

November 20, 2009

VIA E-MAIL

Mr. Peter Dengate Thrush
Chairman of the Board of Directors
Mr. Rod Beckstrom
President and CEO
ICANN
4676 Admiralty Way, Suite 330
Marina del Ray, CA 90292

RE: Comments of the International Trademark Association on the
Third Draft of the New gTLD Applicant Guidebook

Dear Mr. Dengate Thrush and Mr. Beckstrom:

The International Trademark Association (<http://inta.org>) (INTA) welcomes the opportunity to provide comments to the Internet Corporation for Assigned Names and Numbers (ICANN) on the third draft of the New gTLD Applicant Guidebook (DAG V3).

INTA is a 131-year-old not-for-profit membership association of more than 5,900 corporations, law firms, and other trademark-related organizations from more than 190 countries. INTA is headquartered in New York City with regional offices in Brussels and Shanghai. INTA's membership crosses all industry lines, from manufacturers to retailers to service firms, and are united in the goal of supporting the essential role that trademarks play in promoting effective national and international commerce, protecting the interest of consumers, and encouraging free and fair competition. INTA has served as a leading voice for trademark owners on the future of the Internet DNS, and is a founding member of the Intellectual Property Constituency (IPC) of ICANN.

Introduction

INTA continues to believe that the introduction of new generic top level domain names (gTLDs) carries the potential to offer benefits to Internet users, only if introduced at the appropriate time, and in a responsible, controlled, deliberate and justified manner. However, in light of the significant harms and unintended consequences that can follow from expanding the domain name space, ICANN should not implement any specific proposal for new gTLDs unless it can

demonstrate to the public that the potential benefits of the proposed changes to the DNS outweigh the harms.

Since an expansion of gTLDs carries with it the potential to jeopardize the security and stability of the Internet, all risks associated with new gTLDs should be properly understood and assessed before decisions are made to expand the number of new gTLDs on the Internet.

While ICANN has committed to operate “...with input from the public, for whose benefit ICANN shall in all events act...”¹ the evidence publically available does not demonstrate that an unlimited introduction of new gTLDs will improve the public’s welfare, rather than advancing the interests of any particular set of stakeholders.

In fact, the Affirmation of Commitments agreement indicates that “...there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally...” and so that to ensure that ICANN’s decisions, “...are in the public interest...ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.”²

ICANN has yet to publish materials that examine and describe the negative effects of introducing an unlimited number of new gTLDs on the public, including costs to domain name registrants, businesses, consumers and owners of trademarks and related forms of intellectual property. As a result, the threshold question of whether the new gTLD program will improve public welfare has not been answered satisfactorily. INTA encourages ICANN to commence this work immediately, and begin meeting its responsibilities on this issue as set forth in the Affirmation of Commitments.

Internet Security and Stability

The world relies on the Internet for communication and commerce. Changes to the DNS should only be made when there is confidence that the changes will not cause a global disruption to the Internet. This occurrence was recently witnessed by the collapse of the entire .se (Sweden) Top Level Domain when it was knocked offline due to an error in the DNS configuration. In spite of all the inherent redundancies, an error occurred that was preventable had sufficient safeguards and preparations been in place.

While ICANN has recently published a report in response to public comments on the DAG, titled “Scaling the Root: Report on the Impact on the DNS Root System of Increasing the Size and Volatility of the Root Zone” (September 7, 2009), its outcomes have not been integrated into the new gTLD process. The study raises numerous concerns about the impact of making simultaneous changes to the root zone, including the impact of introducing large numbers of new gTLDs. Clearly substantial work remains for ICANN to ensure that the stability of the DNS will not be harmed by the new gTLD program. INTA awaits further community consideration of the study, but in light of the importance of the issue, remains concerned that efforts in this area were

¹ See: Section 8. Subsection C. Affirmation of Commitments by the United States Department of Commerce and ICANN.

² See Id. Subsection 4.

not completed prior to the decision to attempt implementing an unlimited number of new gTLDs to the Internet.

Top Level Domain Demand and Economic Analysis

ICANN has yet to commission a comprehensive economic study and analysis of the domain name marketplace to understand the effects on the public and competition of introducing an unlimited number of new gTLDs. INTA highlights the cautionary note reflected in the 2006 ICANN Board Resolution about the complexity of the domain registration market and the high levels of economic expertise required to produce reliable analysis and findings. Individual advocacy papers that opine on generalized economic theory, rather than empirical data of the market, fail to meet these standards.

INTA applauds ICANN for acknowledging that the work commissioned in this area has been insufficient, and supports the commissioning of a new truly independent study based on the empirical realities of the domain name registration marketplace. Once completed, the results should be assessed by the community and integrated into the new gTLD program accordingly.

Malicious Conduct

INTA is concerned that insufficient work has been done to address the overarching issue of malicious conduct in new gTLDs. INTA believes that the malicious conduct issue should be afforded the same weight as the other overarching issues that have been identified, which all have required separate processes and public comment periods in efforts to develop solutions. As set forth in INTA's comment on the staff Explanatory Memorandum, the recommendations proposed to address malicious conduct issues in new gTLDs are wholly inadequate in light of the widespread levels of malicious conduct currently in the DNS.

INTA encourages ICANN to develop mandatory and required processes aimed at addressing the high levels of DNS-related crimes and fraud currently perpetrated through phishing attacks, the spread of malware, and other forms of malicious conduct in the gTLD space. INTA also believes that in order to address the overarching issue, the existing domain name registration process must be significantly reformed to ensure the ongoing integrity of domain names and registry data.

Trademark Protection

In response to numerous public comments received on the previous versions of the DAG highlighting the need for trademark and consumer protection, INTA welcomed the formation of the Implementation Recommendation Team (IRT) to develop solutions to the overarching issue of trademark protection in new gTLDs. INTA strongly encourages ICANN to rely on the specific recommendations contained in the public comments, including INTA's recommendations set forth below, as resources to develop additional appropriate solutions for addressing the overarching issue of trademark protection.

INTA is concerned that ICANN has apparently rejected the Implementation Recommendation Team (IRT) recommendations relating to the Globally Protected Marks List and use of the string similarity algorithm, without proposing alternative mechanisms to meet the policy objectives of those proposals. INTA understands that several of the IRT's recommendations, as modified by staff, have been sent for consideration to the Generic Names Supporting Organization (GNSO). INTA will continue to provide input into that process through its participation in the Intellectual

Property Constituency (IPC), and withholds comment on the staff proposals until the GNSO process is completed. In addition, INTA expects that ICANN will issue the GNSO Council recommendations on these topics for public comment, so they can be properly considered by the community, as called for by the Board's October 12, 2009 letter. However, INTA believes that additional solutions are necessary, beyond those already proposed, if trademarks are to be adequately protected in a large scale expansion of new gTLDs.

This lack of safeguards is exacerbated by the exclusion of trademarks from the string similarity review, and then the failure to explicitly adopt the "likelihood of confusion" standard for evaluating strings similarity. These points are discussed at greater length in INTA's comments, set forth below, by module, on version three of the Draft Applicant Guidebook. Where applicable, we acknowledge in our comments the improvements that have been made over the first two versions of the DAG.

Module 1 - Introduction to the gTLD Application Process

Evaluators. INTA has previously recommended in its comments on DAG1 and DAG2 that ICANN identify in the DAG the criteria for the selection and qualification of the Evaluators. DAG V3 contains no criteria, and ICANN's inclusion of certain criteria in its February 25, 2009 "New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest" is not sufficient notice of the criteria. INTA recommends that ICANN include in the next version of the DAG either the criteria or a hyperlink to where they may be found on the ICANN website.

Timeframes for Filing Objections. As set forth in DAG3, the duration of the objection period is easily misunderstood and ICANN should clarify it. Moreover, INTA recommends that ICANN extend the objection period by two weeks such that it closes four weeks after the Initial Evaluation period. Preparing and filing a well-reasoned objection will require significant resources. It is very inefficient to expend those resources until it is clear to a potential objector that an application against which an objection may be lodged will, in fact, pass Initial Evaluation. Extending the objection period to four weeks after the Initial Evaluation period closes will allow potential objectors to expend resources and to take action on only those applications against which an objection can be filed. More importantly, it is alarming that this period is six days less than what ICANN provides to domain name owners to respond to a UDRP complaint. Surely, the registration of a gTLD requires a more thoughtful consideration than the registration of one domain name.

Public Comment. ICANN should provide further detail about the types of public comment that Evaluators will consider and what impact public comment could conceivably have on an application. INTA suggests that ICANN restore the requirement that Evaluators perform "due diligence" on public comments received to ensure that comments submitted by persons or entities in bad faith or that are baseless are not considered.

Required Documents. INTA suggests that ICANN include the following among the required documents in Section 1.2.2:

- Certifications or attestations of a corporation (including its individual partners and investors who might be doing business under other names) regarding pending litigation, especially infringement, domain name challenges, or the lack thereof

- Documentation such as certification of compliance with requirements for disclosure of any regulatory proceedings regarding fraud, omissions or non-compliance with disclosure requirements required by any laws or regulations and any pending proceedings related thereto including matters such as tax filings or securities offerings.

Of course, any such information submitted should be verified or attested to by specific individuals or third party regulatory authorities. For example, applicant entities should be required to provide certificate of active status or good standing from the applicable Department of State; patents and trademarks should be submitted on certified copies from the applicable patent and trademark office showing they are live and not opposed, abandoned or cancelled.

Open or Community gTLD. Requiring that the community for whose benefit a community-based application is intended be “clearly delineated” instead of a “restricted population” is a helpful change.

Cost Considerations. INTA is pleased that ICANN has deleted the TAS User Registration Fee. However, with regard to the Registry Services Review Fee, it is unfortunate that ICANN still has not clarified the circumstances under which a 5-person panel would be required (as opposed to a 3-person panel), has not identified the ceiling on the registrar services review fee [and the justification that will be applied if that fee should exceed \$50,000]. While it is helpful that ICANN has provided an estimated Comparative Evaluation Fee, it would be appropriate at this point in the drafting of the DAG to provide a fee range with an upper limit.

Module 2 – Evaluation Procedures

String Similarity Review. INTA objects to ICANN staff’s continued exclusion of trademarks from the string similarity review. While INTA agrees that a pre-registration review against other TLDs and other applied-for strings is prudent, the exclusion of defined categories of trademarks from this string similarity review is a glaring omission that could be characterized as substantiating allegations of ICANN’s institutional bias in favor of its revenue collectors (e.g., existing gTLD registries) and against trademark owners. The harm arising from consumer confusion between an applied-for gTLD string and a trademark, on the one hand, is just as significant as that arising from consumer confusion between an applied-for gTLD string and an existing TLD, on the other hand. Indeed, in many cases the harm arising from mark-based confusion presents greater risks to registrants and users, who may be deceived or duped into an erroneous purchasing decision or transaction by a confusing use of a TLD which is similar to a brand name. Therefore, INTA must once again reiterate its support for a trademark reserved names list.

Public comments have repeatedly emphasized the need for such a list and its application to the string similarity review in order to protect registrants and users from consumer confusion that could arise between applied-for gTLDs and marks on the reserved list. As evidenced by DAG3, ICANN staff continues to ignore these public comments, even though the IRT recommended the creation and use in the string similarity analysis of a Globally Protected Marks List. In fact, DAG3 appears to dismiss these concerns and place the onus on brand owners to bring costly and time consuming challenges under dispute resolution procedures. This is not “conservative” as the DAG contends, but rather is shortsighted, wasteful, and not protective of Internet users as ICANN commits to in the Affirmation of Commitments.

String Similarity Standard. INTA notes that DAG3 contains inconsistent articulations of the standard of string confusion. In some places, DAG3 states that a gTLD string can be refused if it “would cause user confusion.” However, elsewhere in the DAG, the standard appears to be articulated as “probability of detrimental user confusion” or as “probability of confusion” or even as “likely to deceive or cause confusion.” INTA strongly urges that a single standard should be adopted and that it should be based upon the rubric of “likelihood of confusion,” a concept that is widely used and understood in trademark and unfair competition jurisprudence worldwide. Requiring a probability of confusion or actual confusion is too narrow a standard, because the standard, like the standard for trademark infringement, should be motivated by the principle that any substantial number of consumers confused or defrauded is too much—that *most* consumers would be confused should not be necessary. If confusion is likely, the gTLD should be denied in order to protect users and the public.

INTA continues to recommend that the string similarity assessment includes similarity in sound and meaning, and not simply similarity in appearance. In the continued absence of more detail as to what weight the algorithm test results will carry, INTA is concerned that those results will carry disproportionate weight.

Geographical Names Process (GNP). INTA’s comments on DAG2 stated that an applicant should have the opportunity to challenge the decisions of the GNP (preferably within an alternative dispute resolution proceeding). This recommendation has not been reflected in DAG3. This appears necessary to address those situations in which the decision of the GNP may be that the application for the new TLD is a geographical name.

Limitations on Evaluators’ Ability to Request Further Information. Section 2.1.2.3 continues to state that the evaluators may make only one request for further information or evidence from an applicant. Providing only one opportunity for clarification (and only upon the evaluator’s request) conflicts with the goal of allowing evaluators to obtain sufficient information to decide applications on their merits.

String Similarity Panel. String Similarity Examiners should have experience in the field of trademark and unfair competition law or consumer behavior research so that they more adequately evaluate the issue of string similarity and user confusion.

Code of Conduct. The proposed code of conduct states that a panelist shall not “advance personal agendas or non-ICANN approved agendas in the evaluation of application.” While INTA agrees that panelist impartiality and fairness is a crucial foundation of the evaluation process, it is crucial that panelists be allowed to consider the public interest in avoiding confusion among top-level domains. In the event that the “ICANN-approved agenda” does not yet include this important concern, INTA emphasizes that it must.

Module 3 – Dispute Resolution Procedures

Purpose and Overview of the Dispute Resolution Process INTA is concerned that the addition of the word “limited” to the first sentence of Section 3.1 (“to protect certain *limited* interests and rights”) may be misconstrued by the ICANN community. INTA recommends that the term “limited” be removed or replaced with another term (e.g. “defined” interests and rights).

Legal Rights Objection INTA continues to believe that ICANN should allow both owners of collective and certification marks to have standing to file Legal Rights Objections. Such marks may include defined community groups (such as those who share a particular professional licensing certification) and thus may be particularly prone to abuse by competing string applicants. In addition, INTA recommends that ICANN clarify that the reference to “rightsholder” in Section 3.1.2 includes an exclusive licensee. For consistency purposes, INTA also recommends that the Legal Rights Objection sentence in Section 3.1.1. be modified to replace the term Objector with an expanded “rightsholder” term. INTA suggests the following amendments:

Legal Rights Objection – the applied-for gTLD string infringes “the existing legal rights of the rightsholder (including those of any exclusive worldwide licensee of such rightsholder).

Independent Objector INTA appreciates that ICANN has specified that the Independent Objector will be selected through an “open and transparent process.” Because DAG3 does not provide sufficient details about the proposed qualifications of the Independent Objector, INTA strongly recommends that ICANN specify the type and breadth of experience in the Internet and legal communities that will be required of successful Independent Objector candidates. INTA further recommends that ICANN adopt sound policies to ensure the Independent Objector remains impartial and not inappropriately subject to external influences. Such policies should include transparency and accountability mechanisms.

INTA continues to recommend term limits for the Independent Objector. While the DAG now specifies that the Independent Objector’s tenure is limited to the time necessary to carry out his/her duties in connection with a single round of gTLD applications, the DAG also indicates that the Independent Objector’s term is “renewable.” INTA continues to recommend that the Independent Objector be subject to a regular and transparent review process to evaluate the performance of the Independent Objector before his/her term may be renewed. ICANN should consider public comments on the Independent Objector’s performance during the evaluation process.

MODULE 4

Translations and Database. In its previous comments on the DAG, INTA has recommended that strings be translated, and that a database be created and maintained for examiners to use in evaluating strings. DAG3 does not incorporate this suggestion. INTA maintains that it would be useful and, possibly, necessary to ensure that potential string contention issues are dealt with appropriately.

Concerns regarding the Comparative Evaluation Process. INTA expressed concerns regarding the subjective nature and application of the Comparative Evaluation Criteria despite some changes to the criteria and the new point system in the DAG v2. The changes to the Evaluation Criteria in Section 4.2.3 seek to tighten up the point allocation by making the criteria more detailed and therefore more stringent. The expanded notes are useful and provide more detailed guidance on how each Criterion will be scored. Whether these changes result in a more accurate assessment of the legitimacy of the community applications remains to be seen. INTA recommends that the scoring system be reviewed and evaluated after the first round of applications is processed and strings allocated.

The amended notes and scoring system in relation to the Evaluation Criterion deal with the subjectivity issue in relation to assessment in part by allowing the Community Priority Panel to use information sources outside the application itself to verify the circumstances when assessing Criterion #I Community Establishment. We recommend this same option is available to the Panel in relation to its assessment of each Criterion.

Concerns regarding 2 (or more) “clear winners” having to proceed to auction. INTA is pleased that DAG3 addresses INTA’s additional concern that two or more “clear winners” may be required to compete in an auction against “standard” applicants. However, INTA’s primary concern that two or (more) “clear winners” under the Community Priority Evaluation will need to compete for a disputed word string at auction has not been explicitly addressed. Other text is clear that an auction would be the allocation method used, barring an agreement to the contrary by those two applicants.

Gaming. INTA had raised concerns that applicants for community applications could try to manipulate the evaluation process to avoid an auction. This issue is supposedly in part dealt with under the major reworking of the evaluation criterion and a tightening up of the requirements in relation to the allocation of points and allowing the panel to seek information external to the application in relation to at least the Community Establishment Criterion #1.

DAG3 does not, however, address INTA’s other concern about subjectivity, namely, that the assessment of the applicant’s claim should require the applicant to demonstrate how they will comply with the Evaluation Criterion post-delegation. INTA believes ICANN could address this concern by adding a criterion concerning post-delegation compliance and requiring the applicant to demonstrate how it plans to satisfy this criterion.

Auctions. INTA reiterates its concern that using auctions as an allocation mechanism is likely to result in strings being awarded to the applicant with the most cash on hand, not necessarily the best applicant. INTA continues to believe that, notwithstanding ICANN’s confidence in contention being resolved before they reach the auction stage, a considerable number of contention sets will go to Auction.

The Auction system, as proposed, also has practical problems. For example:

- The proposed time frame for Auctions seems short given they may involve people around the world
- The shortness of “rounds” may not allow for internal discussion by bidders, and
- The length of time allowed for payment for a successful bid is too long.

INTA notes that DAG3 indicates that the implementation of Auction Rules will override the procedure set out in DAG V3. Given the potential for significant change, it is difficult for INTA -- or any other party that wishes to participate in public comment -- fully to assess and consider the practical implications of the proposed Auction system if it is potentially subject to such change.

Payment Period. In addition, the length of time for the winning bidder to submit its payment has now been increased to 20 days. INTA had commented that the previous shorter period of time was too long, particularly given ICANN’s reference to a declaration of default being delayed for a “brief period”. INTA believes that this even longer payment period is also unacceptable.

Default Penalties. INTA recommends that ICANN further refine the default penalties for failure to pay for a winning bid in a timely way. It is unclear how ICANN would collect default penalties (exceeding the deposit); the rationale of using the alternative penalty amount of 10% of the bid as the default penalty was unclear – and may be excessive and significant in some instances and not correlate to the corresponding loss to ICANN. A better alternative may be to set a maximum threshold penalty. We note that the default penalties provision has been amended. However, the amendments do not deal with the matters raised by INTA and in particular do not deal with the possibility of penalties being excessive in some circumstances.

ICANN needs to make it clearer that the default penalties apply to both the initial winner and subsequent winners, should the initial winner default.

Module 5

INTA appreciates that a portion of its prior comments on Module 5, (which prior comments we incorporated herein by reference), apparently were considered and, to a limited extent, incorporated into this third version of Module 5. Nevertheless, as summarized below (and as with other Modules) INTA continues to harbor concerns regarding the transition to delegation and the proposed registry agreement.

Pre-contract review. INTA’s comments on DAG1 suggested that ICANN require a pre-contract review to avoid potential delay between the initial application and transition to delegation. INTA recommended that ICANN should have the ability to refuse entry into the Registry Agreement if that pre-contract review discloses negative changes in the applicant’s qualifications, (such as, for example, evidence that the applicant lacks long term financial viability or inadequate staffing). ICANN did not implement this suggestion.

We repeated these recommendations in our comments on DAG2, and added that “[s]uch a pre-contract review is not burdensome and is consistent with the practice in many other endeavors such as regulatory filings by public companies.”

DAG3 contains the same non-mandatory provision regarding asking the applicant for additional information as follows:

To ensure that an applicant continues to be a going concern in good legal standing, ICANN reserves the right to ask the applicant to submit updated documentation and information before entering in the registry agreement.

This language does not go far enough. ICANN should mandate a pre-contract review, which should not be limited to whether the entity is merely “a going concern in good legal standing.” ICANN should recognize that many of the “entities” applying for new TLDs will have only just been formed for this specific purpose and therefore can easily pass the “good legal standing” test. Applicants must reveal to ICANN which individuals and corporations are affiliated with the entity and what their past legal standing was, etc. Material negative changes in an applicant’s status or financial qualifications should be sufficient to allow ICANN to refuse to enter into a Registry Agreement with that applicant.

Information re-certification. INTA's comments on DAG1 and DAG2 proposed that ICANN require applicants to re-certify the information previously provided, in particular the information required by Section 1.2.3 of Module 1 (now Section 1.2.2), and to provide updated documentation where applicable. In particular, our DAG2 comments emphasized that the DAG seems to lessen the importance of providing accurate application information and updating that information. INTA reiterates the importance of requiring applicants to re-certify and provide accurate and updated information.

Identify Transition Evaluators. INTA's prior comments noted that Module 5 failed to identify who would be responsible for conducting the pre-contract review and the pre-delegation technical check. That information remains outstanding, and INTA repeats its request that ICANN provide this information.

Audits. INTA repeats its suggestions made in connection with its comments on DAG1 and DAG2, that ICANN itself conduct audits vis-à-vis technical check questions 3, 7, 8 and 9 in Section 5.2.1 or in the alternative, a third party conduct the audit; and that all audit terms and conditions should be set forth before the application round opens.

In DAG3, ICANN has replaced the technical check questions with required pre-delegation testing procedure. This new procedure is an important and encouraging development. However, INTA believes that ICANN should establish all testing criteria and procedures before the new gTLD application round opens and that the persons or entities conducting such testing should also be identified so that such criteria, procedures, and persons/entities can be fully vetted.

Registration Data Publication Specifications. In our comments to the first version of DAG Module 5, we suggested that ICANN require all new gTLDs to function as thick "Whois" registries. The Implementation Recommendation Team adopted this recommendation in its report. ICANN did not implement this suggestion, so we repeated it in response to the second version of DAG Module 5. We further specified that this requirement would help support critical ICANN objectives by protecting against phishing, fraud and trademark infringement. Thick Whois should be a critical requirement, not merely a recommendation or best practice.

The current version of DAG Module 5 adds a "Whois" servicing requirement in that the "Applicant must provision Whois services for the anticipated load," which will be tested by ICANN. While the meaning of "anticipated load" is unclear, this is a step in the right direction. The scope of the Whois services to be provided by the Applicant should be further specified and require that the Applicant provide (and certify that it has provided) detailed and correct information about registrants and that such information be gathered consistent with the IRT recommendations of a universal Thick Whois model.

Registration Services and Continuity. INTA's comments on DAG2 requested that ICANN provide more information on the role of the "Registry Services Continuity Provider" including how it would interact with the Registry Operator under normal circumstances. DAG3 removes all specific mention of the Registry Services Continuity Provider. INTA strongly urges development of standards for a services continuity provider, which would provide for situations where there is a registry failure or shut down. Provision should also be made for how the closure of a branded TLD will be handled. In situations where the branded TLD owner makes satisfactory provision for the transfer or closure of any second level domains, it should be permitted to discontinue the TLD without it being re-allocated to an unconnected third party.

Most importantly, ICANN has not, *but must* foreclose the possibility that a branded TLD—a TLD whose primary function is to reflect a pre-existing trademark—might be re-allocated or managed by a follow-on registry if the brand owner becomes insolvent or merely decides to discontinue operation of the registry. In such cases, the authority to operate the registry must be perpetually associated with the trademark owner (or the trademark owner’s permission). Not only the operation of the registry, but the operation of second-level domains in the branded TLD will ordinarily depend on permission from the brand owner. Therefore, to the extent ICANN forces the surrender of the registry to a party not connected with the trademark owner, ICANN and the new registry operator may be liable to the trademark owner for the infringement both of the registry operator, but of domain owners in the registry. This is a critical and fundamental issue for the continuing protection of a valuable trademark, not only from a liability perspective but also because we would expect that many trademark owners would regard the possible redelegation of their branded TLDs as an unacceptable legal risk, such that it would foreclose the viability of applying to operate a gTLD registry.

Renewal of Registry Agreement. INTA’s DAG2 comments noted that the proposed revisions to Article 4 of the Registry Agreement would generally cause the Agreement to renew automatically and would limit ICANN’s ability to terminate for breach only to Articles 2 or 6. (For example, a breach of Article 1’s representations and warranties would seem to provide no basis for non-renewal or termination.) As we have cautioned in the past, “Eliminating this possibility does not seem prudent”.

While the language in Article 4 of the Registry Agreement in DAG3 has been revised, the problem has only been worsened. The relevant language now permits non-renewal only in cases of “fundamental and material breach[es]” of specified portions of Articles 2 and 6 upon adjudication by a court or arbitrator after the Registry Operator has failed every opportunity to cure. Thus, if anything, the ability to disallow renewal is even weaker. While it is important to give Registry Operators the ability to cure defaults, ICANN should retain the power not to renew a Registry Operator’s Agreement based on breaches of any portion of the Registry Agreement.

Use of Registrars. The Draft Registry Agreement sets out four possible options for registry/registrar separation which range from no restrictions to complete restrictions on cross-ownership. INTA repeats its position that there should be complete separation of registry and registrar activities and that registries not be permitted to register domains in their own TLD, with the possible narrow exception of single-owner, branded TLDs.

If allowed to go forward, this proposed deregulation will facilitate “insider trading” that will open the door to abusive domain registration practices and higher domain name prices for some registrants. Indeed, recent events in the domain name industry make clear that concerns about a registrar’s privileged access to a registry’s names are not merely hypothetical, but have resulted in real harms. In fact, the temptation and potential financial gain to a registry are even greater with domain names that have never been released than those that have been captured for re-sale on the aftermarket. The fact that such abuses have occurred in the aftermarket suggests they are almost certain to happen in the original market.

Eliminating vertical separation will provide affiliated registrars with access to sensitive registry data -- including the entire universe of data for potential and existing domain names from all registrars that sell domain names in the TLD. By definition, a registry has unique access to DNS traffic in its TLD including: through logging, checks by *all* registrars for domain names (existing or non existing names) as well as the domains that are queried the most. Additionally the

vertically integrated registry/registrar has unique visibility into the moment of deletion for all names registered in the domain; with access to this data, an affiliated registrar could have the unfair competitive advantage to identify potentially high value names and monetize them through auctions, traffic sites or by selling them at higher prices to consumers through an affiliate on the secondary market. Moreover, it could do so at little or no incremental transaction cost.

A vertically integrated registrar could access information concerning DNS traffic to identify high value names and then reserve them simply for additional pay-per-click advertising. This would turn vast parts of the Internet into a giant advertising engine. As a result, consumers would pay higher prices for domain names, with the result that the promised availability of domain names, used by many as the principal reason to introduce new gTLDs, will never materialize. The Internet will become saturated with vast amounts of pay per click advertising. In its August 2009 statement on the end of domain tasting,³ ICANN observed that:

Aside from the problem that domain names may have been difficult to register, domain tasting also had a series of negative consequences on the manner in which people used the Internet. If individuals accidentally allowed their domain names to lapse, it had become extremely difficult for them to get the domain back (since it was being picked up and dropped by automated systems). Domain tasting also saw an enormous proliferation in the number of websites featuring nothing but advertisements, thus leading to a form of Internet graffiti.”

The concerns involved with vertically integrated registrar/registries are similar to those involved with domain tasting. ICANN must remember its mission to the safety and stability of the DNS and not allow a return to the “Internet graffiti” that would likely result from vertically integrated registrars.

Price Caps (Paragraph 2.9 (now 2.10) in Registry Agreement). INTA’s comments on DAG2 recommended that the adoption of price caps, in large part to prevent new gTLD registry operators from increasing renewal costs to the detriment of registrants, particularly for high-value domains, a category that includes trademark owners’ large domain name portfolios. INTA further suggested that new gTLD registry operators be prohibited from speculating on domain names based on their perceived fame or value.

In response, ICANN revised paragraph 2.9 (now Paragraph 2.10) completely. The new paragraph attempts to address this problem by requiring notice of 180 days (for renewed domains) and 30 days (for initial domain registrations) before most price increases can go into effect. During this time period, registrars must be offered the option to obtain domain name renewals at the same price for periods ranging from one to ten years at the discretion of the registrar. The only exceptions to this notice requirement are that (1) “Registry Operator[s] need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to a price for which Registry Operator provided notice within that past twelve (12) months”; and (2) “need not provide any notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3.”

³ <http://www.icann.org/en/announcements/announcement-12aug09-en.htm>

INTA welcomes ICANN's efforts to address concerns about the absence of price caps articulated by INTA and others. However, the potential for abusive pricing remains. Under DAG3, a registry operator can, at its sole discretion, increase prices over time. While the potential ability to renew a domain name registration for a 10-year term might be helpful for a small subset of registrants who know in advance that they wish to secure such a long term registration, the vast majority of domain name registrants do not register domain names for such a long term for a variety of reasons, so this is not an adequate solution to the problem. Additional measures to prevent, discourage and control abusive pricing are needed. At a minimum, registry operators should be required to provide a rationale for requested price increases that are in excess of some incremental uniform increase indexed to a set standard, such as the cost of living index, for example.

Module 6 - Application Terms and Conditions.

Paragraph 1. The deletion of the phrase "reflect negatively" and the prohibition on refunds for an application rejected due to material misstatements, misrepresentations, or omissions of material information are positive changes.

Paragraph 2. We continue to believe that ICANN should require full disclosure of all corporate relationships (parent, subsidiaries, affiliates, etc.) as well as disclosure of any other applications the applicants and related corporations have for gTLDs.

Paragraph 4. ICANN should include a notice and cure provision in the case where an applicant's fees are not received timely. Simply because a fee is late should not, without proper notice and cure provisions, be grounds for the cancellation of the application.

Paragraph 6. ICANN should provide an explanation for the overly broad, unduly burdensome, and commercially unrealistic requirement that an applicant release ICANN from all claims, covenant not to sue, and waive any rights to judicial action and review. This paragraph should be deleted and rewritten with appropriate limits on the release of ICANN from liability.

Paragraph 7. INTA supports ICANN's intention to keep specifically identified information confidential, as outlined in Module 1.

Paragraph 8. We continue our request that ICANN require applicants to keep all of their "personal identifying information" current and updated and require that such updates be made within a reasonable period of time (perhaps as long as 60 days) after the information has changed.

Paragraph 9. INTA welcomes ICANN's decision to limit its right to use applicant's name and/or logo in ICANN public announcements to those relating to applicant's application and actions taken by ICANN related thereto.

Paragraph 11. INTA appreciates ICANN's stated intention to use reasonable efforts to ensure that the persons with whom ICANN consults maintain the confidentiality of information in the applications that are specifically noted as being confidential.

Registry Restrictions Dispute Resolution Procedure (RRDRP)

INTA supports ICANN's decision to propose a dispute resolution procedure to allow third parties with standing to seek enforcement of the term of a gTLD registry's agreement.

However, INTA believes that the existence of the RRDRP will not and should not limit or supplant ICANN's contract compliance responsibilities. The RRDRP must remain a supplemental dispute resolutions mechanism for use in a hopefully narrow set of circumstances.

Introduction

Existence of RRDRP Calls into Question ICANN's Ability to Deal Effectively With New gTLDs. ICANN's claim in the introduction that, without this RRDRP, ICANN would be called upon to expend significant resources on gray areas of eligibility and content restrictions only highlights the fact that ICANN is not equipped to deal with a large number of new gTLDs. Instead, the RRDRP could be characterized as shifting the burden of contract compliance to third parties. INTA is concerned by ICANN's apparent admission that its intended new gTLD implementation plan is likely to result in gaming of community application requirements. Given that ICANN will benefit financially from the introduction of new gTLDs and has ostensibly set application fees in order to cover its costs of overseeing registry operators' compliance, it is highly inappropriate to require third parties to bear the financial cost of ICANN's contractual compliance responsibilities.

ICANN's Contractual Compliance. The introductory statement that the RRDRP is not intended to replace ICANN's contractual compliance responsibilities calls into question what action ICANN itself will take if a community gTLD registry operator violates its commitment to use the gTLD for the benefit of a particular community. Because ICANN will be evaluating gTLD applications, ICANN should also have the responsibility to ensure that the applicants comply with the terms of their contract with ICANN. If an RRDRP complaint is filed against a gTLD registry operator, ICANN should submit a statement summarizing whether it has found the registry operator to be in non-compliance. ICANN should be a party to RRDRP proceedings.

Standing Requirement that Complainant Be Harmed by the Operation of the gTLD at Issue. ICANN should eliminate the standing requirement that a Complainant must be harmed by the operation of the gTLD at issue or, in the alternative, allow the Independent Objector to initiate RRDRP proceedings. If a new gTLD registry operator is violating the terms of its registry agreement with ICANN by breaching the representations about community benefit that were the basis for awarding the gTLD to that operator in the first instance, there must be a mechanism for any third party to report such violation and facilitate a resolution.

Processing Fee. The fee should be less than \$1000 unless the Complainant has previously filed a complaint with ICANN and ICANN has concluded that the allegations are without merit.

Draft Procedures. As noted previously, the standing requirement should be revised or eliminated. INTA recommends that ICANN establish a deadline by which a Panel Determination must be rendered. INTA recommends a deadline of 60 days after the Complaint is filed.

Administrative Review. A 10-day period is unnecessarily long for review of the Complaint to determine that all necessary information has been provided. INTA recommends a 5-day period. In addition, INTA suggests adding a 5-day period within which a Complaint could cure any

administrative deficiencies in the Complaint. A similar cure period applies to UDRP proceedings.

Response to the Complaint. ICANN should require the gTLD registry operator to disclose in its Response all other registries that it, or related or affiliated companies, operates.

Panel. Thirty days is simply too long a period for the basic step of appointing the panelist(s), after all information and documents have been received. We propose a 15 day period for appointing the panel (presumably from the provider's existing list of approved neutrals). The party paying the panel fee should be the sole party that chooses whether the panel consists of one Panel member or three. There needs to be a minimum and maximum range set for the costs of the proceedings. If the Provider appoints an expert on its own initiative, the Provider should bear the cost of the expert's fees.

Hearings. The party requesting a videoconference or teleconference should bear its cost. The proposed standard of proof of "clear and convincing evidence" is too burdensome. As with the UDRP and the proposed RRDRP, the standard should be a "preponderance of the evidence" standard.

Remedies. ICANN should clarify the section addressing monetary sanctions to specify that such monetary sanctions will be paid to the Complainant. Monetary sanctions should be based on the greater of the financial harm to the Complainant or the financial benefit to the Registry, with treble damages for egregious conduct. Monetary sanctions should also include the possibility of awarding attorneys' fees to the complainant (as are available to registry operators in cases filed "without merit"). Without that scale, the sanctions are not sufficient to act as a deterrent. ICANN should outline minimum and maximum guidelines for penalties or sanctions. Specific findings could be linked to specific penalties, or penalties could vary for first time offenders versus multiple offenders. Violating registrations should be deleted as they are a direct result of the gTLD registry operator's violation of its registry agreement. Refunds, if any, to registrants of such violating registrations must be paid by the gTLD registry operator.

First-time offenders should be temporarily banned from registering new gTLDs. Repeat offenders should be permanently banned. Regardless, Complainants should never be banned, even temporarily, from filing Complaints.

The evidentiary standard for finding a case "without merit" should be the same standard applied to the Complainant. As presently worded, the standard for finding a case "without merit" is lower than the standard for establishing a valid complaint.

The Panel should have the express authority to order remedial measures (e.g., ordering the registry operator to implement procedures to limit further inappropriate actions).

The Panel Determination. Barring any justification from ICANN to the contrary, remedies should take effect immediately.

Comments on the Proposed Trademark Post-Delegation Dispute Resolution Procedure (PDDRP)

INTA commends ICANN for proposing a trademark-based Post Delegation Dispute Resolution Procedure. Without such a procedure it will be difficult to ensure adequate and effective protection of trademark rights against registry behavior that causes or materially contributes to trademark abuse, whether through the TLD itself or through domain name registration in the TLD.

However, INTA believes that the proposed standards for the infringement both at the top-level-domain and the second-level-domain need clarification.

In addition, as an overarching comment, the standards only contemplate use of the PDDRP where the gTLD “is identical or confusingly similar to the complainant’s mark.” This provision will limit use of the PDDRP to only those situations where the gTLD itself is identical or confusingly similar to a complainant’s mark and will prevent use of the PDDRP where the gTLD is combined with second level domains to the injury of trademark owners or consumers. For example, the operator of a .bank gTLD could engage in widespread fraud through willful registration of wachovia.bank, suntrust.bank, chevychase.bank, bankofamerica.bank, etc. to entities using the domains for fraudulent purposes, and the registry operator would not be subject to the PDDRP because the .bank gTLD alone is not “identical or confusingly similar to the complainant’s mark.” In other words, operators of truly generic TLDs will be immune from PDDRP proceedings no matter how the TLD is being used in combination with second level domains—even in cases of intentional and egregious trademark infringement and fraud.

Standard for Top-level Infringement. The proposed standard requires that to hold a registry operator liable for infringement at the top-level, a complainant must assert and prove that

“by clear and convincing evidence that the registry operator’s affirmative conduct in its operation or use of its gTLD, that is identical or confusingly similar to the complainant’s mark, causes or materially contributes to the gTLD: (a) taking unfair advantage of the distinctive character or the reputation of the complainant’s mark, or (b) unjustifiably impairing the distinctive character or the reputation of the complainant’s mark, or (c) creating an impermissible likelihood of confusion with the complainant’s mark.

INTA is aware that the proposed criteria (a) – (c) are built on the legal rights objection criteria for Pre Delegation Dispute Resolution as proposed in WIPO’s Trademark Based Post-Delegation Dispute Resolution Procedure. INTA agrees that a more concrete development of these criteria, including an exhaustive list of factors, would not be appropriate to cover all scenarios of an abusive use of a TLD by a registry operator.

However, INTA disagrees with the requirement that a complainant must assert and prove that the Registry shows an “affirmative conduct” with regards to the conditions (a), (b) or (c). Instead it should be sufficient that the Registry knowingly permitted or could not have reasonably foreseen (i.e., recklessly disregarded) that the use of the gTLDs meets the conditions (a) (b) and (c) so that also scenarios in which the registry turns a blind eye to the abusive use of the gTLD would be covered.

Standard for Second-level Infringement. INTA supports ICANN’s proposal to extend the RDDRP to the second level, but does not agree with the proposed standard, which requires that

by clear and convincing evidence: (a) that there is substantial ongoing pattern or practice of specific bad faith intent by the registry operator to

profit from the sale of trademark infringing domain names; and (b) of the registry operator's bad faith intent to profit from the systematic registration of domain names within the gTLD, that are identical or confusingly similar to the complainant's mark, which: (i) takes unfair advantage of the distinctive character or the reputation of the complainant's mark, or (ii) unjustifiably impairs the distinctive character or the reputation of the complainant's mark, or (iii) creates an impermissible likelihood of confusion with the complainant's mark.

INTA notes that the standard in its current form raises many questions and needs clarification.

Questions:

1. The "clear and convincing evidence" standard is too high in the absence of separate litigation and discovery. INTA recommends sufficient "evidence" or a "preponderance" standard.
2. What is "specific bad faith intent"? Is the implication that "general bad faith intent" is permissible? If so, this is unacceptable.
3. National laws on cybersquatting, such as the ACPA in the United States, hinge liability not only on bad faith registrations, but also bad faith use or trafficking in domain names. The test articulated above limits bad faith to "profit from the sale of trademark infringing domain names and systematic registration of domain names." This does not cover examples where the registry itself may be using the domain names, trafficking in domain names, etc. and should.
4. The requirement of creating an "impermissible" likelihood of confusion should be eliminated. This implies that there may be some forms of "permissible" likelihood of confusion that would be acceptable.
5. What is the relationship between condition (a) and (b)? The conditions listed under (b) (i) – (iii) must all be considered as addressing the registration of "trademark infringing domain names". The requirement of condition (a) which also addresses "trademark infringing domain names" is therefore unclear. To have a deterrent value it is necessary that registry operators that turn a blind eye to systematic cybersquatting and registration of infringing domain names -- in addition to those that intend to profit from systematic cybersquatting -- be subject to proceedings under the PDDRP.

Although the second-level infringement standard is intended to provide a remedy against gTLD registry operators that profit from systemic cybersquatting and trademark infringement instead of adopting appropriate mechanisms to counter such abuse, the conditions set out under (i) – (iii) cover only certain trademark infringement scenarios with regard to trademarks which have acquired a reputation and cases of an impermissible likelihood of confusion. They do not -- but must -- cover other typical scenarios of cybersquatting. Accordingly, another condition should therefore be added to the requirements under (b) which addresses domain names "that have been registered and used in bad faith pursuant to the principles of the UDRP".

The proposed standard addresses "the systematic registration of domain names" which meets the conditions (b) (i) – (iii) but not the systematic "use" of domain names; it should be made clear that the standard addresses the systematic registration or use of domain names which meet the requirement (b) (i) – (iii) or have been registered and used in bad faith.

Content of the Complaint. The content bullet points appear to be duplicative. It is not clear whether the standing requirement is, or should be, separate from the requirement to identify the particular legal rights claim being asserted. The requirement of a “detailed explanation of the validity of the Complaint” is duplicative of the preceding requirements. If intended to be an additional requirement, explanatory details should be provided.

Administrative Review of the Complaint. An administrative review period of 10 days is too long. Instead, ICANN should use a 5-day period for review of the complaint to confirm compliance with PDDRP formalities.

Response to the Complaint. While holding the complainant to the highest possible evidentiary standard of “clear and convincing evidence,” the PDDRP conversely allows defaults to be set aside by a mere showing of “good cause.” ICANN should raise this standard to “excusable neglect” or some higher standard to prevent gTLD registry operators from easily avoiding default judgments by showing “good cause.” The following sentence appears to contain a typographical error or alternatively is not clearly worded: “If the registry operator believes the Complaint is without merit, it will affirmatively plead in its response the specific grounds for the claim.”

Panel. A 30-day period to simply appoint the Panelist(s) is too long. INTA proposes instead a 15-day period.

Discovery. If the Provider appoints an expert on its own initiative, the Provider should bear the cost of the expert’s fees.

Burden of Proof. The proposed standard of proof of “clear and convincing evidence” is too burdensome. As with the UDRP and the proposed RRDRP, the standard should be a “preponderance of the evidence” standard. If there is a concern that the process may be abused, safeguards can be included on the back end (i.e. the appeals process).

Remedies. The section addressing monetary sanctions should be clarified to specify that such monetary sanctions will be paid to the complainant. Monetary sanctions should include the possibility of awarding attorneys’ fees to the complainant (as are available to registry operators in cases filed “without merit”). The Panel should have the express authority to order remedial measures (e.g., ordering the registry operator to implement procedures to limit further inappropriate actions). The evidentiary standard for finding a case “without merit” should be the same standard applied to the complainant. As presently worded, the standard for finding a case “without merit” is lower than the standard for establishing a valid complaint.

Panel Determination. A 45-day period for the Panelist(s) to provide its/their decision is too long. A 30-day period is more appropriate.

Comments on Mitigating Malicious Conduct

INTA welcomes ICANN’s effort to address this major concern of the Internet community. The potential for malicious conduct in the domain name space could increase exponentially if the Internet domain name system expands to include an unlimited number of new gTLDs. Nonetheless, ICANN’s proposals for mitigating risk do not go far enough to address those risks.

The current recommendations on mitigating malicious conduct require further analysis and evaluation and ICANN should conduct in-depth studies to fully understand the risks that malicious conduct on the Internet poses vis-à-vis the stability and security of the DNS in the context of a massive gTLD rollout.

Overall, INTA is concerned that ICANN has placed primary compliance responsibility on new gTLD registry operators without providing sufficient compliance procedures and resources. Historically, ICANN had not vigorously enforced the Registrar Accreditation Agreement against registrars, and has only relatively recently revoked registrar accreditations. ICANN has had few occasions to take compliance action against gTLD registry operators, most of which are operated by entities in the United States or in other English-speaking countries, which makes compliance for ICANN, a U.S. entity, easier. With an undetermined number of new gTLD registry operators expected, ICANN will have even more actors to oversee and supervise. ICANN must specify how it will effectively ensure that all these new registries will comply with the new requirements. Neither the Mitigating Malicious Conduct Explanatory Memorandum nor DAG3 lists a specified course of enforcement actions that ICANN may (or will) take, nor do they explain how ICANN plans to enforce the agreements and address malicious registry (or registrar) conduct after applicants are approved.

A. How do we ensure that bad actors do not run registries?

Additional Grounds for Denying Registries. ICANN's proposed grounds for denial of an otherwise qualified applicant create a solid foundation, but they are ultimately inadequate. ICANN should expand the grounds for denial of an otherwise qualified applicant as follows:

- if any funder⁴ or corporate affiliates of funders of (a) an applicant or (b) any officer, partner, director or manager or other affiliate or (c) any person or entity owning (or beneficially owning) 15% or more of an applicant are disqualified by any of items (a) to (f) specified in Item 1.
- Section 1(a) should be made clear that crimes related to financial or corporate governance misconduct will preclude another otherwise qualified applicant from becoming a registry operator. The existing language is unclear as to whether all felonies or only felonies related to financial or corporate governance misconduct preclude becoming a registry.
- Subsection (f) is vague and should be worded with much greater specificity to include an applicant that is “associated with a pattern or practice of either liability for, or bad faith in connection with, trademark infringement or domain name registrations, including:”
- Similarly, Subsection (f)(iii) should be restated as follows: “registering domain names primarily for the purpose of disrupting the business of, or diverting Internet traffic from, a competitor; or”
- ICANN should add new subsections (g) and (h) which would also add as grounds for disqualification findings that an applicant has previously violated registrar or registry agreements as follows:

⁴ “Funder” refers to funding by any individuals or entities (other than financial institutions) who financially support the operations of a registry, but who themselves may not be a registry.

“g. is the subject of a material breach of an existing ICANN registrar or registry agreement(s); or

“h. intentionally submitted or provided fraudulent information in connection with its application, the review of that application or the defense of any objections to that application.”

Background Checks. ICANN should expand the scope of criminal background and reference checks to include (i) the applicant; (ii) any officer, partner, director, or managers of the applicant and (iii) any person or entity owning with controlling interest in the applicant and (iv) any funder of any of the foregoing. Further, such criminal background and reference checks must be mandatory.

ICANN should consider information gathered during the course of these background checks, including records of past criminal activity, and disqualify applicants on the basis of the gathered information. These measures will mitigate the risk that known felons, known cybersquatters, and/or members of criminal organizations will become involved in registry operations or gain ownership or proxy control of registries.

INTA recommends that ICANN consider having each applicant and related persons submit fingerprint cards with its application, which is a procedure performed in the U.S. for certain financial services and securities personnel pursuant to statutory requirements of state or federal government.⁵ ICANN should investigate the applicability of these same requirements in other parts of the world and adopt similar measures to authenticate the identity of applicants and their controlling persons applying to become a registry or a registrar or an owner of a registry or a registrar.

Risks Involved in Registry Transfers. ICANN’s decision to forego approval of all changes in control of registry operators is a deficiency, one with potentially grave implications, in the proposal. To permit a change in control without review and approval from ICANN would permit a circumvention of the very controls espoused in the requirements of this document. INTA suggests that any proposed change in control of more than 25% of the ownership of a registry over time be submitted to ICANN for prior review and written approval. If all the conditions of operation originally set forth in the applicant’s application are verified, written approval should not be unreasonably withheld by ICANN; provided, however, that review and approval of the transfer should be required if the change in control will not change operations.

Risks after Registries are Approved. This Explanatory Memorandum suggests that properly vetting registry operators will serve to proactively keep malicious conduct out of the domain name space. More is required, however, to deal with registry operators that become bad actors post-delegation.

In addition to establishing provisions that would prevent registries from actively being bad actors and engaging in malicious conduct, ICANN should adopt measures to prevent registries from passively allowing malicious conduct. The Registry Agreement requires stronger oversight mechanisms to hold registries responsible for conduct committed (or omitted, as the case may be) by registrars and their registrants that they work with. Punishing abuse will incentivize registries to better police their gTLD space. Furthermore, ICANN’s registry contracts should

⁵ This requirement applies, for example, to every member of a national securities exchange, broker, dealer, registered transfer agent and registered clearing agency.

require registries to negotiate stronger standards for business and security practices rather than just suggest that registries negotiate stronger standards for business and security practices with accredited registrars (as ICANN suggests in this document).

Resellers. ICANN must take action regarding resellers, which are a large source of registrar-related misconduct. Although doing so is beyond the scope of the Explanatory Memorandum, ICANN should insist on appropriate changes to the RAA.

How do we ensure integrity and utility of registry information?

ICANN suggests that requiring DNSSEC deployment, prohibiting wild carding and encouraging removal of Orphan Glue records will help to ensure the integrity and utility of registry information. While these standards are commendable, they will only be successful to the extent that these rigorous standards are enforced and enforced in a timely manner to prevent continued malicious conduct and the resulting damages.

How do we ensure more focused efforts to combating identified abuse?

ICANN suggests that combating identified abuse can be helped by requiring thick Whois records, centralizing of zone-file access, documenting registry and registrars level abuse contact and policies and making an Expedited Registry Security Request process available.

The recommendation of the Thick Whois requirement is commendable, but like other recommendations put forth in the Explanatory Memorandum, it will only be successful to the extent that it is enforced. Whois records often contain false information, so more is needed to discourage this sort of behavior. ICANN should emphasize the importance of Whois accuracy.

ICANN should require strict proxy or anonymous registration guidelines to prevent circumvention of the Thick Whois requirement, including requiring the applicant to disclose the “true registrant” upon request by a brand holder protecting its trademark rights or to escrow such proxy/anonymous data to be available upon the occurrence of specified triggering events. INTA also supports the development of additional procedures to combat abuse, including the development of a rapid domain name suspension process to address abusive domain names that host or support malicious conduct.

How do we provide an enhanced control framework for gTLDs with intrinsic potential for malicious conduct?

ICANN suggests that a High Security Zones Verification Program will enhance control framework for this type of gTLDs. INTA notes that this measure is currently optional. To establish a safe, stable and secure Internet, the HSZV Program must be mandatory. Making the program optional makes it likely that only “good” actors will seek verification, while “bad” actors will not, and not be penalized or even judged for it. Because applicants will not lose points for not participating in HSZV and will not gain points for participating, there is no real incentive for participation.

The HSZV process must be transparent. ICANN must notify the public that if any registry experienced unresolved deficiencies that resulted in the denial of an applicant’s request for verification. Similarly, it is important that the public receive notice of nonrenewal of verified status for failure to meet the then-applicable standards.

Thank you for considering our views on these important issues. If you have any questions regarding our submission, please contact Claudio DiGangi, External Relations Manager, Internet & the Judiciary at: cdigangi@inta.org

Respectfully submitted,

A handwritten signature in black ink that reads "Alan C. Drewsen". The signature is written in a cursive style with a large initial "A" and "D".

Alan C. Drewsen
Executive Director