

24 October 2012

The New gTLD Applicant Group (NTAG) writes in reply to the renewed requests from the Business Constituency (BC) and Intellectual Property Constituency (IPC) for additional Rights Protection Measures (RPMs) for new gTLDs. If the BC and IPC policy requests are granted at this time, the applicant community's reliance on the Applicant Guidebook will have been misplaced and the delicate balance of interests underpinning the new gTLD program will be upset.

RPMs are not a new issue, nor are the specific BC and IPC proposals. The ICANN community has struggled with the issue for many years. After different -- and numerous -- processes and negotiations, including the Implementation Recommendation Team (IRT), the Special Trademarks Issues Working Team (STI), various draft guidebooks, and the GAC-Board consultations, the ICANN Community and Board agreed, through a bottom-up consensus based process, to a balanced policy of mandatory requirements for the protection of trademarks in the final Guidebook.

Many of the BC & IPC proposed policy changes have been considered and rejected in no fewer than four different processes and numerous prior Board decisions. Indeed, many go far beyond the recommendations of the IRT, which was comprised almost exclusively of trademark attorneys. These last-minute policy recommendations amount to just another bite of the same apple that already has been bitten down to its core.

The new gTLD policy development process is over. Applicants relied on the policies in the final Guidebook in making business decisions on whether to apply. At the time that ICANN accepted applications and fees from applicants, ICANN and applicants entered into binding agreements. ICANN should not change these agreements unilaterally without extraordinary reason and especially not when it would materially harm the counterparties to the agreements.

There is no extraordinary reason here. The ICANN community spent more time and effort on RPM policy than any other issue related to the new gTLD program. The debate should not be reopened because an interest group wants to rehash substantive compromises and settled policy with new ICANN leadership. The rest of the community has not taken the same approach. Indeed, not only have applicants not tried to reopen the debate over RPMs, most have voluntarily agreed to additional RPMs that make sense for their strings.

Many of the proposed policy changes are far more intrusive into the businesses of applicants than are voluntary RPMs, and thus would materially harm applicants in that they would amount to changes in business processes and create costly burdens. Several of the proposals would harm consumers as well. The proposals would put new entrants in a competitive disadvantage with incumbent registries, as these new policies would not be required in existing gTLDs. As partners in the new gTLD program, ICANN should strive for new gTLDs to succeed and not shackle them with costly requirements that are unnecessary and not required by their competitors.

As the NTIA's letter to ICANN dated 4 October, 2012 states, any new RPMs should be applied equally to both new and existing gTLD registries. We agree with the NTIA's suggestion that any new RPMs should be explored "through community dialogue and appropriate policy development processes in the coming year."

The Policy Development Process (PDP) process is the only vehicle to appropriately consider new RPMs. The PDP process would analyze such proposals for new RPMs and weigh the impacts on the parties, including consumers. Any subsequent Consensus Policies would then be binding on all gTLD operators, not just new gTLD operators. Last minute changes to the Guidebook just prior to launch would be highly objectionable.

We have no objection to finalization of implementation details, such as resolving the costing issue of the URS, but the Guidebook is in final form and any untimely requests for policy changes should be rejected. We understand that Fadi Chehade discussed these renewed policy change requests with representatives of the BC and IPC on 18 October 2012. We would welcome the same opportunity at his earliest convenience.

Sincerely,

NTAG