internet.

I am Mei-lan Stark, Senior Vice President, Intellectual Property, for Fox Entertainment Group. I am appearing today on behalf of the International Trademark Association (INTA) where I serve on a voluntary basis as Treasurer and a member of the Board of Directors. INTA is a not-for-profit membership association dedicated to trademarks and related intellectual property, with 5,600 member organizations in over 190 countries.

INTA's membership spans all industry lines and sectors and is united in support of the essential role trademarks and related intellectual property play as elements of fair and effective commerce. INTA serves as a leading voice for trademark owners, ensuring that trademarks are adequately protected so that consumers can rely on them to make informed decisions about the products and services available in all markets, including the rapidly growing online marketplace.

It is an honor for me to appear before this Subcommittee, which has long exercised leadership in the protection of trademarks and consumers and in the creation of efficiencies in the areas of civil enforcement, criminal enforcement, and coordination of federal intellectual property efforts in the fight against counterfeiting and piracy.

I. Intellectual Property Protection is Vital to Consumer Protection

Trademarks serve a critical function in our economy. As trusted indicators of source and authenticity of goods and services, trademarks perform an important consumer protection role. Trademarks prevent consumer confusion and mistake in the marketplace and serve to inform consumers. In fact, trademarks are one of the most effective and efficient communication tools ever employed. A brand communicates a vast array of information about the quality and characteristics of a good or service instantaneously thereby allowing consumers to make rapid and informed choices among competitive offerings. Simply put, consumers rely on brands in making purchasing decisions each and every day.

Throughout all the developments we have witnessed in communication technologies and mediums, and as a significant percentage of sales and consumer interactions migrate online, companies pursue this new market in one way that is unchanged from the days when all sales were made in stores or through mail-order catalogues – by developing goodwill and reputation in our brands. The goal of the brandowners is straightforward – to build a brand that consumers trust.

But when unauthorized misuses of trademarks, such as abusive domain names, are allowed to proliferate, the integrity of the brand is threatened and the vital consumer protection capacity of the brand is compromised. When consumers are directed through an abusive domain name to a site that they did not intend to visit and become the victims of phishing schemes, frauds, false advertising claims, or purchase dangerous counterfeit products, consumer are not only harmed,

they lose confidence in both the brand and in the usefulness of the Internet as a safe and reliable marketplace. The result is a diminished brand-experience for consumers. The loss of consumer confidence in turn impairs the effectiveness of the targeted brand as a source identifier and communication tool.

In today's Domain Name System ("DNS") of twenty-one gTLDs and nearly 300 ccTLDs, there are more than ample examples of abusive domain name registrations. It is precisely because these misuses can have such far-reaching and damaging effects on our trademarks and ultimately our customers that INTA and its members have worked to ensure that trademarks are afforded the same protection on the Internet as they have offline by promoting:

- minimum standards and practices in domain name registration procedures;
- maintenance of a publicly accessible "Whois" database providing free, reliable and accurate contact details on registered domain names;
- low-cost, uniform administrative procedures to address abusive registrations;
- a measured and justified approach to expansions of the top-level domain name space;
- rigorous enforcement of DNS-related agreements; and
- an adequate voice for intellectual property owners in the formulation of domain name policy.

II. Efforts to Improve the Ongoing Management of Internet Names and Numbers

Following the opening of the Internet for commercial use in the 1990s, a new era of global communication and commerce emerged. To address the challenges of managing Internet names and numbers in the new environment, the United States Department of Commerce issued a statement of policy, known as the White Paper that began transitioning control of the management of Internet resources, such as domain names, from government to a new organization led by the private sector.¹

INTA has been on record supporting this privatization of the DNS to create a stable, representative organization that could meet the needs of global commerce and protect the public interest in the management of these resources.

In 1998, ICANN was incorporated, and it entered into a Memorandum of Understanding (MOU) with the Commerce Department to manage DNS policy and eventually to administer contracts with generic top-level domain name registries and registrars.

Responsibility for oversight of ICANN's activities was lodged in the National Telecommunications and Information Administration (NTIA), part of the Department of Commerce. Under the MOU, ICANN provided a series of status reports to the NTIA on its progress.

¹ United States Department of Commerce, White Paper on the Management of Internet Domain Names and Addresses, at http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm June 6, 1998.

On September 29, 2006, NTIA and ICANN transitioned from their original MOU to the Joint Project Agreement (JPA). The JPA had a three-year term and provided for the Commerce Department to conduct a mid-term review of ICANN's performance under the agreement.

On October 29, 2007, the Department consulted with interested stakeholders to conduct the Mid-Term Review, to assess ICANN's progress in meeting the responsibilities outlined in the JPA.² INTA submitted comments that identified necessary improvements in core areas of ICANN's performance.³

Consistent with INTA's submission, the NTIA released a statement that while "ICANN has made significant progress in several key areas, most participants agree that important work remains to increase institutional confidence through implementing effective processes that will enable: long term stability; accountability; responsiveness; continued private sector leadership; stakeholder participation; increased contract compliance; and enhanced competition."⁴

In September 2009, at the conclusion of the JPA, ICANN and the Commerce Department moved to an "Affirmation of Commitments" (AoC) agreement.⁵ The AoC was intended to re-affirm ICANN's continuing obligation to manage the DNS in the public interest.

A. ICANN's Policy Processes must adequately incorporate the views of the public, including intellectual property owners

INTA has long stated that ICANN must develop an organizational structure that reflects the appropriate representation of the public, including trademark owners and commercial users, in its affairs, and that adequate stakeholder representation is necessary before privatization of the management of the Internet DNS can be fully realized.

If the Internet is to serve the needs of international commerce, the private sector, including the intellectual property community, must have proper representation in the private sector model. Otherwise, DNS-related policy development and decision-making will not reflect the importance and relevance of intellectual property issues in the DNS to businesses, consumers and Internet users across the globe.

We have seen over the course of ICANN's history an erosion in the broad public representation called for in the White Paper. For example, through internal organizational reviews ICANN has reduced the business community's representation within its governance structure. As a result policies such as the new gTLD program have been approved without proper consideration of

² See announcement of: Commerce's NTIA Seeks Public Comments Regarding Joint Project Agreement with ICANN. October 29, 2007, available at: http://www.ntia.doc.gov/ntiahome/press/2007/PR_ICANNJPA_10292007.html

³ See INTA Comments on Mid-Term Review of Joint Project Agreement (JPA). February 12, 2008. Available at: http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_079.pdf

⁴ See NTIA Statement on the Mid-Term Review of the Joint Project Agreement (JPA) Between NTIA and ICANN. April 2, 2008. Available at: http://www.ntia.doc.gov/ntiahome/domainname/icann_jpa_080402.html

⁵ See Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers. Available at: http://www.ntia.doc.gov/ntiahome/domainname/Affirmation_of_Commitments_2009.pdf

trademark and intellectual property issues. This has had the effect of reducing participation within ICANN in general due to the perception that business and consumer protection concerns often are ignored.

B. ICANN continues to experience challenges meeting its obligations under the AoC, including contract compliance

Contract enforcement is central to ICANN's competence in managing Internet Names and Numbers, and, while some limited progress has been made, contract enforcement has gone from "non-existent to "not-yet-adequate." ICANN's lack of resources with respect to contractual enforcement has directly led to conduct that translates into DNS instability, e.g., lax compliance by certain registrars and registries with respect to their obligations under the contracts, tolerance of inaccurate Whois information, and a lack of uniformity and cooperation with respect to proxy registrations.

INTA agrees with many other IP groups in recognizing that the success of the entire ICANN experiment depends on using contractual agreements as a substitute for government regulation, and the viability of that experiment remains in question so long as those agreements are not consistently and predictably enforced.⁶

One significant example of this lack of enforcement by ICANN is the registrars' obligation to maintain accurate Whois data. Access to reliable Whois information is necessary to ensure accountability in the domain name space for all users of the Internet, including intellectual property owners. Yet, for millions of registered gTLD domain names, this vital information is often false or inadequate, frustrating the efforts of not only intellectual property owners, but also law enforcement and anti-abuse groups.⁷

ICANN has not clearly indicated how it plans to address this shortcoming in contractual compliance should there be a large influx of new gTLD registries. Despite the dedicated efforts of the small number of compliance staff, to date ICANN has not provided adequate compliance resources, and proposed budgets do not indicate sufficient new resources to meet the challenges of the gTLD proposal.

III. Introducing New gTLDs

A. Introductions to Date

When the Domain Name System was first designed in the mid-1980s, seven three-letter "generic" top-level domains (.com, .org, .net, .edu, .gov, .mil and .int) and an expandable set of two-letter "country-code" top-level domains, such as .de for Germany, were introduced. For a variety of reasons, consideration was given to expanding the number of generic top-level domain names in the system.

⁶ See Comments of the Intellectual Property Constituency. April 28, 2009. <http://forum.icann.org/lists/op-budget-fy2010/pdf4f6V4c2H5.pdf>

⁷ See Draft Report for the Study of the Accuracy of WHOIS Registrant Contact Information. (approximately 30% of the domain names sampled in the 5 largest gTLDs) were classified as fully or substantially failing an accuracy test. Available at: <http://www.icann.org/en/compliance/reports/whois-accuracy-study-17jan10-en.pdf>

In the White Paper, the Commerce Department concluded that the newly formed corporation would be the most appropriate body to consider the introduction of new gTLDs, based on global input, and this was one of the first tasks ICANN addressed shortly following its incorporation.

The White Paper also called upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent process, to develop recommendations on DNS issues affecting intellectual property, including evaluating the effects, based on studies conducted by independent organizations, of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders.

These findings and recommendations were then submitted to the ICANN Board in conjunction with its development of a policy for the introduction of new gTLDs.

A report published at the time by WIPO concluded that intellectual property owners have experienced considerable difficulties in ensuring the protection of their intellectual property rights in the then-existing gTLDs, and that such problems might be ameliorated if ICANN proceeded to make various policy and administrative changes in the process of registering domain names, including enhanced protection for intellectual property owners.

WIPO went on to suggest that any new gTLDs would need to be introduced in a slow and controlled manner so that experience with the proposed improved practices and procedures could be monitored. That experience would be the arbiter of whether such practices and procedures did indeed result in a significant reduction of the problems that had been encountered by intellectual property owners.⁸

However, ICANN failed to adopt key recommendations of WIPO, such as a mechanism for protecting famous marks and other provisions aimed at improving the domain name registration process and the accuracy of contact details on registered domain names.

In 2000 ICANN began the process of introducing seven new top-level domains (.aero, .biz, .coop, .info, .museum, .name and .pro).

These seven new gTLDs were authorized as a "proof of concept" by ICANN to gain a first-hand understanding of the practical and policy issues involved in their introduction to the DNS.

In October 2002, following the introduction of the seven new domains, ICANN issued a *Plan of Action for New gTLDs*, which suggested the approach of "parallel processing," which allowed progression on yet another set of new gTLDs before the evaluation of the previous round was completed.

As a result, no comprehensive evaluation of the first round of gTLD expansion was undertaken prior to the decision to initiate a second round.

⁸ The Management of Internet Names and Addresses: Intellectual Property Issues. Final Report of the WIPO Internet Domain Name Process. April 30, 1999. Available at: <http://www.wipo.int/amc/en/processes/process1/report/finalreport.html>

In December 2003, ICANN began a process to solicit proposals from sponsors of proposed new top-level domains and begin entering into contracts with the operators for seven additional gTLDs (.asia, .cat, .jobs, .tel, .travel, .mobi and .post).

In 2005, WIPO at the request of ICANN issued a report titled: "New Generic Top-Level Domains: Intellectual Property Considerations".⁹ The WIPO report noted that, given previous experience with new gTLDs, it was likely that the opening of new domain name space would attract abusive registrations, and that additional safeguards including preventive trademark protection in any new gTLDs would be necessary.

WIPO's report further observed, "when one trademark owner registers its trademark in one such gTLD and another owner registers an identical or similar mark in another gTLD, the public will not be able to clearly attribute each domain name to a specific trademark owner without checking the web site content. This is likely to cause confusion. Moreover, to the extent Internet users are unable (or become unaccustomed) to associate one mark with a specific business origin, the distinctive character of a trademark will be diluted. As a result, trademark owners are likely to try to register their marks in all such gTLDs."

The experience of brand owners in the existing twenty-one gTLDs, and the nearly 300 ccTLDs, has confirmed WIPO's observations. Among the costs incurred by brand owners are:

- defensive registrations of domain names and later renewals;
- retention of vendors or use of additional in-house resources to monitor the Internet for domain name abuses;
- legal fees and other costs involved in bringing UDRP proceedings or litigation against violators; and
- loss of traffic and sales from consumers diverted from the company's legitimate web site.

Nonetheless, in 2005 – the same year it began entering into registry agreements for the second round of seven new gTLDs -- ICANN initiated a policy development process that formed the basis of the current proposal for an unlimited number of new gTLDs.

B. ICANN's Current Proposal for New gTLDs

INTA is not against the expansion of the gTLD space. In fact, INTA has always recognized that the Internet will never be, nor should it be, static and that some expansion of gTLDs is to be expected under appropriate circumstances. The efforts of INTA and its members are intended to aid in the process of the expansion of the gTLD space with the overarching goal of assuring that any expansion is conducted in a timely, properly scaled, and responsible manner. For example, the Association has and continues to be a supporter of International Domain Names (IDNs), which permit domain names to exist in non-Latin characters such as Chinese, Arabic or Cyrillic.

⁹ WIPO Arbitration and Mediation Center - New Generic Top-Level Domains: Intellectual Property Considerations (2005 Report). April, 06 2005. Available at: <http://www.wipo.int/amc/en/domains/reports/newgtld-ip/index.html>

That said, INTA remains concerned that the current proposal for new gTLDs has not yet been refined to the point of being ready for launch.

The proposal itself goes back to June, 2008, when the ICANN Board approved a set of policy recommendations for the introduction of new gTLDs.

Following that decision, ICANN issued a draft Applicant Guidebook (DAG), the road map that would be followed by interested parties applying for new gTLDs. After the receipt of the initial public comments on the DAG, ICANN identified four overarching issues in connection with its proposal that were required to be resolved: trademark protection; the potential for malicious conduct; Internet security; and top-level demand and economic impact.

In accord with ICANN's identification of these four overarching issues, in 2009 INTA passed a Board Resolution that new gTLDs should not be introduced until those issues were resolved and that any expansion of the gTLD space must be "responsible, deliberate and justified." These principles have not been satisfied, and INTA believes that more multi-stakeholder collaboration is required before ICANN can satisfy its own stated objectives for the introduction of new gTLDs.¹⁰

1. Economic Impact and Analysis

Before publishing the first Applicant Guidebook, ICANN did not undertake a comprehensive economic study that would include data on the performance of the existing gTLDs, an analysis of the effects of competition, and an understanding of where demand might originate. After the public comments, ICANN retained an economist to produce a report on the potential benefits and costs of its proposal, but the report failed sufficiently to assess the economic impact.

As a result, ICANN commissioned work by another set of economists, and in June 2010, published Phase I of *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names*.¹¹ This report provided an analytical framework to assess the economic impact of ICANN's proposal stressing the importance of the issue of external costs (which include costs associated with cybersquatting and consumer confusion).

Phase I summarized prior analyses of other reports related to the introduction of new gTLDs. It identified several shortcomings of previous studies and concluded that they were incomplete. The central finding was that additional information should be collected.¹²

The *Economic Framework* noted that domain name registrants may suffer costs in maintaining an Internet presence or protecting their trademarks, and that these costs "create a gap between the net private benefits of new gTLDs to their operators and total net benefits to society," and

¹⁰ See INTA Board Resolution. Creation of New gTLDs and Trademark Protection. July 8, 2009. Available at: <http://www.inta.org/Advocacy/Pages/CreationofNewgTLDsandTrademarkProtection.aspx>

¹¹ See: *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names*. June 2010. Available at: <http://www.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf>

¹² Reply to Comments on *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names*. February 21, 2010. Available at: <http://www.icann.org/en/topics/new-gtlds/analysis-response-economic-framework-21feb11-en.pdf>

“because new gTLD applicants generally can be expected to make decisions to maximize their own (private) benefits rather than overall social benefits, an open-entry delegation process can lead to private decision-making that is not optimal for society as a whole.”

Phase I of the *Economic Framework* cited the scarcity of empirical data necessary to assess the impact of new gTLDs and proposed studies to obtain this information.

Phase II of the *Economic Framework*, published in December of 2010, undertook case studies of earlier gTLD introductions and concluded:

- (1) new undifferentiated gTLDs are unlikely to improve competition;
- (2) there is no scarcity of names in existing gTLDs; and
- (3) many stated benefits of new gTLDs are speculative, but the most likely arise from differentiated TLDs such as IDNs or community-based domains.

But Phase II went on to say that the costs to trademark owners and Internet users were real, and it cited:

- (1) “misappropriation” of intellectual property, which history shows results in very real and substantial costs of domain name watching, defensive registrations, litigation and other enforcement efforts, and lost profits;
- (2) domain navigation “dilution,” which results in the increased cost/burden of navigation because there are potentially hundreds or thousands more places to look for the domain name of interest, and also includes, as the Report notes, costs that “cannot be mitigated;”
- (3) harm to Internet users from cybersquatting, which history shows results in very real and substantial costs due to the spread of malware, phishing, and the offering of counterfeit products;
- (4) reduced investment in IP, which results from the prospect of increased opportunities for misappropriation; and
- (5) losses from failed gTLDs, which can create chaos for a company whose business is built around a domain name in a particular gTLD, as well as increased “clutter” on the Internet from links that fail to resolve.

The *Economic Framework* did not make an assessment of whether the benefits outweighed the costs in ICANN’s proposal. But it did suggest that ICANN should continue its practice of introducing new gTLDs in discrete, limited rounds, and that by proceeding with multiple rounds, the biggest likely costs—consumer confusion and trademark abuse – could be evaluated in the earlier rounds to make more accurate predictions about later rounds.

There has been no demonstrable effort by ICANN to use the *Economic Framework* to tailor its proposal to maximize benefits and minimize social costs, for example by proceeding with a measured introduction of new gTLDs focusing on IDN or community-based domains. Thus, there is an increased risk that the net result of the new gTLD proposal will be negative.

In fact, while ICANN's own economists cited the lack of empirical data to assess the costs, the ICANN Board determined that no further economic studies could better inform the Board's decision on this issue.¹³

2. Need for Stronger Intellectual Property Protection in the Applicant Guidebook

At the same time the economic study was under discussion, there was debate on how to protect trademarks in any new gTLD.

In response to significant concerns about the inadequacy of trademark protections in earlier Draft Application Guidebooks, ICANN formed an Implementation Recommendation Team (IRT) of trademark experts and members of other constituencies to recommend trademark protection mechanisms. The IRT submitted extensive and detailed recommendations to ICANN. The ICANN Board and Staff subsequently rejected or weakened key IRT recommendations. One issue that was rejected was the IRT's recommendation for an "exclusion" or blocking mechanism to minimize defensive registrations and costs for trademark owners as previously suggested by WIPO and later endorsed by the *Economic Framework*.

While the most recent version of the DAG makes some improvements in the Rights Protection Mechanisms ("RPMs") previously announced, the following are recommendations, inter alia, necessary to ensure adequate consumer and trademark protection:

- Uniform Rapid Suspension System (URS) – to be effective, the standards of proof must be brought into conformity to similar claims brought in civil disputes. The URS should provide trademark owners with a sufficient remedy to minimize the need for serial enforcement actions against the same domain name;
- Trademark Clearinghouse – to provide sufficient benefits, it is essential for the Clearinghouse, and its Trademark Claims Service, to remain operational past the sixty-day initial launch phase of the registry;
- The Clearinghouse must be integrated with other RPMs, such as the Uniform Rapid Suspension Procedure (URS); and
- Post-delegation Dispute Resolution Procedure – standards for registry conduct should ensure registries do not intentionally turn a blind eye to abusive conduct.

These recommendations, reflective of comments filed by the IP community on the various iterations of the Draft Applicant Guidebook, were also identified as outstanding issues in the advice from ICANN's Government Advisory Committee (GAC), which has been advising ICANN on these new gTLDs since March 28, 2007.¹⁴

In its December 9, 2010 communiqué to the ICANN Board, the GAC expressed concern that many of the original public policy issues it previously raised remained unresolved, which it believed resulted "primarily from the fact that the Board adopted the GNSO recommendations

¹³ See Adopted Board Resolutions. 25 January 2011. Special Meeting of the ICANN Board of Directors. <http://www.icann.org/en/minutes/resolutions-25jan11-en.htm#4.a>

¹⁴ See: GAC Principles Regarding New gTLDs. March 28, 2007. Available at: http://gac.icann.org/system/files/gTLD_principles_0.pdf

on new gTLDs without taking due account of GAC advice at that time, thereby creating a flawed process.”¹⁵

Following the conclusion of ICANN’s public meeting in December, 2010, the GAC accepted an invitation from the ICANN Board to meet intersessionally before ICANN’s next public meeting in the interest of resolving outstanding issues with the new gTLD process.

Subsequently, the GAC and ICANN Board met intersessionally, and again during ICANN’s last public meeting in March, 2011. During this time period, the GAC provided advice on a number of issues of concern to their governments, and the ICANN Board responded by agreeing to implement certain changes, which have been incorporated in ICANN’s latest Applicant Guidebook.

On the remaining issues of GAC advice, including issues related to intellectual property protection, ICANN has either requested further clarification from the GAC, or indicated that its current view is not consistent with the GAC’s advice.

Following their intersessional meeting in March, 2010, the GAC indicated it was “committed to taking whatever time is required to achieving these essential public policy objectives.”¹⁶

At its last public meeting, the ICANN Board resolved that “the Board intends to complete the process set forth in the timeline in time for final approval of the new gTLD implementation program at an extraordinary meeting of the ICANN Board to be held on Monday, 20 June 2011, at the ICANN meetings in Singapore.”¹⁷

3. Implications of ICANN’s Proposal for Brand Owners

ICANN estimates 500 applications for new gTLDs in the first round and has publicly declared it will approve up to 1000 new gTLDs each year. I have already touched on the costs to brand owners and the threats to consumers in the current environment, and the harms for consumers are also immediate and real. Consumers may suffer the minor annoyance of being misdirected in their search, but they may also be subjected to the more significant threats of landing on harmful sites that sell counterfeit goods, that seek to steal personal identity, that shock the viewer, or that perpetrate other frauds.

In urging support for its plan, ICANN has emphasized the opportunity for each brand owner to purchase its own gTLD. Let’s call it .brand. In order to do so, however, brand owners, who are seldom in the business of running domain name registries, will incur significant costs, which potentially include:

¹⁵ ICANN Governmental Advisory Committee. GAC Communiqué – Cartagena. December 9, 2010. Available at: http://gac.icann.org/system/files/Cartagena_Communique_0.pdf

¹⁶ ICANN Governmental Advisory Committee. Brussels Intersessional Meeting Communiqué. March 8, 2011. Available at: <http://gac.icann.org/system/files/Brussels%20Intersessional%20Meeting-%20GAC%20Communique.pdf>

¹⁷ See ICANN Board Resolution. Process for Completion of the Applicant Guidebook for New gTLDs. 18 March 2011. Available at: <http://icann.org/en/minutes/resolutions-18mar11-en.htm>

- a \$185,000 application fee payable to ICANN;
- an annual maintenance fee of \$25,000 payable to ICANN;
- costs related to obtaining a letter of credit as part of the application;
- additional, undetermined costs in the many cases where winning an auction for their .brand will be necessary;
- more significantly, the infrastructure, the Information Technology and personnel costs that will be necessary to maintain a gTLD; or alternatively the costs to outsource the back-end services of the registry;
- the staffing and resources required to assure compliance with ICANN agreements and policies;
- the costs to operate RPMs such as the mandatory sunrise periods and trademark clearinghouse;
- staffing and resources to handle additional legal issues that will arise, such as third-party subpoenas;
- costs associated with possibly setting up a legal entity to own and operate the gTLD and any attendant tax implications;
- the marketing costs that must be incurred in moving a customer base, accustomed to finding the brand on its existing site, to this new gTLD.

For other brandowners, such as small and medium-sized businesses, or entities such as not-for-profit organizations, the costs of applying for a new gTLD will be prohibitive. These organizations will be excluded from applying for a top-level domain, and, with limited resources, will face extensive difficulties in protecting their intellectual property in any new gTLD space.

But even for brand owners contemplating such an investment, the opportunity may be nothing more than a defensive move to prevent another entity from acquiring a domain name that could dilute the brand virtually overnight, confuse consumers and later preclude the brand owner from acquiring .brand.

In addition to these risks, the really pernicious possibility under the process as currently formulated is that, except in some narrow, not yet well-defined circumstances, a brand owner that becomes a registry operator will not be able to walk away from its investment if it proves unworkable for any reason. If the registry operator does abandon the registry, ICANN can re-sell or reassign the gTLD. That may have no significance beyond the financial loss if the registry is generic, e.g. .film, but what if the brand owner acquired .brand? ICANN could sell that valuable piece of intellectual property to a competitor, to a third party, or to a third party with bad intentions. Any of those results will ruin, not just diminish the value of the brand. The brand owner contemplating whether to attempt to purchase .brand is unable to plan an exit strategy and could be forced to continue the operation of that registry. In other words, under this ICANN proposal the brand owner can be forced in and not be able to get out. This would be a disaster for the brand and its consumers.

IV. Conclusion

INTA appreciates the efforts of the ICANN Board and Staff to improve the Draft Application Guidebook and the proposed gTLD program, but our members continue to have a number of concerns about ICANN's gTLD proposal:

- the ability to adequately protect their intellectual property and their consumers;
- the ability to manage costs, which have not been quantified;
- uncertainties related to the effectiveness of the rights protection mechanisms;
- issues related to the process of applying for a new gTLD, including the effectiveness of the objection procedures and the scope of ICANN's authority over the gTLDs; and
- insufficient confidence that registrar and registry agreements will be enforced, especially with respect to Whois and abusive registrations.

As a result of ICANN's stated intention to finalize the entire new gTLD process at its next public meeting, scheduled for June in Singapore, intellectual property owners are also concerned that the imposition of this arbitrary deadline will impede ICANN's ability to address these important public policy issues.

INTA looks forward to continuing to work with ICANN, the stakeholder community and this Committee in the responsible evolution of the domain name system.

In closing, we want to express our sincere thanks to the U.S. Government, in particular the Department of Commerce, and the more than 100 national governments who make up the GAC for their support for effective rights protection mechanisms and their continuing oversight of this critical ICANN initiative.

