

Potential Human Rights Issues Arising from the gTLD Subsequent Procedures

The Cross Community Working Party on Human Rights for the purpose of ICANN's transition has prepared the following summary of issues arising from the procedures of assigning the new generic top level domains, or 'gTLDs'. The Working Group aims to highlight matters in which ICANN's functioning causes concerns relating to the preservation and respect for human rights of the community at stake.

In the case of gTLD procedures, as brought out in PDP on New gTLD Subsequent Procedures by the Generic Names Supporting Organisation, these concerns of human rights violations are varying in terms of both degree and effect. The following document outlines the important human rights concerns involved in the new gTLD allotment and resolution procedures. The issues are categorized in accordance with the relevant rights which they may affect. The degree and nature of each potential impact is either based on existing and prior examples of a similar nature, or have been phrased as questions that will hopefully be addressed at a later stage through amendment and new PDPs.

It is a part of the objectives of CCWP-HR to ensure that the human rights concerns are accounted for during the transition and subsequently implementing measures which minimize or remove the impact on the human rights of individuals involved in the new gTLD process.

Freedom of Expression

The necessity of freedom to express oneself has been highlighted as an essential human right. The United Declaration of Human Rights states in Article 19 that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

In a world where censorship and inequity in access to resources limits one's ability to express themselves, gTLD procedures must be careful in limiting the extent of restrictions on free speech and expression so that little, except for a few reasonable restrictions, prevents an individual from free expression with respect to gTLDs.

1) Content-based gTLD String Evaluations-

As a part of the procedure of new gTLD Application Evaluation for a particular string, there is a concern expressed that validity of the string may come to depend on the evaluation of the content

of the website. This concern was first expressed when ICANN's San Francisco GAC Communiqué March 16, 2011 stated that the Corporation may move on to a system "*assuming an ongoing management and oversight role regarding Internet content*". The Council of Europe Report at ICANN 50 drew on this communiqué to suggest that this could mean that ICANN may extend its scope such that "*the approval or rejection of applied-for new gTLD strings may involve an evaluation process where judgments related to content are made.*" In other words, ICANN could examine applications for a gTLD string and prioritise certain types of content or speech over others, which would amount to a denial of free speech. As a procedure that could potentially focus on content of a gTLD through value judgment, gTLD owners may face ICANN's procedural censure merely based on their website contents.

2) Community, Trademark and Public Interest Objections to gTLD strings-

The Applicant Guidebook provides for four opposition mechanisms to gTLD string applications. One of these is the community objection, where there is a significant objection from the community to a certain proposed gTLD string, such that a panel of experts will review all objections designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Following this, the two parties either enter into dispute resolution process or the application/objection is withdrawn.

This is concerning because the definition of what amounts to 'significant objection from the community' is unclear, so that such objections can be made in an exploitative fashion against free speech even where there is no real or significant harm or effect accruing to any community. The Trademark Objection may allow for companies to take action against gTLD strings which are used to make fair criticism of existing organisations. Eg. The .sucks domain may be held as defamatory to an individual or company merely based on the domain name, and irrespective of the actual content of the website.

Similarly, the Public Interest based objection to strings can take place where a potential new gTLD is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law. This also can potentially overreach its mandate, resulting in harm to the right of free speech. Eg.- When two TLD strings are identical/very similar, the string which is of greater value to the public interest will receive priority in evaluation- however it is unclear what the specific standard of public interest will be in this case.

3) Extent of reservation rights granted to IGOs

As the present framework stands, special rights are granted to non-governmental/intergovernmental organisations to prevent third party registration of any TLD string similar to their name. This protects such organisations from facing a loss of reputation or recognition from users, who might confuse their domain with that of the similar third party TLD string. However, it is suggested that this restriction must be narrow so that it does not cause an undue restriction on the extent of choice available to gTLD string applicants. Reservations are currently in place

for IGOs as well as many names related to IOC, ICRC and the National Red Cross movements. The IOC and ICRC related reserved names list is very expansive and can affect one's potential to comment on their work through a .sucks or .fail domain, etc.[6]

4) Censorship-

There is a possibility that gTLDs could result in easier censorship by governments. For example, the Chinese government had made a proposal for a law which would allow only domain names registered in China to be accessed within the country, and for all others to be automatically blocked[1]. Additionally, there is a potential for automatic censorship of domain names blacklisted by governments, regardless of the location of registration. Such a procedure was suggested by .xyz[2] and demonstrates how government pressure can affect the manner in which registries reserve or block domains.

Global censorship and seizure of international domain names also takes place through the United States government bodies, namely the Immigration and Customs Enforcement, mainly on grounds of internet counterfeit trafficking and piracy. Domain names are disabled through the transfer of control of the domain by the registrar to the authority, however, efforts for greater control through filtering of domain names were proposed by the SOPA and PIPA Bills. The use of DNS for the control of intellectual property is disproportionate as it can have the technical effect of undermining the security of DNS, as well as causing global censorship on the basis of one country's IP laws.[3]

Consumer Welfare and Privacy

In order to ensure that the users are given prime importance and so as to not unduly impact their privacy and sensitive information, security forms an integral aspect and responsibility of ICANN assuring an unimpeded ability to access resources online. Article 12 of the UDHR refers to the right to privacy and protection against interference with the same. Since domain names can potentially cause harm to the user's privacy, it is ICANN's duty to protect against the same in the cases listed below.

1) Registry Security-

Under the new gTLD regime, it is possible for the use of either existing accredited registries or any registry service of choice. While this increases the choices available to users, there is the concern that unsafe or unsecure registries may arise due to insufficient oversight into their security procedures.

2) Protection against TLD Squatting-

The threat of TLD squatting refers to use of domain names similar to well-known existing names for the purpose of misleading the public. Such squatting can cause users to unintentionally access gTLDs of similar names which may have malicious content or may collect sensitive information from them on this pretext. It is of great importance that ICANN protects internet users from confusing and malicious activities of this nature.[4]

Procedural Fairness

As a part of the basic principles of natural law, it is imperative that there is no real or apparent bias in a system and its functioning. In the context of gTLDs, the assignment and regulation procedures must thus aim to increase transparency and accountability. As a part of these efforts, uncontrolled discretion must be limited through reliance on due procedure.

1) **Base Registry Contract-** The Base Registry Agreement exists between the registrar and registry. The public comment to the Preliminary Issue Report suggested that some elements of the gTLD procedures, such as registry pricing, sunrise periods and practices, and other things have been perceived by some in the community to have circumvented the intended goals/protections developed by the community, especially in regard to potential registrants seeking to protect their rights in names. For example, the treatment of certain names as ‘premium names’ where registry operators can charge a greater amount creates a potential for exploitation without ICANN ensuring oversight on registry pricing policies, with a clear guidance mechanism for registry pricing.[5]

2) **Trademark Clearing House-** The priority mechanism of the Trademark Clearing House, whereby any applicant having an existing trademark in a related gTLD string is granted priority over other applicants, is a potentially restrictive process that can create monopolies. Due to the sunrise period clause, there is priority even if the trademark has not yet acquired a registration. As a result, the question of the validity of the trademark has not been properly addressed before the grant of the gTLD, leading to a concern of the absence of sufficient procedural safeguards.

Diversity Issues/ Increasing Accessibility and Participation-

Article 1 of the Universal Declaration of Human Rights provides that all humans are ‘*born free and equal in dignity and rights*’ and Article 7 supplements this with the requirement of equal protection against discrimination as a manifestation of our inherent equality. Article 27 provides us with the ultimate goal of the same, which is that ‘*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.*’ Thus, it is essential that ICANN propagates the principles through extensive global participation and opportunities. According to a study conducted by ICANN on the new gTLD program, presently the extent of representation of the global community is limited and demonstrates that the current system may be unable to bridge this divide. Increasing access will ensure that no group is unfairly privileged and a level playing field is created for all those who wish to participate in the gTLD process.

1) **Global Inequality in Allotment-**

ICANN's statistics on the new gTLD program indicate that 1586 of 1930 applicants for new gTLDs are from Europe and USA[6]. As acknowledged in the Update to the Cost Considerations of the new gTLD Program, there remained concerns that \$185,000 USD may act as a deterrent to applicants from developing nations, not-for-profits, and others with limited financial resources.

2) Applicant Support Directory-

The applicant Support Directory created by ICANN allows for financially needy gTLD applicants to seek financial and technical assistance for their application. ICANN also sets aside a certain amount for assisting such applications. However, the extent of the initiative's success is unclear. Requesting ICANN for information/ setting up transparency procedures regarding the outcome of the requests and efficacy of the Directory/funds set aside by ICANN for donation would allow us to better understand the system and possible methods to improve it.

3) Concerns with the FCFS Policy-

Presently, gTLDs are allotted based on a first come first served (FCFS) basis. It is possible that this favours applicants who have prior access to information over those who may not as yet have information regarding the allotment. As a result, applicants with the advantage of knowledge would more likely receive their preferred allotments than less privileged parties looking for a domain string. This may also impact the profile of applicants, encouraging those from more affluent first world nations where there are already many successful applicants for gTLD.

4) Cultural Relativism with respect to Offensiveness of gTLDs-

Many governments have opposed new gTLDs on the ground of public interest, such as .catholic and .islam on the ground that the content associated with these domains may not be in line with the belief of these religions, thus affecting certain communities adversely. Saudi Arabia also made an opposition to .gay, .baby, .porn, .sexy, .adult, .hot, .sex, .dating and .virgin on the grounds that they are against public morality, particularly to its communities. While their opposition may not be viewed the same way globally, it raises the question of the weight to be given to each community's views in order to ensure diversity in participation and involvement.

5) Internationalised domain names-

Internationalised domain names, or IDN, were created to promote multilingual participation on the Internet through the inclusion of native languages and scripts as a part of domain names. The new gTLD procedures intend to further the growth of IDN. However, while the IDN initiative is intended to be more inclusive globally, we must determine whether all countries and speakers of different languages in fact have an equal opportunity and access to IDN. This would allow for true representation of their language, country or dialect in the IDN system. While the demand for different IDNs may affect the supply of the resource, it is to be determined whether societies having more limited access to technology ought to be encouraged to increase demand through the creation of relevant IDNs.

- [1] <https://thestack.com/world/2016/03/29/china-proposes-foreign-domain-name-censorship/>
- [2] <https://www.eff.org/deeplinks/2015/10/accepting-chinese-censorship-domains-registry-xyzcom-invites-more>
- [3] Further reading is available at
<http://www.gizmodo.com.au/2014/06/are-new-top-level-domain-names-a-squatters-dream/>
- [4] Laura DeNardis, *Hidden Levers of Internet Control*, available at
<http://www.tandfonline.com/doi/pdf/10.1080/1369118X.2012.659199>
- [5] Report of Public Comments to the Preliminary Issue Report on New gTLD Subsequent Procedures at <https://www.icann.org/en/system/files/files/report-comments-new-gtld-subsequent-procedures-04dec15-en.pdf>
- [6] <https://newgtlds.icann.org/en/program-status/statistics>
- [7] <https://www.icann.org/sites/default/files/packages/reserved-names/ReservedNames.xml>