



International Trademark Association
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INTA Internet Committee Comments

“An Economic Framework for the Analysis of the Expansion Generic Top-Level Domain Names”
July 21, 2010

The Internet Committee (the Committee) of the International Trademark Association (INTA) welcomes the opportunity to comment on the report “An Economic Framework for the Analysis of the Expansion Generic Top-Level Domain Names” (the Report).

I. The Need for Improved Transparency and Community Involvement in Addressing the Overarching Issue

The Affirmation of Commitments requires ICANN to operate in a transparent, fact-based community-led manner. The Committee remains deeply concerned with ICANN’s lack of transparency and community involvement in addressing the overarching issue of a lack of economic foundation in the new gTLD program. Posting pre-arranged material for public comment without adequate public input into the process simply does not satisfy ICANN’s obligations to act in the public’s interest. In this instance, ICANN has provided a very brief background description of the issues in a public announcement *following* the key decisions it made on the approach, resources, methodology, and issues that were to be examined in the analysis. See: <http://www.icann.org/en/announcements/announcement-3-16jun10-en.htm>. This approach has inevitably produced flawed results. The Committee strongly encourages

ICANN to give adequate time and due consideration to the issues and properly consult the public in the efforts to address the overarching issues.

II. Framework Analysis Overstates Benefits and Understates Costs

The Committee notes that many of the potential benefits of new gTLDs cited in the analysis are speculative in nature, and are not based on analysis of the previous introductions of new gTLDs by ICANN in 2000 and 2003. The report appropriately states that one potential benefit – that new gTLDs may provide competition to existing gTLDs resulting in lower quality-adjusted prices – may not be large. In this regard, the Committee notes that a fact-based study of the domain name marketplace would shed light on whether new gTLDs have increased competition to the benefit of consumers, or whether their impact has created harms that outweigh the competitive benefit.

The report also opines that new gTLDs may support new business models to benefit consumers, but does not indicate why a top-level domain name would be needed to support the delivery of products and services on the Internet, or to provide improved levels of customer service. The report states that new gTLDs may relieve the scarcity in domain names, but provides no evidence that such scarcity exists or is a problem for consumers. The report states that new gTLDs might reduce search costs, but later states that search costs may increase. The Committee believes that search costs are likely to increase as consumers will have to wade through even more domain names to find relevant content.

In terms of costs, the report states that an economically rational applicant would not incur costs unless it had a business model that allows for a profit. The Committee finds this

logic faulty as brand owner applicants may be pressured to apply for a new gTLD in order to minimize the harm or loss that could result from the dilution of their brand should another applicant obtain a new gTLD similar to the trademark. Rather than being a profitable venture, a brand owner may obtain a new gTLD because the economic harm from applying is less than the economic harm to their company if they do not apply. The report states there will be costs to competing registries and existing registries may suffer losses from the introduction of new gTLDs. However, this is based on the assumption that new gTLDs will create competition among registries when there is evidence that consumers treat various registries as complementary rather than competitive. As indicated above, the report acknowledges that there may be increased search costs and potential consumer confusion or fragmentation of the Internet. The report correctly states that search engine users may not benefit from new gTLDs. However, it incorrectly concludes that only direct navigation users are affected by new gTLDs, which is incorrect as new gTLD registrations can make it more difficult for consumers to find relevant content when using search engines.

The report acknowledges that trademark infringement is a cost. However, the report erroneously suggests that the costs of trademark protection may be decreasing over time due to various factors. It is the Committee's experience that costs to trademark owners dealing with the massive level trademarks in the domain name space has been *increasing*, not decreasing over the years, as the report suggests without substantiation. Second, the harm to trademarks includes not only costs associated with enforcement and preventative measures (additional domain name registrations, etc.), but includes damage to brand equity and to the

established good will and reputation of the mark owner. Third, protection of intellectual property encourages innovation by rewarding and incentivizing creators and innovators, and conversely, inadequate intellectual property protection discourages innovation and creativity, which is a detriment to the public welfare.

In terms of consumer costs, ICANN should have a baseline understanding on the current level of consumer confusion in the domain name system, including as the analysis cites, “lost time as a user tried to locate the correct site, damage inflicted on the user’s computer when he or she inadvertently visited a website that downloaded malware onto his computer, or purchasing of counterfeit goods from websites that appear to be legitimate.” (P. 60) Before introducing new gTLDs, ICANN should study the present proliferation of consumer confusion in order to understand how this public harm would extrapolate with a wide-scale introduction of additional new gTLDs.

III. The Analysis Cites Biased and Unscientific Resources

The survey of existing studies should have highlighted the essential fact that many of the “studies” referenced in the analysis are unscientific and are of highly questionable worth. They certainly fall well below the standards requested by the community, and the survey portion of the report is insufficiently critical of the paucity of serious prior data-based and scientifically conducted studies. In terms of analysis, the report appropriately points out that ICANN must consider “private” versus “social” costs and benefits of new gTLDs, and correctly states: “where there is divergence between the net benefits to registry operators and the net

benefits to the community, ICANN cannot rely upon the private incentives of the registry operators to produce a result that is optimal for the community or society as a whole.” P. 14.

As mentioned above, the report cites several resources, which utilize flawed methodologies to draw conclusions without any scientific basis. The use of biased resources, generated by parties with a vested financial interest in the unfettered introduction of new gTLDs, raises concerns regarding ICANN’s impartiality and ability to address the overarching issue in a balanced and transparent manner.

IV. The Need Remains for Comprehensive, Independent Study of the Domain Name Marketplace

The report correctly points out that consumers, as much as trademark owners, will be seriously harmed if cybersquatting and other trademark-based concerns with new gTLDs are not adequately addressed by ICANN. However, the Committee notes that ICANN through DAG4, has not adequately addressed the overarching issue of Trademark Protection (see comments of INTA, IPC, and WIPO) thus leaving consumers susceptible to serious public safety and health concerns. The report describes some studies that it believes might provide useful insights into the costs and benefits of introducing new gTLDs. To the extent the report recommends that a low priority be placed on these projects, we vehemently disagree.

It is essential that a market study and cost-benefit analysis be undertaken to determine the positive and negative impacts that the introduction of new gTLDs will have on the public, including trademark owners and consumers, in order to determine whether such new gTLDs

should be introduced in the first place, and to determine the scope, manner, and pace of any introduction of new gTLDs.

V. Conclusion

The Committee believes that the introduction of new gTLDs should be limited to only those that create net public benefits. In order to gain an accurate understanding of the public impact of market entry in the gTLD space, economic theory needs to be applied to the particular facts of the marketplace, and subjected to detailed analysis and review to see if there's a likely problem or whether there are likely benefits. This is of particular importance in regards to introducing new gTLDs to the Internet where market entry can produce significant public harm.

As a result, the Committee continues to call for a comprehensive, independent study of the full domain name marketplace to gain an empirical fact-based understanding of the impact of introducing new gTLDs on competition, intellectual property and consumers. Only by grounding its new gTLD program on an economic foundation, based on the realities of the marketplace, can ICANN resolve a key overarching issue: whether and how the introduction of new gTLDs will serve the public interest, and how to structure any roll-out of new gTLDs in a manner that will lead to net public benefits.

Thank you for considering our views on this important issue. Should you have any questions regarding our submission, please contact INTA External Relations Manager, Claudio Digangi at: cdigangi@inta.org