

NCUC Statement on the ICANN new gTLD Proposal (December 2008)

Principle G of GSNO's Recommendations explicitly state "The string evaluation process must not infringe the Applicant's freedom of expression rights." That fundamental principle must necessarily guide and be clearly reflected in the ICANN implementation guidelines; in particular, the proposed morality and public order implementation guidelines and the trademark protections. Despite the statement in 3.5.3 (Module 3) of the Draft Applicant Guidebook that "everyone has the right to freedom of expression", subject only to "***certain narrowly interpreted*** exceptions that are ***necessary to protect other important rights***" (emphasis added), this does not seem to currently be the case. We wish to emphasize that ICANN implementation of such an important new development as new gTLDs cannot and should not deviate from the policy passed by the GNSO.

The NCUC believes that the proposed new gTLD Policy as reflected in the current Draft Applicant Guidebook is unnecessarily complicated and bureaucratic, and raises various significant issues that will impact upon socio-legal structures. Furthermore, the NCUC believes that ICANN is once again engaging in broad policy-making activities and, as was the case with the UDRP, the gTLD proposals demonstrate ICANN's inability to create sound policy that complies with fundamental legal standards.

A. Morality and Public Order.

NCUC continues to believe that the proposed standards open the door to unacceptable forms of content regulation by ICANN and provide the ability for a "heckler's veto" over legitimate possible domains.

(1) Category 1: Incitement to Violent Lawless Action (page 4 of the Explanatory Memorandum applicable to Morality and Public Order Considerations):

In this section ICANN staff seems to have committed the fallacy of confusing the gTLD string with the content that might be found under a string. If this section is not amended, ICANN will be explicitly using its power over gTLD approvals to censor and regulate web site content.

It is not at all clear what the reference to 'violent lawless action.' means in the context of approval of a gTLD string. In May 2005, the Council of Europe adopted a new Convention on the Prevention of Terrorism, which requires State parties to criminalize 'public provocation to commit a terrorist offense'. 'Public provocation' means 'the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed'. This provision was the product of a special report that was drafted by experts on the field having considered both 'apologie du terrorisme' and 'incitement to terrorism'. 'Apologie' was interpreted in the sense of the public expression of praise, support, or justification of terrorism. Similarly, the drafters were aware that this legislative approach might have freedom of expression implications, but argued that it could still constitute a legitimate restriction under human rights law.

Examples of indirect incitement or 'apologie' that can be characterized as 'public provocation' include 'presenting a terrorist offence as necessary and justified', and 'the dissemination of messages praising the perpetrator of an attack, the denigration of

victims, calls for funding of terrorist organizations or other similar behavior'. Such conduct must be accompanied by the specific intent to incite a terrorist offence. It must also cause a credible danger that an offence might be committed, which may depend on 'the nature of the author and of the addressee of the message, as well as the context'. Basically and especially in relation to the freedom of expression issue, there needs to be credible evidence that conduct constitutes public provocation.

NCUC does not accept the expanded regulation of expression implied by the CoE's convention. But even if it did, the NCUC cannot understand how it is possible for a single gTLD string to fit in this category. Even strings such as .hate or .kill, for example, might be used in ways that are lawful or that do not fall within the type of narrow exceptions that can justify an encroachment on free expression rights. The existing proposal therefore implies that, by denying an application for a new gTLD on this basis, ICANN will be able to determine and regulate actual content associated with a gTLD.

(2) Category 2: Incitement to or Promotion of Discrimination based upon Race, Color, Gender, Ethnicity, Religion or National Origin (page 5 of the Explanatory Memorandum)

On the substantive grounds that could give rise to a refusal under this category, we refer to Recommendation R (97) 20 of the Council of Europe and especially Principle 3. ICANN needs to clarify a variety of issues, such as the types of 'objective criteria' and the nature of the 'independent judicial control' that will be used to determine the narrow exceptions that justify an interference with free expression. The Recommendation can be found at:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=568168&SecMode=1&DocId=582600&Usage=2>

We note further that banning conduct such as "meanness" is NOT an accepted principle of international law as ICANN claims and also contradicts US law relating to applicable grounds for violating freedom of expression. In addition, what specific jurisdictions did ICANN study to determine this category to be one of the three recommended standards? There is a discrepancy amongst jurisdictions that ICANN does not seem to have addressed adequately; this category of prohibited speech might be the "European standard" but to our understanding is not the US one. Although the Explanatory Memorandum refers to just one public international law expert who has declared he would have no problem resolving morality and public order issues, this is clearly insufficient ground for adopting such a standard in view of the likely substantive differences in jurisdictional standards that will arise.

(3) Category 3: Incitement to or Promotion of Child Pornography or Other Sexual Abuse of Children (page 5 of the Explanatory Memorandum)

It is a well-settled principle of international law that child pornography is illegal. The NCUC categorically and unequivocally stands behind this principle. We note, however, that "incitement or promotion" to engage in child pornography can be different from the pornography itself. The current standard seems to conflate the two; as such, we seek clarification as to the scope of incitement or promotion that ICANN recommends as

falling into this category, as ICANN cannot arrogate to itself the right to regulate actual website content as opposed to domain names.

(4) Dispute Resolution

Module 3 of the Draft Applicant Guidebook states that objections based on morality and public order considerations will in principle be determined by the International Chamber of Commerce (ICC). As the ICC is an industry association for businesses, and as such represents and advocates on their behalf, we do not see the ICC as a particularly well-qualified arbiter of standards of morality and public order or as conducive to considering the interests of non-commercial parties in such a broad and values-based determination.

(5) Other Issues relating to Morality and Public Order

The NCUC wishes to raise two other important questions on this issue.

First, we are puzzled as to why, in view of the opinions of “virtually all” the jurists and experts consulted that broad standards are to be preferred, ICANN nonetheless proceeded to highlight the three specific categories discussed in the Explanatory Memorandum. The Explanatory Memorandum notes only that these constitute “minimum” categories that an unknown number of unidentified experts have identified as satisfying the law of “most” jurisdictions (again, as yet unidentified.)

Secondly, the Explanatory Memorandum is rife with references to well-known jurists, public international law experts and the like. It is thus unclear how many experts, from which tribunals and jurisdictions, what their qualifications and experiences are, and to what extent there was disagreement amongst any of them. None of the opinions, research and specific conclusions that were gleaned from the consultations so far have also been made available by ICANN.

In view of these two observations, the NCUC believes that it is impossible, unwise and unacceptable for the recommendations put forward by ICANN relating to the morality and public order objections to be adopted in their current form.

B. Community

Currently, the recommendations for "communities" favour entrenched institutions at the expense of innovators and start-ups. There is no working definition of "community", so it is possible that the community of "Internet users", and the community of "dog owners", the community of "blondes" and the community of "anything you can reasonably describe" would be a "defined community" according to ICANN, and as such will have standing if there is an “established institution” to lodge the objection.

In light, further, of the nature of the Internet and the explosive growth of social networking technology, it seems ironic that ICANN will prize such “analog” factors as the existence of a formal charter and public historical record, and indeterminate considerations such as the extent of global recognition, in evaluating the standing of a certain “community”.

C. Legal Rights

When it comes to the legal rights section most of the recommendations oppose traditional and long-standing principles of trademark law. ICANN continues to support its substantially mistaken rationale and re-enforces the presumption that trademarks and domain names constitute identical rights. This perception is highly supported by the UDRP and it continues to be supported by the new gTLD proposal.

Trademarks and domain names are not the same thing and, under existing and traditional trademark law principles, domain names neither can nor should be equated to trademarks. Both can be used as identifiers, however there are substantial differences between them. First of all and as long as the trademark is not considered well-known or famous, trademark law is highly territorial in nature (thus the lack of any international trademark law treaty). Trademark owners who wish to acquire international protection for their marks should proceed and register their marks individually and comply with each jurisdiction's rules and procedures. This is not the case with domain names where protection is international because of the global nature of the Internet. Moreover and aside from strict and specific exemptions, geographical and generic terms cannot acquire trademark protection. This of course is not the case for domain names, since under the current domain name registration system any word – geographical or generic – can be registered as a domain name (e.g. loans.com and Barcelona.com). The main reason for trademark law preventing such registrations is to allow competition to flourish and ensure the smooth function of trademark markets. It would be seriously anti-competitive to allow an owner to trademark the word coffee and sell coffee, since this would automatically eliminate other similar businesses from entering the same market. Finally, trademark law allows multiple trademark registrations to exist within the same territory as long as these do not create confusion to the consumers' eyes. This is a fundamental principle of trademark law and one that is supported by the classification system. Trademarks fall under different classes depending on the goods and/or services they are dealing with and this system ensures that anti-competitive practices do not occur.

The new gTLD proposal resembles the classification system as it currently exists within trademark law. If this is the rationale behind the proposal then the NCUC sees some basic value in it (along the lines of allowing multiple domain name registrations under the various new gTLD strings). However, this does not seem to be the notion behind ICANN's proposal. Under traditional trademark law, classes allow multiple registrations and are not meant to exclude any existing or potential rights' holder. The new proposal once again sees the creation of new gTLDs as an elitist activity reserved exclusively for trademark owners. The high costs associated with the applications, combined with the unique nature of domain names, will prevent domain names holder from benefiting from this new arrangement. The following are just a couple of examples, which demonstrate that ICANN has not fully considered any of the legal implications that the new system will create and demonstrate how this new system is meant to benefit only trademark owners to the detriment of domain name holders.

What will happen in the scenario, when two applicants apply for .penguin. "Penguin" is a trademark for both a chocolate bar and a publishing house. Under the new ICANN regime only one trademark owner will be allowed the .penguin extension. What will be the criteria for choice? The NCUC believes that new policy monopolizes verbal territories exclusively to one rights' owner contrary to what trademark law has sought to prevent.

In the same manner, if ICANN allows registrations of generic names as gTLD extensions, serious concerns about anti-competitive practices are equally not addressed. Let's assume that there is a .food application. Why should it belong only to one business associated with food, which has the financial means to afford the application process? ICANN's proposal erects significant barriers to entry that could suppress the participation of SMEs and individual entrepreneurs in the market. This could be

particularly problematic for potential entrants from the developing and transitional countries and seems especially ill-considered given the current international political debate. When trademark law specifically forbids the registration of generic names as trademarks (again apart from some strict exemptions, i.e. when the trademark has acquired a distinctive character) its main purpose is to prevent anti-competitive practices. Common words are not exclusive rights and, therefore, cannot be used as such.

From an adjudication process point of view, WIPO acting as the dispute resolution provider is by itself problematic as it takes us back to the bias that have been and still are identified in the context of the UDRP. WIPO is an intellectual property organization and as such it will inevitably favor and prioritize applications by trademark owners.

D. Standing

The issue of who has standing to object has yet to be determined. The current uncertainty thus raises significant concerns over the scope of availability of the dispute resolution procedure. In relation to Morality and Public Order, for example, section 3.1.2.3 of the Draft Applicant Guidebook indicates that it could be either i) only governments who have standing to object, or ii) as-yet-undefined "interested parties" who would have standing to object.

In view of the other substantive and weighty concerns we have already put forward in this Statement, including the issue of the ICC as appropriate arbiter, the NCUC believes that further details as to standing need to be disclosed as soon as possible, to enable a more fruitful public discussion to take place.

E. Other issues

The new gTLD Policy affords a noticeable amount of discretion to ICANN when deciding whether the applicant meets the set criteria; similarly, the Terms and Conditions seem to exclude any liability for ICANN and its decision-making processes. The new Policy uses words like 'sole and absolute discretion' in a repeated fashion; these concern issues such as the evaluation process of an application, the possibility for ICANN to terminate the registry agreement, to refund the fees to an unsuccessful applicant, etc. At the same time, ICANN is excluding its liability for various issues that raise more concerns: although ICANN says that it will offer a very secure system to 'ensure that confidential information remains confidential', at the same time, they 'offer no assurances that these procedures will keep an applicant's data confidential and secure from access by unauthorized third parties'. This raises issues of privacy and protection of personal information to which ICANN needs to respond.

More worryingly term 6 of the Terms and Conditions states: "APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER START-UP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE

OPERATION OF A REGISTRY FOR THE TLD." This provides no leverage to the applicants against ICANN and leaves ICANN's decisions unchallenged by legal authorities – contrary to the UDRP, which allows court litigation.

The NCUC also believes that the costs associated with the application process are extremely high:

- a) \$100 fee to access the application system
- b) \$185,000 to apply for a domain name
- c) \$50,000 for Registry Services Review Fee
- d) \$TBD to file Objection t

The NCUC is certain that the high costs will reduce the incentives for SMEs and entrepreneurs who, even if they have the incentive, will find it very expensive to apply, especially in light of the fact that ICANN reserves the right not to refund the money to unsuccessful applicants.

Finally, after the panel makes a decision on the objection proceedings, it is still open to ICANN to approve or deny the domain in question. It is not clear whether such discretion can be based on disagreement with the panel's findings.