



# **Evaluation of the New gTLDs: Policy and Legal Issues**

**Prepared for the  
Internet Corporation for Assigned Names and Numbers (ICANN)**

**by**

**Summit Strategies International**

**July 10, 2004**

## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b>	<b>4</b>
<b>CHAPTER 1: INTRODUCTION</b>	<b>6</b>
<i>Background</i>	6
<i>Purpose</i>	10
<i>Policy &amp; Legal Issues</i>	11
<b>CHAPTER 2: LEGAL &amp; FUNCTIONAL ASPECTS OF START-UP</b>	<b>13</b>
<i>Objective</i>	13
<i>Methodology</i>	14
<i>Analysis</i>	15
.info	15
.biz	34
.name	50
.museum	58
.coop	64
.aero	71
<i>Conclusion: Start-up</i>	79
<b>CHAPTER 3: COMPLIANCE WITH REGISTRATION RESTRICTIONS</b>	<b>82</b>
<i>Objective</i>	82
<i>Methodology</i>	83
<i>Analysis</i>	84
.biz	85
.name	88
<i>Assessment</i>	91
<i>Conclusion</i>	92
<b>CHAPTER 4: EFFECT OF NEW GTLDS ON COMPETITIVENESS IN THE DOMAIN NAME MARKET</b>	<b>94</b>
<i>Objective</i>	94
<i>Methodology</i>	94

<i>Analysis</i>	<b>95</b>
General Market Conditions	95
Scope of New gTLD Market	97
Competitiveness Factors	104
<i>Conclusion</i>	<b>115</b>
<b>CHAPTER 5: REASONABLENESS OF THE LEGAL FRAMEWORK</b>	<b>116</b>
<i>Objective</i>	<b>116</b>
<i>Methodology</i>	<b>117</b>
<i>Analysis</i>	<b>118</b>
Contextual Framework	118
Reasonableness Test	120
<i>Conclusions</i>	<b>130</b>
<b>CHAPTER 6: LEGAL &amp; REGULATORY ISSUES</b>	<b>132</b>
<i>Objective</i>	<b>132</b>
<i>Methodology</i>	<b>132</b>
<i>Analysis</i>	<b>133</b>
.info	133
.biz	135
.name	137
.museum	138
.coop	138
.aero	139
<i>Conclusion</i>	<b>140</b>
<b>CONCLUSION</b>	<b>142</b>
<b>ACKNOWLEDGEMENTS</b>	<b>144</b>
<b>APPENDIX A</b>	<b>145</b>
<b>APPENDIX B</b>	<b>148</b>

## EXECUTIVE SUMMARY

In November 2000, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) selected seven proposals for new top-level domains (gTLDs): .aero, .biz, .coop, .info, .museum, .name and .pro. This was the first effort to expand the domain name system (DNS) since the 1980s, other than by adding “country code top-level domains” that correspond to particular countries or territories. Shortly before the first of the new gTLDs was launched in September 2001, the ICANN Board decided that it was important to evaluate the “proof-of-concept” under which they were introduced. The Board established the “New TLD Evaluation Process Planning Task Force” (Task Force) to determine the scope of the evaluation. The Task Force decided that seven questions, among others, would take priority. Those questions, which are the focus of this report, address the effectiveness of intellectual property protections, compliance with registration restrictions, competition, the reasonableness of the legal framework, and regulatory issues.

The new gTLD start-up periods proved generally effective at protecting the interests of trademark holders, but suffered from other problems. The lack of any screening or verification in the .info Sunrise period led to serious abuses, including an unusually high number (43%) of registrations that had to be cancelled or transferred. The intellectual property claim process that .biz established operated more smoothly, but was extremely complicated. It proved fairer than a Sunrise period because parties without registered trademarks – including individuals – could defend registrations by demonstrating a legitimate interest or right. The .name system of defensive registrations was complex too, and in an unrestricted TLD would not be consistent with attracting new users and uses to the DNS. Looking to the future, these experiences suggest several options: (i) a Sunrise period that verifies registrations by use of online databases and other means in a cost-effective manner; (ii) notice to prospective registrants and trademark holders of their respective claims prior to adjudication, perhaps on the basis of the familiar UDRP rather than the new “STOP” procedure .biz used; or (iii) reliance on UDRP alone, as simpler and appropriate given that trademark registrations may constitute only 2 - 3% of all registrations.

The process .info and .biz used to allocate names – called a “round robin” -- was criticized for enabling manipulation of the system. Some registrars kept their list of desired names short and offered coveted slots to their best customers. Others used registrars they controlled to do the same, while they opened their own lists to the general public. (Initial efforts by .biz to design an alternative distribution system for led a court to determine it would have constituted an illegal lottery.) The .name registry sought to eliminate the advantage of submitting shorter lists by using random batch processing, but that did not prevent registrants from submitting duplicate requests through multiple registrars. Admittedly, the dilemma of how best to allocate names does not have an easy solution. Other

options include first-come, first-served; auctions; and reverse Dutch auctions. The most appropriate method depends to a great extent on which underlying values should be given priority. It also depends on which entity should benefit from the monetary rewards that certain names generate. Both subjects require more discussion within the ICANN community.

Both the .biz and .name gTLDs are subject to restrictions that limit registrations to commercial purposes and to personal names, respectively. Random sampling indicated fewer problems than expected in .biz, with 1.8% of the registrations appearing to fail to satisfy the criteria and another 9.6% being unclear. In .name, where it was somewhat easier to estimate noncompliance, 10.6% of registrations raised questions, with another .8% unclear. While the registries are not obligated to enforce the restrictions through verification, there are simpler methods, such as random screening, or heightened scrutiny when a registrant reaches a certain number of registrations, which could help. Another solution is to recognize the difficulty of enforcing restrictions on global registries and adopt the model offered by the .com, .net and .org TLDs, which were once restricted but are no longer.

The new gTLDs have introduced some competition, but how much is debatable. Examining market share, extent of actual choice and price elasticity suggests that impact has been minimal. Other evidence, however, indicates that TLD expansion has attracted about 20% new registrants and led to new uses among 40 – 60% of registrants. The most significant contribution has been the development of facilities-based competition. As a result, new providers of registry services have been able to compete effectively with the incumbent registry, VeriSign, on that basis. Innovation has played a supporting role, and may become increasingly important as the three largest registries work to distinguish themselves from one another.

The agreements that underpin the new gTLDs reflect a level of detail that may not be necessary for future TLDs. While it was understandable for ICANN to have erred on the side of caution as it undertook initial expansion, the resulting legal framework is cumbersome. There was relatively strict insistence that the agreements adhere to key provisions of the original proposals, although it appears that such rigidity was not always the wisest course. While the agreements are relatively uniform, there are some cases -- such as the requirement that smaller, sponsored TLDs use only ICANN-accredited registrars -- where divergence would have made sense. In a future round, it should be possible to use a streamlined base agreement and limit appendices to those necessary to ensure critical elements of registry performance and compliance with ICANN policies. There should also be more flexibility in the agreements to enable both ICANN and the registries to address routine issues.

Launching a new gTLD is not for the faint of heart. The experiences of the six that have done it already, and the wisdom the community as a whole as gained, should provide valuable assistance to those TLDs that follow.

## CHAPTER 1: INTRODUCTION

### ***Background***

On November 14, 2000, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) selected seven proposals for new top-level domains (TLDs).<sup>1</sup> These were the first proposals accepted for TLDs since the 1980s, other than those relating to “country code top-level domains” (ccTLDs) that correspond to particular countries or territories.<sup>2</sup> These seven TLDs – called generic top-level domains, or “gTLDs” to distinguish them from ccTLDs, were accepted as part of a “proof-of-concept” designed to test different ways of introducing new TLDs. The seven “new” gTLDs added to the domain name system (DNS) are listed in the order in which they reached operating agreements with ICANN:

**.biz:** The .biz gTLD is an unsponsored, restricted domain that was established to serve commercial entities. It is open to registration by businesses (with some exceptions). The Registry Operator is NeuLevel, a joint venture of NeuStar, Inc. of the United States, and Melbourne IT, Ltd, of Australia. Principal investors of NeuStar include MidOcean Partners<sup>3</sup> and Warburg Pincus.<sup>4</sup> NeuLevel is headquartered in the United States.

**.info:** The .info gTLD is an unsponsored, unrestricted domain, in which any individual or entity may register. The Registry Operator is Afilias, a consortium of registrars and other investors, including DNS Investment GmbH, CORE, Corporate Domains<sup>5</sup>, Domain Bank, Domain Registration Services, Global Media Online (GMO), NS Holding Company,<sup>6</sup> Register.com, Schlund+Partner AG, Sitename.com, LLC<sup>7</sup> and Tucows International. Afilias is headquartered in Ireland, with management and operational offices in the United States and Canada.

**.name:** The .name gTLD is an unsponsored, restricted domain that was established to provide a name space for individuals. The Registry Operator is Global Name Registry Ltd, a subsidiary of GNR, headquartered in London. Investors include Carlyle Europe Venture Partners, L.P., Northzone Ventures AS, and Four Seasons Venture AS.

---

<sup>1</sup> TLDs enable users to navigate the Internet through the use of familiar names, rather than by the Internet Protocol numbers that serve as routing addresses between computers. It is easier, for example, to remember to find [www.icann.org](http://www.icann.org) than “192.0.34.65.” The label to the right of the “dot” in a domain name serves as the TLD. In this example, “org” is the TLD.

<sup>2</sup> In 1988, .int was introduced into the root.

<sup>3</sup> This share was formerly held by Deutsche Bank.

<sup>4</sup> Investors holding shares of more than 5% are listed for all registries.

<sup>5</sup> Corporate Domains is a wholly-owned subsidiary of Corporation Service Company (CSC).

<sup>6</sup> This share was formerly held by Network Solutions Inc., and reports indicate that VeriSign owns it today.

<sup>7</sup> Sitename.com, LLC is affiliated with Galcomm.

**.museum:** The .museum gTLD is a sponsored,<sup>8</sup> restricted TLD that was established to serve the needs of the international museum community. The Sponsoring Organization is the Museum Domain Management Association, known as MuseDoma. MuseDoma is incorporated in the United States and has its principal offices in Sweden. The Registry Operator is the Internet Council of Registrars (CORE).

**.coop:** The .coop gTLD is a sponsored, restricted domain that was established to serve the needs of the international cooperative community. The Sponsoring Organization is DotCooperation LLC (DCLLC or DotCoop), a U.S. company of which the National Cooperative Business Association (NCBA) is the sole member. The Registry Operator is Poptel.coop, which is run by Poptel Ltd.

**.aero:** The .aero gTLD is a sponsored, restricted domain that was established to serve the global aviation community. The Sponsoring Organization is Société Internationale de Télécommunications Aéronautiques SC (SITA), which is a cooperative association incorporated in Belgium owned and operated by the Air Transport Community (ATC), with operations in Switzerland. The Registry Operator is SITA Information Networking Computing B.V. (SITA INC). SITA INC outsources its technical operations to CORE.

**.pro:** The .pro gTLD is an unsponsored, restricted domain that was established to serve the needs of professionals, particularly those in the legal, medical and accountancy fields. The Registry Operator is RegistryPro, a subsidiary of Hostway Corporation, which acquired it from Register.com.

Pressure for expansion of the DNS had been building since before ICANN's first Board Meeting in October 1998. The White Paper issued by the U.S. Department of Commerce in June 1998 described one of ICANN's principal responsibilities as overseeing "policy for determining the circumstances under which new TLDs are added to the root system," including "development of policies for the addition, allocation, and management of gTLDs and the establishment of domain name registries and domain name registrars to host gTLDs . . . ."<sup>9</sup> The White Paper recognized that the "challenge of deciding policy for the addition of new domains will be formidable" and noted that "[a]t least in the short run, a prudent concern for the stability of the system suggests that expansion of gTLDs proceed at a deliberate and controlled pace to allow for evaluation of the impact of the new gTLDs and well-reasoned evolution of the domain space."

---

<sup>8</sup> There are significant differences between the unsponsored and the sponsored gTLDs, which are described in Chapter 2 (Start-up) and Chapter 5 (Legal Framework). The sTLDs (also referred to as SgTLDs) are operated by "Sponsoring Organizations," sometimes called simply "sponsors." This Evaluation and other documents will occasionally refer to all of the new gTLDs as "registries," which is descriptive of their function. It does not imply that the sponsors are also the registry operators, for they are not.

<sup>9</sup> "[Management of Internet Names and Addresses](#)," 63 Fed. Reg. 31741 (1998).

ICANN initially referred consideration of gTLD expansion to its (then) newly formed Domain Name Supporting Organization (DNSO), the predecessor to today's Generic Names Supporting Organization (GNSO). After extensive deliberations by a group known as "Working Group C" and public comment, the DNSO adopted a Statement on New gTLDs in April 2000.<sup>10</sup> That statement recommended the ICANN Board approve introducing new gTLDs "in a measured and responsible manner, giving due regard . . . to (a) promoting orderly registration of names during the initial phases; (b) minimizing the use of gTLDs to carry out infringements of intellectual property rights; and (c) recognizing the need for ensuring user confidence in the technical operation of the new TLD and the DNS as a whole." The DNSO Statement also recommended "a limited number of new top-level domains be introduced initially and that the future introduction of additional top-level domains be done only after careful evaluation of the initial introduction."

In July 2000, after additional public comment, the ICANN Board adopted the DNSO recommendations and authorized the ICANN President to issue a call for proposals to operate new TLDs.<sup>11</sup> Forty-four applications were received by the deadline of October 2, 2000. These applications were the subject of extensive public comment and review by an evaluation team and ICANN Staff. The Board met at an all-day public forum on November 15, 2000 and selected the seven TLDs that are the subject of this Evaluation.<sup>12</sup>

Negotiations on registry agreements with the new TLD operators began the following month. The process took longer than expected due to a variety of reasons described in Chapter 5 (Legal Framework). In May 2001, registry agreements were concluded with NeuLevel for .biz and with Afilias for .info. Agreements followed with Global Name Registry for .name, with MuseDoma for .museum, with dotCoop for .coop, with SITA for .aero and with RegistryPro for .pro.

In May 2001, the Board decided to initiate a process for monitoring the introduction of the new TLDs and evaluating their performance.<sup>13</sup> The process of evaluating the experiences of the seven "proof-of-concept" TLDs was intended to assist in developing appropriate procedures for the introduction of additional TLDs. At its Stockholm Meeting in June 2001, the Board called on the President of ICANN to establish and chair a New TLD Evaluation Process Planning Task Force (NTEPPTF or Task Force) designed to recommend the plan and its schedule. The Task Force commenced work under the leadership of President M. Stuart Lynn and issued an Interim Report in December 2001. The "Final Report of the New TLD Evaluation Process Planning Task Force" (Task Force

---

<sup>10</sup> "DNSO Names Council Statement on New gTLDs," (April 19, 2000), at <http://www.dnso.org/dnso/notes/20000419.NCgTlds-statement.html>.

<sup>11</sup> Regular Meeting of the Board (July 16, 2000) at <http://www.icann.org/minutes/00.46>.

<sup>12</sup> ICANN Public Forum (Nov. 15, 2000), see Scribe's notes at <http://cyber.law.harvard.edu/icann/la2000/archive/scribe-icann-111500.html>.

<sup>13</sup> Special Meeting of the Board (May 7, 2001) at <http://www.icann.org/minutes/minutes-07may01.htm>.



Report) was issued on July 31, 2002. The ICANN Board accepted the report of the Task Force in August and asked the President of ICANN to develop a plan of action for approval.<sup>14</sup>

The President prepared “A Plan for Action Regarding New gTLDs,” which urged that key recommendations of the Task Force report be implemented while at the same time steps be taken towards approval of a limited number of new sponsored gTLDs.<sup>15</sup> This Action Plan was approved by the Board in December 2002.<sup>16</sup> Preparations for the evaluation began in July 2003, and its substantive phase was launched in October 2003 at the ICANN Meeting in Carthage.<sup>17</sup> The technical data necessary to complete the policy and legal analysis that is the subject of this report was provided in June 2004.

The Task Force Report formulated nineteen questions that it recommended be addressed in the Evaluation. The questions cover technical areas that are fundamental to smooth operation of the domain name system (DNS); business factors associated with starting a new registry; legal aspects of the new regulatory framework; and procedural aspects of bringing the new TLDs into existence.

The Task Force designated twelve of these questions as highest priority in anticipation of time and resource constraints. Seven of these twelve questions – involving the start-up phases, registration restrictions, competitiveness issues, the legal framework, and legal/regulatory issues – are the subject of this report.<sup>18</sup>

---

<sup>14</sup> Special Meeting of the Board (Aug. 23, 2002), at <http://www.icann.org/minutes/02.97>.

<sup>15</sup> “A Plan for Action Regarding New gTLDs,” (Oct. 18, 2002), at <http://www.icann.org/committees/ntepptf/new-gtld-action-plan-18oct02.htm>.

<sup>16</sup> Fourth Annual Meeting of the ICANN Board (Dec.15, 2002), at <http://www.icann.org/minutes/gTLDActionPlan>.

<sup>17</sup> The evaluators were concerned that starting the Evaluation in 2003 might mean that some important information might not be recalled during interviews. On the contrary, the roughly one year between the end of the start-up periods and the beginning of interviews has provided a certain distance that enabled people to consider their actions more dispassionately.

<sup>18</sup> The seven policy and legal questions are:

- “How effective have start-up mechanisms been in protecting trademark owners against cybersquatting and other abusive registrations?” (TF Question B3)(ICANN Q3/8/11);
- “How effective were the different start-up mechanisms employed [from a functional perspective]? To what extent did they achieve their objectives or, conversely, cause consumer confusion, delays, legal issues, operational problems, or other impediments to smooth implementation?” (TF Question B6)(ICANN Q3/8/11);
- “Have there been any unusual number of disputes during the start-up period and how well have they been addressed?” (TF Question L3)(ICANN Q3/8/11);
- “How often and how successfully have advance filtering and other mechanisms for enforcement of registration restrictions been used, both in sponsored gTLDs and in restricted unsponsored gTLDs?” (TF Question B2)(ICANN Q4);
- “What effect have the new gTLDs had on the scope and competitiveness of the domain name market, in terms of opening new markets, and in their effect on existing TLDs and registrants?” (TF Question B4)(ICANN Q6);

The other questions posed by the Task Force – relating to technical and procedural aspects of launch – are either being addressed by others or have been deemed by ICANN Staff as less critical to address at this time.<sup>19</sup>

## **Purpose**

The purpose of the Evaluation is to assess – for the six gTLDs that are fully operational – how well the proof-of-concept idea has worked in practice. The .pro TLD too is examined in the context of assessing the legal framework governing all of the new gTLDs. The goal is to determine what worked well with the launch and what did not, and why. The objective is not to dwell on the past, but to determine what lessons can be learned from the different launch experiences. What is important is understanding why certain decisions were made and their underlying rationales, and what alternatives were available. It is not enough to challenge decisions simply on the basis of hindsight.

Sometimes it is helpful to illuminate the policy choices underlying certain decisions, in order to assess whether they remain valid. Some policy choices were explicit, whereas others are not. The ICANN community as a whole, for example, has decided that protection for trademark holders is important, even if not all parts of the community agree. For that reason, several of the Task Force Report's questions focus on the adequacy of these protections, and not on whether they are reasonable in the first instance. Other policy choices are more subtle. With respect to the distribution of highly desirable names during Land Rush, some allocation mechanisms reward registrants or registrars, while others inure to the benefit of the registries or ICANN. The values underlying these

- 
- "How well do the agreements provide a [reasonable] framework for the addition of future TLDs?" (TF Question L1)(ICANN Q9); and
  - "Have the new gTLDs encountered any legal or regulatory problems that were not considered at the outset, and, if so, how could they have been avoided?" (TF Question L2)(ICANN Q10).

<sup>19</sup> The Task Force Report indicated the direction of the Evaluation "should be left to the ICANN Staff." It also gave "reasonable latitude" to the Evaluation Team "as to how it proposes to answer any of the questions." The five technical and procedural questions are:

- "Has there been any measurable or otherwise determinable effect on DNS performance, security, and stability with the introduction of the new gTLDs, including any impact on the root server system?" (TF Question T1)(ICANN Q1);
- "Have new TLD registries incorporated technologies, including new technologies, that can adversely affect the performance of the DNS, violate DNS technical standards, or cause existing applications to fail" (TF Question T2)(ICANN Q2);
- "To what extent and in what timeframe have the registry operators provided free, real-time access to a fully searchable Whois database?" (TF Question B3)(ICANN Q5);
- "Are adequate management policies and safeguards in place to ensure protection against accidental or malicious acts that could substantially interfere with continuity of service?" (TF Question B5)(ICANN Q7); and
- "To what extent were the Board's original objectives met through processes that were used for selection, approval, negotiation, and implementation? How could these processes have been streamlined?" (TF Question P1)(ICANN Q12).

policy choices, and which should take priority, are issues for broader discussion within the broader ICANN community.

It should be remembered that the proof-of-concept itself was launched as an experiment. As such, problems were to be expected, rather than be considered the exception. But to what extent were specific problems anticipated? If not, was it because they could not have been foreseen? Or were there factors that should have enabled them to be predicted, and which can therefore offer guidance for further TLD expansion?

Launching a new registry or sponsoring organization is clearly not for the faint of heart. It would be a challenging undertaking in the best of circumstances. In this case, the new gTLDs submitted their proposals at a time when financial markets were still bullish on Internet companies and opportunities. When they launched their registries one and two years later, it was a changed economic environment.

### ***Policy & Legal Issues***

The following chapters address the seven questions covering policy and legal aspects of the Evaluation. Because some are similar, they are grouped into five areas:

#### **Start-Up Period (Q3/8/11)**<sup>20</sup>

- How effective have start-up mechanisms been in protecting trademark owners against cybersquatting and other abusive registrations? (TF Question B3);<sup>21</sup>
- How effective were the different start-up mechanisms employed [from a functional perspective]? To what extent did they achieve their objectives or, conversely, cause consumer confusion, delays, legal issues, operational problems, or other impediments to smooth implementation? (TF Question B6); and
- Have there been any unusual number of disputes during the start-up period and how well have they been addressed?" (TF Question L3).

#### **Registration Requirements (Q4):**

- How often and how successfully have advance filtering and other mechanisms for enforcement of registration restrictions been used, both in

---

<sup>20</sup> These parentheticals refer to the numbering of the twelve questions that were provided to ICANN at the outset of the Evaluation. These numbers are not used again in this Evaluation, but provided initially to assist in cross-referencing previous materials.

<sup>21</sup> These parentheticals refer to the Task Force Report's numbering system, with "B" indicating a business question and "L" a legal question. These numbers are not used again in this Evaluation, but provided initially to assist in cross-referencing previous materials.

sponsored gTLDs and in restricted unsponsored gTLDs? (TF Question B2).

Competitiveness (Q6):

- What effect have the new gTLDs had on the scope and competitiveness of the domain name market, in terms of opening new markets, and in their effect on existing TLDs and registrants? (TF Question B4).

Legal Framework: (Q9):

- How well do the agreements provide a [reasonable] framework for the addition of future TLDs?" (TF Question L1).

Other Legal & Regulatory Issues (Q10):

- Have the new gTLDs encountered any legal or regulatory problems that were not considered at the outset, and, if so, how could they have been avoided? (TF Question L2).

Each chapter describes the context for the questions it seeks to answer, the guidance offered by the Task Force Report and the methodology that was used, before offering an assessment. The primary means to collect information were extensive interviews with the registry operators and other persons, data sampling, statistical analysis, market research and review of public comment fora. The goal was to uncover as much relevant and accurate data as necessary or helpful to respond to the question posed. Not surprisingly, people were sometimes more willing to share information when the conversation was not on the record. This was encouraged, as the goal was completeness and accuracy, rather than public attribution. Because many discussions reflected a mixture of ground rules, the persons interviewed are generally referred to in this report by descriptive terms, rather than by name or specific affiliation. There are exceptions, such as when a point refers explicitly to someone's actions, or the person holds a formal position at ICANN. All information was confirmed, irrespective of whether a primary source is identified in the text.

## CHAPTER 2: LEGAL & FUNCTIONAL ASPECTS OF START-UP

The Task Force Report raised the following questions:

- *“How effective have start-up mechanisms been in protecting trademark owners against cybersquatting and other abusive registrations?”*;
- *“How effective were the different start-up mechanisms employed [from a functional perspective]? To what extent did they achieve their objectives or, conversely, cause consumer confusion, delays, legal issues, operational problems, or other impediments to smooth implementation?” and*
- *“Have there been any unusual number of disputes during the start-up period and how well have they been addressed?”*

### **Objective**

The Task Force report recommended that the Evaluation examine several specific elements, including:

- The number of cases that have been filed under each new gTLD’s start-up challenge procedures and the percentage of successful challenges.
- The difficulties faced by trademark owners in using each of the various start-up systems, the nature for these difficulties, and the reasons behind them.
- Data on the number of Sunrise applications filed in .info, the number of trademark claim forms filed in .biz, and the number of defensive registrations in .name.
- Indications of potential registrant confusion concerning the nature and manner of a start-up mechanism (e.g., when and how they were expected to apply, when they were expected to receive decisions, and the nature of the ground rules).
- Actual registrations during start-up that did not conform to the stated ground rules.
- Legal disputes that arose regarding start-up mechanisms that resulted in changes.
- Significant numbers of complaints received by the registries or other ICANN constituent bodies from actual or would-be registrants, analyzed in terms of who is launching the complaint; the type of complaint; the effect of the complaint; and the responsiveness of the proper authority in addressing the complaint.<sup>22</sup>

---

<sup>22</sup> The Task Force Report also recommended examining the percentage of domain names currently registered in each of the new gTLDs that correspond to trademarks for which the registrant was seeking protection, through data sampling. A representative sample, however, would not necessarily indicate

The Task Force Report recognized that measuring the effectiveness of the different start-up periods would be “one of the most difficult, although one of the most important, questions to answer objectively.” Because the various registries employed different start-up mechanisms, direct comparisons are difficult. Indeed, the purpose of the “proof-of-concept” approach was to try different approaches to gain an understanding of what does, and what does not, work well. The Report also cautioned against drawing conclusions solely on the basis of views held by a party that failed to obtain a name it sought.

## ***Methodology***

This Chapter uses a variety of means to measure: (i) how effective the start-up mechanisms used to protect trademark owners against cybersquatting and other abusive registrations generally were; (ii) how effective the different mechanisms used were from a functional perspective (e.g. did they meet their objectives or cause legal issues, consumer confusion, delays, or other, non-operational, impediments to successful launch?); (iii) whether there have been an unusual number of legal disputes during the different start-up phases and, if so, how well were they addressed. These questions were answered by extensive interviews with persons and organizations involved in or knowledgeable about the start-up periods, analysis of media and other reports of problems, and analysis of decisions by the start-up dispute settlement providers, the World Intellectual Property Organization (WIPO) and the National Arbitration Forum (NAF).

Dozens of *interviews* were conducted with relevant parties, including:

- Interviews with .info, .biz, .name, .coop, .museum and .aero officials concerning the start-up procedures they used and evidence of any problems; the number of trademark applications filed; information and statistics on challenge procedures; information and statistics on ineligible registrants; number, scope and outcome of complaints; number, type and resolution of disputes during start-up; and the number of any disputes challenged in court and their impact on compliance.
- Interviews with current and former ICANN Staff and Directors, members of ICANN constituencies, ICANN-accredited registrars,<sup>23</sup> and officials from the U.S. government, the European Commission, WIPO and NAF.
- Interviews with selected trademark holders concerning any problems encountered with the different start-up mechanisms, including AT&T, Intel, Royal Philips Electronics, Verizon and others.

---

whether the registrant is the party that holds the mark. For this and other reasons, ICANN and the evaluators decided that generating this data would not be an efficient use of resources.

<sup>23</sup> A sample of registrars was selected for interviews on all the Evaluation questions on the basis of size, location and extent of service in the new gTLDs. After preliminary consultation with the Chair of ICANN’s Registrar Constituency, the following registrars were selected: Domain Bank, Inc., Nominalia, PSI-Japan, Inc., Register.com, Tuonome.it and Tucows Inc.

- Interviews with representatives from a sample of trade associations, such as the Copyright Coalition on Domain Names (CCDN), the International Trademark Association (INTA), and the U.S. Council for International Business (USCIB).
- Interviews with representatives from a sample of non-commercial organizations, such as the Media Access Project and the Center for Democracy & Technology.

A range of *media* publications, including *Computer Wire*, *The New York Times*, and *The Wall Street Journal*, were searched for reports of legal or functional problems during the start-up process.

### ***Analysis***

The start-up periods are addressed in the order in which the TLDs went “live.”

#### **.info**

On May 11, 2001, ICANN and Afilias entered into a Registry Agreement under which ICANN granted Afilias the right to operate the .info TLD. Appendix J of the Agreement established a start-up plan for beginning registry operations. The .info start-up plan consisted of two major phases – the Sunrise period and the Land Rush period.

#### Sunrise

The .info Sunrise period opened on July 25, 2001, and closed, after four rounds, on August 31, 2001. During Sunrise, owners of any current trademark or service mark registration having national effect that was issued before October 2, 2000 could register a domain name identical to the textual or word elements of that mark.<sup>24</sup> October 2, 2000 was selected as the cutoff because it was the date of Afilias’ application to ICANN to operate the TLD, which described the planned Sunrise mechanism. Afilias charged registrars \$5.75 for each Sunrise domain name registration per year, with 5 years being the minimum -- and 10 years being the maximum -- term allowed.

In order to obtain a valid Sunrise registration, the trade or service mark owner and registrar had to provide the following mandatory data: Trademark Name, Trademark Date, Trademark Country and Trademark Number. Submissions that did not include any data in these fields were rejected; submissions that contained

---

<sup>24</sup> See Appendix J (Registration Start-Up Plan) of ICANN-Afilias Agreement. Minor, non-textual variations were accepted. For example, if there was a space between the textual elements of a mark, the Registrant could use a hyphen or combine the elements: "SERVICE MARK" could therefore be registered as servicemark.info or service-mark.info. The term “national effect” included European Community Trademarks but not U.S. state registrations.

any data in these fields were processed. In other words, an application that left the “Trademark Number” field blank would be rejected, but an application that included in that field the word “none,” the number “1000,” or other inaccurate information, would be accepted (unless one of the other mandatory fields was left blank).

Any third party could challenge a suspect Sunrise registration by invoking the Sunrise Dispute Resolution Policy before December 26, 2001 and paying \$295 to WIPO, the selected provider. To prevail, a challenger had to establish that: (i) the registrant did not own a current mark; (ii) the registration was not of national effect; (iii) the second level of the domain name was not identical to the mark; or (iv) the trademark registration was issued after the October 2, 2000 cutoff date. The Sunrise Policy was intended to operate more quickly and be less costly than a UDRP action.

The ICANN-Afilias Registry Agreement did not require Afilias to examine the validity of Sunrise registrations. Appendix J of the Agreement states that “[n]either Registry Operator nor the Authorized Registrars will verify any of this information prior to issuing a Sunrise Registration.” While it is clear that the registry did not have to verify the accuracy of trademark information, nothing precluded it from instituting other, simpler measures to deter abuse, such as automated screening or random checking for fields that contained suspect information (e.g., that listed “None,” or the year “1000,” for a Trademark Number). Some people interviewed thought there was an understanding that Afilias would conduct “sanity checks” to weed out obviously inaccurate information. An ICANN official recalled being “shocked that Afilias was not screening for rationality” because “we expected some kind of basic check.” He interpreted Appendix J to acknowledge that Afilias was not in the business of screening trademarks, but not to excuse it from taking minimal steps to detect patently false submissions. Another ICANN official indicated that there was no requirement, or even informal understanding, that Afilias would screen submissions.

Numerous interviews suggest that Afilias’ proposal to use this Sunrise policy and procedures was based on several considerations, including:

- Need for protection: The intellectual property community made it clear that strong protection for trademark holders was essential to securing its support for launching a new registry. The ICANN Intellectual Property Constituency (IPC) assessed each application for a new gTLD on the basis of several criteria, including protecting trademark holders’ rights, providing efficient dispute resolution mechanisms, utilizing enforcement mechanisms, ensuring the adequacy of Whois service and discouraging abusive registrations. Afilias scored “good” on Sunrise and dispute resolution, “unsatisfactory” on enforcement, “satisfactory” on Whois, and



“incomplete” on abusive registrations (see [http://ipc.songbird.com/Proposed TLDs chart nov 00 1st try.htm](http://ipc.songbird.com/Proposed_TLDs_chart_nov_00_1st_try.htm)).

- Limited preparation time: Afiliias, as all applicants, had limited time to prepare its application. Like some of the other applicants, it was not a pre-existing entity. Rather, it was formed by a group of registrars that are competitors, for the purpose of proposing a new gTLD. Its biggest concerns were building the registry, financing it and getting equity back to shareholders, rather than the complexities of trademark protection.
- Insulation from liability: Afiliias believed the safer course was to process all information that was submitted to the Registry, rather than vet submissions and risk liability for turning away a legitimate trademark owner or mistakenly allowing a cybersquatter to register a trademarked name. Afiliias also rejected the idea of screening out obviously false information on grounds that those determined to abuse the process would simply file more facially convincing registrations, thereby making detection harder.
- Speed to market: Afiliias wanted a procedure that would make names available to the public as quickly as possible. Prior to launch, it was expecting to receive in the range of 300,000 Sunrise applications. It believed that verification of each one would have taken months to complete because of the difficulty in checking trademark databases in certain jurisdictions.
- Good faith: Afiliias did not think -- erroneously, it turns out -- that registrants would fabricate false trademark information when such data could be easily verified in many cases. (It should be noted there is an inconsistency between this notion of a “quick check” and the “speed to market” rationale that it would have taken too long to verify. It is actually possible to check trademark registrations in a number of jurisdictions online, particularly in North America and Europe, see discussion below under “Non-Conforming Registrations.”)
- Reasonable cost: Afiliias proposed charging registrars a wholesale price of \$5.75 per year per Sunrise registration, which is the same price as a normal registration. It concluded that at this price it was not feasible to check submissions.<sup>25</sup>
- Availability of remedial measures: Afiliias thought the Sunrise dispute settlement policy it established would effectively address any registrations made under false pretenses. Some Registry officials believed that the right of anyone to become a challenger, irrespective of whether they had any trademark rights, would help police the database. At the same time, other Registry officials viewed the \$295 fee – and the prospect of losing it if unsuccessful – as sufficient deterrent to challengers that had no right to

---

<sup>25</sup> This price was considerably less than that charged by other unsponsored registries for trademark protection: NeuLevel charged \$90 to file a .biz IP claim and GNR charged \$15 to \$100 for a .name defensive registration, depending on the type. Unlike these other two products, a .info Sunrise registration gave the registrant a usable domain name.

the name. It turned out that people were unlikely to spend a few hundred dollars to challenge a name unless they were going to be able to register it themselves. Indeed, a number of those who mounted successful challenges did so in order to register the name, although they failed to satisfy the trademark criteria. Ultimately, the Registry itself challenged many of these registrations and prevailed.

During the Sunrise period, Afilias received 80,951 applications for registrations, and awarded 51,764 domain names. After the Sunrise period began, it quickly became apparent to the Registry that a large number of registrations referred to trade or service mark information that did not exist. Some of these submissions were made in error, such as by legitimate trademark owners that did not understand what data was required. Other mistakes were made by registrars that input correct data incorrectly, or that were testing new EPP software. For example, “science.info” was reportedly registered to the Dupont Corporation as a test by a registrar unfamiliar with the new EPP batch processing software.<sup>26</sup>

Other errors were made intentionally because it was easier to do that than provide the correct data. At least one large registrar, for example, submitted tens of thousands of Sunrise applications with the identical information of “10-01-2000” (one day before the October 2, 2000 cutoff) in all Trademark Date fields and “US” in all Trademark Country fields. It was discovered later that most of the trademark owners had submitted valid data to the registrar, and that the registrar formatted the fields this way because of internal engineering problems. Once the registrar signed an agreement with Afilias acknowledging its mistakes, it was allowed to correct the information in a shadow database Afilias had established for corrections. (The master database was under Registry Lock for 6 months following Sunrise.)

In other cases, registrants fabricated trademark data in order to procure potentially valuable names, particularly “generic” names like “star.info” and “fashion.info.” In one notorious case, a registrant obtained nearly 5,000 Sunrise registrations without valid trademarks.<sup>27</sup> Appendix J of the Registry Agreement may have increased this kind of abuse by making it clear that neither Afilias nor registrars had any obligation to verify trademark information. It was generally known among registrars, and at least some of their customers, that Afilias was not going to check Sunrise applications prior to processing. Registrants who falsified trademark data presumably believed that the benefit of gaining a highly desirable name outweighed the risk of losing it later upon discovery.

---

<sup>26</sup> The Corporation Service Company (CSC) had no comment on this incident.

<sup>27</sup> The registrant was Konrad Plankenstein and the registrar was Speednames. Questions have been raised on the ICANN public comment fora about why the money Mr. Plankenstein paid for these registrations was not refunded when they were discovered to be fraudulent. The response of the Registry and a number of registrars is clear: “read the rules.” See [Complaints](#), below.

Of the 51,764 Sunrise registrations Afilius awarded, 1,579 were challenged by third parties before WIPO. Another 13,593 challenges were filed directly by Afilius under a procedure called “Challenges of Last Resort.” A total of 15,172 cases<sup>28</sup> were decided by WIPO between December 26, 2001 and August 26, 2002. Roughly 7,000 additional registrations, including several large blocs of registrations, were cancelled by Afilius when it asked those registrants to produce evidence of trademark registration, and they did not. The total number of Sunrise registrations that were challenged, or cancelled without challenge, was approximately 22,000, or 43% of all Sunrise registrations. As a result, the number of unchallenged Sunrise registrations is approximately 29,000, representing about 2.9% of the .info database.

### Land Rush

The Land Rush period began as scheduled on September 12, 2001, notwithstanding the terrorist attacks on the United States a day earlier. Afilius did modify its original start-up plan to conduct only a single Land Rush round, rather than multiple rounds. It also extended the deadline for submissions until September 21, 2001. The allocation method - proposed by Afilius and incorporated into its Registry Agreement - was a “logical queue system,” also called a “round robin.”<sup>29</sup> Each registrar submitted a list – or queue – of names that it was seeking to register on behalf of its customers. Afilius randomized each queue, as well as the order of the draw for each round, so that the registrar selected to go first in each round would be unlikely to be the same. The round robin proceeded until each name in every queue had been checked for availability. 306,017 domain names were awarded in this fashion.

### Land Rush 2

Afilius conducted a second Land Rush period to allocate names that were returned to the general pool after WIPO or the Registry cancelled problematic registrations. Approximately 17,000 names were allocated by round robin in July 2002. An additional 1,500 names are currently awaiting allocation through round robin or another method.

### Registrar Domain Names

The names awarded during the Sunrise and Land Rush periods were in addition to names registered under other provisions of the Registry Agreement. These names included (i) reserved names, such as “internic.info” (see Appendix K); (ii) names registered to Afilius, such as “afiliusco.info” (see Appendix X); and (iii) Registrar Domain Names (see section 5 of Appendix J). “Registrar Domain

---

<sup>28</sup> See generally “WIPO End Report on Case Administration under the Afilius Sunrise Registration Challenge Policy for .info” at <http://arbiter.wipo.int/domains/reports/info-Sunrise/report/indx.html> for an informative and comprehensive overview of WIPO’s role in Sunrise dispute settlement proceedings (WIPO .info Report).

<sup>29</sup> Afilius also used this method to allocate Sunrise registrations.

Names” enabled each registrar accredited by Afiliias at least ten days before Land Rush to register up to ten names, subject to certain conditions. The conditions were that the name not be reserved or already registered; that it be a trade name, trademark or service mark of the registrar; and that it be identical to a name the registrar had already registered in .com or .net. Afiliias viewed this provision as providing an important incentive to motivate registrars to complete accreditation before the opening of the Sunrise registration period. After review of the registrars’ requests for names, Afiliias approved 366 names.<sup>30</sup> The Registry rejected several dozen registrations because they were not used as trade names, or were not identical to a .com or .net registration. Afiliias indicated that, in hindsight, it ought to have also required registrars to actually use the “registrar reserve” name or forfeit the registration.

### Assessment

This section of the Evaluation examines the launch of .info from the perspectives of effectiveness, impediments to smooth implementation and disputes, in accordance with the questions posed by the Task Force Report.

#### Effectiveness

*“How effective have start-up mechanisms been in protecting trademark owners against cybersquatting and other abusive registrations?”*

The Sunrise start-up mechanism appeared generally effective in protecting trademark owners against cybersquatting and other forms of abusive registration. As noted above, the Sunrise period enabled trademark owners who held a mark of national effect issued before October 2, 2000 to register a domain name identical to key elements of that mark. Trademark owners took advantage of this opportunity to protect roughly 29,000 marks from cybersquatting. By being able to register their marks before Land Rush, this group was offered a greater degree of protection than they would have otherwise enjoyed under the UDRP. Consistent with this protection, one would expect to see a relatively low number of challenges brought by trademark holders. Only 1,579 out of 51,764 (3.05%) registrations were challenged by third parties. Excluding the 328 cases that were terminated, mostly due to payment deficiencies, the challengers prevailed in 1,196 out of 1,251 (95.6%) active third party challenges.

This statistic, however, is skewed because it was initially possible for any third party to challenge a registration and obtain a transfer of the name, even if they

---

<sup>30</sup> The domain name “fortknox.info” has been cited as an example of a Sunrise abuse by an Afiliias executive, CEO Hal Lubsen, the former head of Domain Bank, Inc. and majority shareholder in that registrar. It appears, however, that this domain name was not registered under Sunrise, but by Domain Bank under the “Registrar Reserve” program. As a result, there was no requirement that the name correspond to a trade or service mark, only that it had to have been previously registered in .com or .net, and used in trade. Afiliias staff indicated that they believed the name met those conditions and approved registration on that basis. The name resolves to Domain.com, an affiliate of Domain Bank.

did not hold a trademark. If one looks only at third party challenges brought under the revised policy and procedures, which required a valid trademark in order to prevail, then 477 out of 775 (61.5%) challenges were successful. Of these successful challenges, however, only 78 decisions (16.4%) resulted in transfer to legitimate trademark holders – a relatively small percentage. The other 399 (83.7%) cases resulted in cancellation of the Sunrise registration. These figures suggest a relatively small number of challenges – and of successful challenges -- brought by trademark holders, which implies that many parties defending marks were able to register them during Sunrise, or were otherwise unaffected by cybersquatting.

With regard to the “Challenges of Last Resort” brought by the Registry before WIPO, 13,020 out of 13,593 (95.8%) cases were decided in favor of Afiliats and resulted in cancellation of those registrations.

Because of the Sunrise registration opportunity, comparing the number of .info UDRP challenges to the same information for .com, .net and .org should indicate fewer instances of cybersquatting in .info. Under UDRP, the challenger has a higher burden of proof in that it must establish not only that it has relevant trademark rights and the respondent has no such rights, but that the domain name was “registered and is being used in bad faith.” Based on statistics obtained from WIPO and NAF, overall, 253 (.022%) of 1,164,136 .info registrations have resulted in UDRP action, compared to 11,637 (.043%) of 27,035,869 .com registrations, 1,879 (.042%) of 4,515,550 .net registrations, and 1,065 (.035%) of 3,015,179 .org registrations.<sup>31</sup> While all of these figures are less than 1%, the .info number is roughly lower than that for .com and .net by almost 50%.<sup>32</sup> At the same time, it cannot be ruled out that cybersquatting is less prevalent in .info because neither cybersquatters nor trademark holders are pursuing any of the new gTLDs to the same extent as .com, .net and .org.

Trademark holders without registered marks did not fare as well under the .info Sunrise provisions. Under the eligibility criteria, mark holders with common law trademark rights, or those who filed for trademark protection before the cut-off date but were not registered until afterwards, were ineligible to register. While a cut-off date helps deter abuse, it would seem more reasonable to accept trademarks that were filed before the cut-off as long as trademark status was granted prior to the start of Sunrise. The situation of common law trademark holders is of course more difficult to address because of the complexity involved in substantiating their claims.

---

<sup>31</sup> Throughout the Evaluation, statistics are current as of December 31, 2003, unless otherwise indicated.

<sup>32</sup> Interestingly, of the UDRP decisions among active .info cases filed at WIPO, 95 out of 105 (90.4%) resulted in transfer to challengers. The corresponding statistics for com, .net, and .org are 81.8%, 84.2%, and 84.2%, respectively. Thus far, trademark holders are more likely to prevail in a .info UDRP action than in the major existing domains, although not by a significant difference.

Afilias indicated that having more than one round of Sunrise registrations – there were four – enhanced overall effectiveness by affording registrars an opportunity to submit names even if they had been unable to participate in prior rounds because of technical, logistical, administrative or other obstacles.

### Impediments to Smooth Implementation

*“How effective were the different start-up mechanisms employed [from a functional perspective]? To what extent did they achieve their objectives or, conversely, cause consumer confusion, delays, legal issues, operational problems, or other impediments to smooth implementation?”*

Under this question, the Task Force Report asks whether there were indications of “significant potential registrant confusion,” “registrations that did not conform to the stated ground rules,” “legal disputes that arose regarding the start-up methodologies that resulted in changes,” and “significant numbers of complaints” with respect to the Sunrise and Land Rush phases of the start-up period.

A significant issue that arose but did not fall precisely into one of these categories involved the separation established between the Registry and its registrar shareholders. ICANN learned during the start-up period that a registrar might be trying to use its Afilias ownership position to gain an advantage with respect to registry-sensitive information. At the ICANN Meeting in Montevideo in September 2001, then ICANN General Counsel Louis Touton issued a warning to the Afilias Board. Mr. Touton told the meeting that “owners should be very wary of putting pressure on their management for things that related to their position as registrars, as this put management in the awkward position of not being able to respond positively to an owner for fear of losing the TLD.” The warning was not directed towards Afilias management, which had resisted the request for favoritism.

### Confusion

There were reports of significant confusion among actual and potential registrants, registrars, and the broader community following launch of the new gTLDs as a whole. Some confusion flowed from the nature of the “proof of concept” idea, which was to try different start-up mechanisms and see which of them worked best. Registrars and consumers therefore had to learn about not just one new mechanism, but several, and at nearly the same time. The practice of having registrars serve as intermediaries between registries and registrants sometimes exacerbated the situation. To work well, this structure required perfect communication and understanding between the registry and participating registrars, and then equally clear communication and understanding between these registrars and their customers. With the added novelty of a Sunrise registration period, clarity turned out to be the exception rather than the rule.

This section assesses the extent to which the .info start-up period in particular may have contributed to this general confusion. Afilias tried to communicate the rules and procedures governing Sunrise to registrars and the public through guidebooks for registrars and FAQs on its website, with mixed results. Registry information consistently highlighted that the Sunrise period was intended for trademark holders, but it could have been clearer that the process was intended to exclude anyone lacking a qualifying trademark. Some registrars, particularly smaller ones like Tuonome.it and PSI-Japan, Inc., understood the requirements and diligently checked trademark information before submitting registrations to Afilias. Others did not understand the rules, or chose to ignore them. Whether by design or ignorance, some registrars disseminated incorrect information and misleading advertisements. This meant that, for some registrants, they first became aware that there were eligibility criteria for a Sunrise registration when other parties filed WIPO challenges against them.

Not surprising, more sophisticated players fared better than others, although their views of the process were far from uniform. One trademark association thought the process “worked fine” and reflected the benefits of stopping cybersquatting earlier than UDRP would have, in as “efficient, certain, simple and low-cost” manner as possible. A trademark holder remarked that the process unfolded well, but that submissions should have been verified to avoid fraud. Another trademark holder, however, characterized both the .info and .biz start-up periods as “confusing, disparate and understaffed,” with Afilias more responsive to problems than NeuLevel. A trade association representative considered both processes to be “confusing and ineffective,” with members describing the start-up procedures as a “feeding frenzy” and a “waste of time.” Another member of that association commented that shortcomings among all of the different start-up mechanisms made some brand owners more enthusiastic about using the UDRP to protect their rights reactively, rather than using a Sunrise period to defend their marks proactively.

#### *Non-conforming registrations*

The most serious impediment to smooth implementation was the fabrication of trademark information in order to secure a favorable domain name ahead of Land Rush. More than 22,000 registrations out of a total of about 51,000 (43%) were cancelled or transferred upon challenge. While it is not the purpose of this Evaluation to review every allegation of improper registration, which would duplicate the challenge processes conducted by Afilias and WIPO, it is important to examine patterns of abuse that occurred in an effort to devise improvements for the future.

The most prevalent kind of abuse was the fabrication of trademark information in order to secure valuable “real estate” on the Internet before Land Rush began. There was no preliminary screening or verification before registration by Afilias or most registrars, so it was possible to obtain a name simply by placing any

information in the required fields and rendering payment. It was reported widely at the time that Bob Connelly, a member of the Afiliac Board, resigned in protest because of the way start-up was conducted, after declaring it an “abomination.”<sup>33</sup>

One way to deter such abuse is to employ a verification system prior to registration. Preliminary screening of submissions would be helpful too, although not as effective alone. It would be more useful in combination with verification, and used in that way to weed out egregiously false or incomplete submissions prior to detailed review. A key question in evaluating Afiliac’s Sunrise mechanism is whether verification before registration is feasible. Several factors suggest that it is the better option.

First, the availability of online trademark databases makes verification a more manageable task than at first may be apparent. One member of the Non-commercial Constituency noted that “trademarks are national, whereas the DNS is global.” There is no question that verifying trademark claims in the context of launching a global product is challenging. Trademark registration processes and accessibility to relevant information varies among countries. On the other hand, several of the world’s largest trademark databases are online, with the highest such concentrations in North America and Europe. There were 49,285 (95.2%) out of 51,764 .info Sunrise registrations that came from these two regions, which suggests that a properly designed program could have therefore verified the vast majority of submissions without great difficulty. For the .us ccTLD, for example, NeuStar designed a system to verify trademark submissions against the U.S. Patent & Trademark Office database during launch of .us. Reports indicate that the system worked well. Verifying registrants in a global database is obviously more complicated, but the example illustrates the possibilities afforded by access to online databases. There would of course still need to be some manual review to address any questions and to deal with databases that are not accessible.

Second, the cost of verification need not be prohibitive if it is distributed among all Sunrise registrants. Verifying trademark submissions is not an inexpensive proposition, but Afiliac discovered that the cost of fixing problems later can be high. The primary cost factor to consider is whether verification can be done on the basis of an online database or not. Other factors to weigh include: (i) the number of verifications anticipated and thus the number of staff needed; (ii) the timeframe for verification; (iii) the costs of staff and overhead of the entity performing verification; (iv) the substance of the registration standard and any processing requirements; (v) the amount of staff training required; (vi) the number of queries expected from actual or potential registrants; and (vii) any infrastructure investment needed to build or maintain the verification database.<sup>34</sup>

---

<sup>33</sup>See, e.g., W. McAuliffe, “Info Reaches the Half-Million Milestone” ZDNet UK (Oct. 25, 2001) at <http://news.zdnet.co.uk/business/0,39020645,2098024,00.htm>.

<sup>34</sup>WIPO officials were extremely helpful in providing information on the factors they have considered in reviewing these kinds of questions.



Rough estimates for checking online databases range from \$10 to \$30, but could be lower if the process is fully automated. Estimates of the expense of checking databases that are not easily accessible run higher, and tend to start at around \$300. Rather than impose a two-tiered pricing schedule, which people thought would be too complicated to administer and could be unfair to trademark holders in jurisdictions requiring manual verification, particularly in developing regions, use of cost averaging could establish a fee that would cover the cost of checking both situations. If, for example, “NewRegistry” was expecting 47,500 Sunrise registrations from jurisdictions with online databases at a verification cost of \$30 each, and 2,500 registrations from other jurisdictions at a cost of \$500 each, then the average cost of a Sunrise registration would be less than \$54.<sup>35</sup>

Interviews with members of the intellectual property community indicated that they would not object to paying reasonable costs directly related to the cost of running a verification program, as long as they were not assessed a premium for protecting their rights. This view is consistent with those of other end-users, who felt that trademark holders seeking the benefit of registration ahead of the general public should have to pay any associated costs.

Actual verification still has limitations. First, it is of little help to common law mark holders, whose claims are harder to check. One option would be to allow them to file a claim of their potential trademark rights with respect to a domain name, which would put a potential Sunrise or Land Rush registrant on notice that they may face a claim if they proceed.<sup>36</sup> Second, legitimate confusion can occur when an agent of a trademark holder, such as an attorney, files the Sunrise application. It can also arise when a corporate parent or subsidiary owns the trademark, but another corporate entity applies for the Sunrise registration. Finally, determined speculators and cybersquatters will still register names. Indeed “trademark hijacking,” by posing as the holder of a legitimate mark, or faking trademark certificates from jurisdictions that do not maintain centralized databases, will happen. These cases, however, should be less prevalent and, when they occur, can be addressed through Sunrise dispute resolution mechanisms or UDRP.

Several questions were also raised about Sunrise registrations submitted without valid trademarks by people who were closely associated with Afilias, as members of the Board of Directors and shareholder registrars. Phillipp Grabensee, a member of the Board and a consultant to Enter-Price Multimedia AG (EPAG), was the registrant for more than 45 Sunrise registrations with invalid trademark information, including robitussin.info, wildcat.info and suedtirol.info. Mr.

---

<sup>35</sup> Cost-averaging should also take into account that a verification regime may increase the number of registrants asserting trademark rights emanating from jurisdictions that do not have online databases. One protection against this possibility would be to charge proportionately higher fees for numerous verification requests. This could deter a registrant from registering 5,000 names (as one did) and alleging trademark information from such a jurisdiction.

<sup>36</sup> See discussion of the .biz start-up period, below. This suggestion is simpler than the .biz approach of adjudicating contested claims. The idea is merely to put a potential registrant on notice that it may face a claim, so that it can decide whether to proceed. If it chooses to proceed, it may face a UDRP action.

Grabensee indicated that he had allowed his name, in his capacity as an attorney,<sup>37</sup> to be used at the request of a client who was having software problems loading its customer database into the Sunrise queue. All of these registrations were cancelled or transferred by WIPO because they did not meet the eligibility requirements. In another example, Govinda Frauke Leopold of 1<sup>st</sup>Domain.net registered hawaii.info and maui.info. She reportedly informed the Registry that these registrations were a test and asked that they be deleted before processing, but the Sunrise round robin had already begun. Another member of the Board, Eric Schaezlein of Schlund+Partner AG, registered eric.info on the basis of an asserted trademark. He indicated that the registration had been submitted as a test and he had requested it be deleted, but it was not possible to do so.

This situation suggests that consideration be given to excluding “insiders” from participation in future Sunrise periods. It may be difficult, of course, to define the term “insider” with precision. This is particularly true when, in a case like Afilias, the registry is owned by registrars that are participating directly in the launch. Stronger protections – and enforcement -- against abuse across the board may be the more pragmatic solution. But greater attention must still be paid to the potential for abuse by those closest to the process.

Some people will find a way to circumvent even the most vigilant verification effort. But not checking trademarks in a Sunrise period is not the right answer. On the contrary, the problems that Afilias encountered demonstrate the need for proactive protection, rather than reliance on the good faith of registrants or verification after registration. Afilias’ experience also suggests that the Registry may not be the right entity to perform verification. First, a new registry at start-up faces dozens of critical issues, and a verification regime may not receive the attention it deserves to operate smoothly. Second, a registry’s expertise rarely lies in the trademark area, but there are third parties with such knowledge. This was evident in Afilias’ turning to WIPO for assistance in designing the Sunrise dispute resolution process and adjudicating Challenges of Last Resort. Finally, there is conflict between the registry’s major interest in high volumes of Sunrise and Land Rush registrations, and the imperative to reject inaccurate or incomplete submissions.

### Legal Disputes Resulting in Changes

Afilias did take action to address some of the problems with its start-up process, although not as quickly as it should have. First, under the terms of the Sunrise Policy and Rules as originally adopted before start-up, a party could successfully challenge a registration and obtain a transfer, without itself having to prove it had any valid trademark rights. Afilias said it designed the process this way so as to encourage people to challenge suspect registrations. WIPO’s decision letter

---

<sup>37</sup> Mr. Grabensee and his client provided information documenting their relationship with respect to these registrations.

would remind a challenger who had prevailed and wanted to register the name “that in order to legitimately register the Domain Name, [it] must hold a trademark or service mark registration.” But no process had been established to enforce this requirement.

To address the problem, Afilius sought WIPO’s assistance to modify the policy and rules to require the challenger to demonstrate it held a valid trademark prior to registration. The challenger seeking the name had to submit a certified copy of its trademark certificate before WIPO would order a transfer. The revised policy and rules, however, did not come into effect until December 5, 2001, which was just three weeks before the end of the third-party challenge period. Although Afilius was aware of the problem with the original policy and rules much earlier, some officials were concerned about making modifications during the challenge period. By the end of November, they came to realize that such change was necessary.

Second, as it had foreshadowed it would do in August 2001, Afilius changed the original policy and rules to facilitate the filing of challenges by the Registry against Sunrise registrations that appeared illegitimate, but had not been challenged by third parties. (Although Afilius had not done so, it already had the authority to cancel any Sunrise registration under Appendix J of its Registry Agreement.) The more than 13,000 challenges filed by the Registry in WIPO proceedings were the “Challenges of Last Resort” described above.

### Complaints

#### Sunrise

Afilius, like other registries, does not maintain detailed information on complaints. The August 2002 “Concepts Report” it filed with ICANN under Appendix U notes the number of complaints, but does not provide further information. That limited data was derived from call logs maintained by customer service representatives, which contain little additional information. Afilius officials were able to recall several types of complaints that they received about start-up, other than fraudulent registrations.

One category of complaints, brought by potential registrants and others in the ICANN community, asserted that trademark holders should not receive any prior registration privileges, i.e., there should not be a Sunrise process. Instead, all domains should be awarded during Land Rush. It is difficult to argue, for example, that an individual named Ivan Brian Moore has less right to register ibm.info than the International Business Machines Corporation. Afilius’ view is that this situation would have led to many additional domain disputes. This view may be correct, although the number of potential disputes is difficult to quantify. As we saw, the UDRP rates for the .com, .net and .org TLDs, where there was no Sunrise, are higher than for .info, but still less than 1% of registrations. The

question of whether to offer trademark protection is a fundamental one that for the time being has been resolved affirmatively, but it is clear that parts of the ICANN community do not endorse this view.

A second batch of complaints, brought by those unable to register certain choice names centered on concern that legitimate trademark holders were able to claim “generic” words in advance of the general public. The domain name “sun.info,” for example, was registered during Sunrise by Sun Microsystems, Inc. The Registry responded to the complaints by pointing out that many governments allow common words to be trademarked. Also, it did not feel comfortable being asked to judge which words were “generic” and which were not, particularly considering various linguistic meanings of the term in different parts of the world.

A third category of complaints came from, or on behalf of, registrants that were found to have submitted false trademark information, and did not receive refunds. In some cases, the number of registrations was so high that a great deal of money was lost. In the case of Mr. Konrad Plankenstein, his 4,981 registrations with false trademark information reportedly cost him \$500,000. The Registry’s response to these kinds of complaints was simple: registrants should take care to read the directions, the eligibility requirements, and any certifications they have to make, before they commit funds.

A fourth kind of complaint came from registrants who contended that their registrars had not properly submitted their Sunrise data or their Land Rush requests to the Registry. As noted above, this did happen on several occasions. Afilias took the view that such matters were between the individuals and their registrars, and gave registrars that admitted errors an opportunity to fix them.

A fifth kind of complaint centered on the fact that the cut-off date for trademark registrations did not reflect the fact that some jurisdictions – such as Great Britain and Australia – allow a trademark to be protected retroactively, back to the filing date. As a result, registrants who used their filing date as their registration date were later found to have registrations that did not meet the eligibility criteria. As noted above, this concern can be addressed. It seems reasonable to allow a Sunrise registration to proceed if the filing date precedes the cut-off date and the registration date precedes the start of the Sunrise period.

A sixth category of complaints focused on the fact that some Sunrise names, once registered, were not being used. The Registry’s response was clear: it has no control over how names are used. This complaint does highlight one aspect of Land Rush allocation: under certain methods, such as round robin and first-come, first-served, sometimes the most valuable domain names are hoarded, rather than developed.

#### Land Rush

Afilias considered the “round robin” process of allocating names to be “an equitable method of distributing domains.” Under this system, the Registry randomized the names in each registrar’s queue, as well as the order in which registrars were chosen in each round. Allocation proceeded in round robin fashion, taking the top name in every queue until all desired names were awarded. This meant that an entry on a shorter queue had a better chance of ending up first on that list, and thereby being selected before the domain was taken. If, for example, there were 20 names in a queue, each name had a 5% chance of being put in the top slot. But if there were 2,000 names in a queue, each one had only a .05% chance of ending up in that slot. The system therefore tended to favor registrars with smaller lists, either because they were smaller registrars, or because larger registrars limited the length of at least one list they controlled.

Afilias developed the round robin idea as an alternative to the more traditional allocation of “first-come, first-served” (FCFS) that was in use for existing gTLDs. The Registry was concerned that FCFS would “invite ‘add storm’ activity” – a flurry of registrar connections pounding its new systems at once – and pose “scalability and SLA [Service Level Agreement] issues for a new registry.” Indeed, such add storm activity by registrars has even caused problems for established registries. Others interviewed, including former ICANN President Lynn, voiced similar fears about using FCFS. Indeed, it turned out that even with the round robin system Afilias used to avoid the potential disruption of FCFS, the Registry’s systems experienced problems when they first opened for real-time registration on October 1, 2001.

Members of the ICANN community raised two main concerns with Afilias’ round robin approach. First, the method favored smaller registrars at the expense of larger ones because desired names that appeared on shorter lists had a better chance of being awarded the domain. One large registrar felt it was unfair that all registrars had the same limited number of connections, notwithstanding the large difference in the size of their customer bases. Another large registrar found the system – as well as FCFS -- troubling because it meant that the most desirable names were more likely to be hoarded by speculators, rather than developed by new users or for new purpose. In this view, having the “best names” be the least likely to be developed meant distorting the market for new domain names. It also made it harder to brand the new gTLDs for marketing purposes.

Second, some registrars offered preferred customers coveted places by limiting the size of their list. For registrars that controlled one or more additional registrars, this enabled them to have one list reserved for premium customers. Space was not offered to the general public, and these customers usually paid a high price for these slots. A number of individuals were surprised and angered to learn that registrars were selling slots on limited queue lists to such clients. (It made no sense to auction specific slots because the Registry was randomizing

the entries in each queue, although some registrars reportedly did so.) ICANN chose not to get involved in these issues because it concluded that these practices did not raise concerns under the ICANN Registrar Accreditation Agreement.

The dilemma of how best to allocate names does not have an easy answer. In addition to the round robin mechanism selected by Afilias, options include FCFS, auctions, reverse Dutch auctions, and random batch processing.<sup>38</sup> The selection method depends to some extent on the values that underpin the distribution system, as well as who should benefit from the monetary gains that certain names generate under the various options.

Dr. Lynn commented that ICANN has never discussed precisely which values should underlie a distribution system or their relative priority. This discussion, in his view, ought to include debate about the proper role of financial and other resources. If, for example, reliability of the DNS is the most important goal, then a phased system makes sense. There are ways to equalize the disparity of different size queues in a round robin, such as adding blanks to equalize their length. If the key goal is utility of the DNS, then getting names to the registrants most likely to use them becomes more important.

One option supported by some is a “reverse Dutch auction.” Under this type of auction, all domain names are offered at a relatively high price for a limited amount of time. The price then drops by a set amount at set intervals, until it reaches more normal levels. If, on the other hand, the main objective is equality of opportunity, then random selection (with no fee unless registration is successful) could be a better way to give all participants the same chance at getting the best names. Indeed, a number of members of the Non-commercial Constituency support this option. Although FCFS seems fair on its face, some maintain that it gives players with more resources too much of an advantage by enabling them to pound registry systems, notwithstanding load balancers. Another option is random batch processing, which combines phased processing with the randomization of all submissions, rather than by queue. This approach was selected by GNR for the .name launch and worked well (see below). These examples of alternatives, which merit scrutiny by the larger ICANN community, address Land Rush allocation, as distinct from Sunrise issues.

The question of which group – registrants, registrars, registries, ICANN, or perhaps the Internet community as a whole – should benefit from the financial windfall typically associated with the roughly 200,000 most desirable names also merit broader discussion. Such a debate is probably best divorced -- at least initially -- from an analysis of the advantages and disadvantages of different Land Rush allocation mechanisms.

---

<sup>38</sup> The OECD has published a draft study of how these options might be applied to the award of TLDs. See “Generic Top Level Domains: Market Development and Allocation Mechanisms,” DSTI/ICCP/TISP (2004)2 (May 4, 2004).

## Disputes

*“Have there been any unusual number of disputes during the start-up period and how well have they been addressed?”*

This section is not intended to duplicate the discussion above of the problems that led to changes in the .info start-up methodology. Rather, it is intended to address more general disputes in connection with the start-up process that could have “substantially impaired compliance with the stated objectives of the gTLD.” Afilias, like other registries, does not maintain detailed information on disputes. What has been possible to obtain through interviews with the registry and with dozens of people involved in the start-up processes is information about the most significant disputes that arose, and how well they were handled. Almost by definition, these are the disputes most likely to have “substantially impaired compliance with the stated objectives of the gTLD.” Also included in this category are disputes relating to start-up processes that resulted in court action, which may have implications beyond the immediate proceeding.

It should be noted that judging whether there was an “unusual” number of disputes is somewhat subjective. The Task Force Report does not offer guidance on what “unusual” should be measured against. It could, for example, mean higher than a specific number, or be measured as a percentage of the size of a database, but establishing such indicators does not eliminate initial subjectivity of deciding the question. It could also mean that the number of disputes was out of the ordinary, or was of an unexpected nature. To address these issues, this Evaluation will use the standard of whether a reasonable person would find that an unusual number of disputes arose, in terms of number or type, or both.

As noted in the previous section, a significant number of disputes arose about the legitimacy of Sunrise registrations. By any reasonable definition, the figure of 43% of all Sunrise registrations having to be transferred or cancelled represents an unusually high number of disputes. The key question for the future, then, is how well was the problem addressed? Afilias acknowledged that shortly after Sunrise began in late July it became evident “third parties were seeking to circumvent the provisions of the Sunrise Period requirements as well as the intent and spirit thereof by inappropriately registering domain names with no corresponding qualified trademark.” It understood “that further action was needed to address the extent of abuse that was occurring, which was not going to be remedied by third party challenges.” It did not believe, however, that halting the registration process was an option, as it felt significant pressure -- competitive and financial -- to be the first Registry to launch a new TLD. It also believed that the most serious abuses had occurred early in the Sunrise period and thus did not justify the confusion that stopping the process would have

caused. Instead, on August 15, 2001, towards the end of the Sunrise registration period and prior to the beginning of the challenge process, Afilias announced its intention to directly challenge registrations if need be. It hoped that by publicizing such a measure, it could “safeguard the integrity” of the Sunrise process.

There are different views about whether the Registry acted quickly enough when the abuses came to light. The August 15 announcement was not made until after the four queues of Sunrise registrations had been processed, thereby diminishing its prophylactic effect. As noted above, the Registry then waited 3 ½ months before it revised the policy and rules that would enable it to file these challenges with WIPO. It also took this long to amend the policy and rules to bar transfers to challengers that lacked a valid trademark. In hindsight, it is obvious that greater attention to the challenge of conducting a Sunrise registration during start-up planning could have reduced the ease with which people were able to circumvent the requirements. While it is conceivable that some preliminary screening might have made the job of spotting abuse more difficult, there would have been fewer cases to worry about. In the end, the Registry had to work with WIPO to verify or cancel thousands of suspect registrations, some of which would have been averted by initial checking. The impact of the start-up problems – which delayed the arrival in the marketplace of nearly 20,000 highly desirable names by nearly a year (longer for some) did substantially impair[ed] compliance with [some of] the stated objectives of the gTLD”. It also undermined the credibility of the new database for several months, until the Registry began its remedial Challenges of Last Resort.

ICANN too was confronted with requests that it take action to address the problem of falsified Sunrise registrations, but preferred to defer any action to the Registry. Mr. Touton described his reaction as “not our role” to get involved. He also believed that “it was most important to get the names out, even more important than fairness, so as to introduce competition” in the registry market. Moreover, ICANN could not “worry about every dispute.” He drew a line between intervening to warn the Afilias shareholders and Board to respect the boundary between registry operations and registrar shareholders, and letting Afilias management address problems that related solely to the registry.

ICANN’s hands-off approach to the start-up abuse surprised some people. During several months of contract negotiations, ICANN had become heavily involved in the details of building and operating the new registry (see Chapter 5). While there were good arguments for letting Afilias management take the lead in dealing with abuse of a system it had designed, it also left people wondering where ICANN was. The lesson for the future, at a minimum, is one of consistency: if ICANN assumes a hands-on approach to establishment of new registries, then the community will expect it to help resolve serious problems as well. If it assumes a less visible role with respect to start-up, than deferring action to the registry in the first instance could be appropriate.



With respect to litigation involving the .info start-up period, Registry officials stated that there have been three court cases, no other lawsuits threatened (except the one noted below), and no settlements reached. In Davies v. Afiliast Limited,<sup>39</sup> the plaintiff, Jeff Davies, had filed more than 30 challenges to various Sunrise registrations, including “hotel.info,” on grounds that they had been improperly registered. WIPO agreed and authorized Mr. Davies to register the names if he met the Sunrise conditions. As noted above, there was no procedure in place at the time to verify whether Mr. Davies had a qualifying trademark, and he succeeded in registering the names. When Afiliast discovered that he lacked trademarks, it put a registry lock on the names. Mr. Davies filed suit on grounds that Afiliast had interfered with his business relationship with his registrar and violated the Anticybersquatting Consumer Protection Act. The U.S. district court in Florida rejected both claims, and Mr. Davies has appealed the decision to the Eleventh Circuit.

In a case somewhat similar to Davies and also taking place in U.S. district court in Florida, USID Inc. has sued Afiliast over the right to use nine domain names that were the subject of WIPO proceedings in which it prevailed as the Priority Challenger. The plaintiff claims that the names in question, such as “coins.info,” “gifts.info,” and “investments.info” are generic and could not have been the subject of trademark claims. When Afiliast discovered that the plaintiff lacked trademarks for the names, it placed them under lock status. See USID, Inc. v. Afiliast, Case No. 03-20346-Civ.

The third case was filed in Tunisian courts in 2002, and involves the registrant of “patent.info.” John Brent Moetteli has a registered trademark in Tunisia for “PATENT INFO.” He succeeded in registering “patent.info” during Sunrise, but lost the name in a WIPO proceeding because he did not have a trademark for PATENT alone. (Had he registered “patentinfo.info,” he probably would have survived a challenge.)

One registrar threatened to sue Afiliast over its refusal to delay Land Rush after September 11, but changed its mind after the Registry agreed to extend the registration deadline to September 21, 2001.

### Conclusion

The .info Sunrise period offered significant protection to trademark holders who were savvy enough to know about the process and how to register their marks. At the same time, Afiliast’s decision not to conduct preliminary screening or verification of trademark submissions opened the door to serious abuses. These problems required the new Registry to expend significant resources -- from staff time to attorneys’ fees to compensation to WIPO for trademark verification -- to address the scope of the problem. It also raised significant public questions

---

<sup>39</sup> 293 F. Supp. 1265 (M.D. Fl. 2003).

about the integrity of the Registry's processes and database, and the actions of some of its Board members. This experience suggests that future verification issues would be more effectively addressed at the beginning of the start-up period, not at the end. While automated screening would offer some protection, it would not be as effective as actual verification. Such screening, however, could be used in conjunction with verification to winnow down the number of submissions that would need further validation. The growing number of trademark databases that are accessible online, particularly in North America and Europe, where the vast majority of Sunrise registrations have come from, means that the cost of verification need not be prohibitive. While there are still a number of jurisdictions where verification must be done manually, cost averaging could result in offering such a service to trademark holders at a reasonable fee based on actual costs. It should also be possible to offer some protection to common law mark holders, as well as parties that filed for trademark protection before the cut-off date (provided they receive their trademark registration prior to the beginning of the Sunrise period).

Afilias' selected a "round robin" process of allocating names, under which it took a randomly selected name from each registrar's list in round robin fashion until all desired domains were awarded. There were two main problems with this approach, in addition to its complexity. First, the round robin method favored smaller registrars at the expense of larger ones because desired names that appeared on shorter lists had a better chance of being awarded the domain name. Second, because of this situation, some registrars limited the length of lists they controlled, and offered those spots only to preferred customers or at premium prices. ICANN stayed out of these issues, viewing its role as limited to enforcement of the Registrar Accreditation Agreement, which it did not believe was implicated. Given the concerns noted, it is important to consider the efficacy of other options for allocating names in future rounds. These include "first-come, first-served," random batch processing, auctions and reverse Dutch auctions. Each option has advantages and disadvantages, and the choice will ultimately depend on which underlying values the ICANN community believes are the most critical. A related question of some importance is which group – registrants, registrars, registries, ICANN or another party -- should benefit from the financial rewards associated with some of the allocation options.

## **.biz**

On May 11, 2001, ICANN and NeuLevel entered into a Registry Agreement under which ICANN granted NeuLevel the right to operate the .biz top-level domain. Appendix J of the Agreement established a start-up plan for beginning registry operations, which included protections for intellectual property holders and a Land Rush system under which parties filed applications for names they were seeking and would be awarded randomly.

## IP Protection

NeuLevel designed a system for intellectual property (IP) protection that involved several phases of an “IP Claim Service.” During the first phase, all trade and service mark owners interested in protecting their mark could enroll in the service by completing an “IP Claim Form.” The IP Claim had to be for a .biz domain that was identical to their trademark and include a description of the goods and services for which the mark was being used, the date of first use of the mark in commerce and, for all registered marks, the country and registration number. Any IP owner could file an IP Claim, irrespective of whether its rights derived from trademark registration or common law.

NeuLevel began accepting IP Claims on May 21, 2001. The Registry charged \$90 for each IP Claim, and received 80,008 forms before the deadline on August 8, 2001. It was possible to have multiple claims filed for the same domain name by different parties, or even by the same claimant. The Registry pointed out in its instructions to claimants that completing an IP Claim was not the equivalent of registering that name, but merely a way to put others on notice that following through with a registration could infringe upon their rights. Every IP holder seeking to register a domain name still, like the general public, had to file one or more “Domain Name Applications” (DNA) with a registrar.

In the second phase, the Registry compared all applications against all IP Claims. For each match, the applicant for the domain name and its registrar were notified that another party had claimed intellectual property rights in the domain. The notification included information about the trademark claim to help the domain name applicant decide whether to proceed with registration. If the applicant decided to proceed to register the name notwithstanding the IP Claim, the name – if successfully registered -- would then be placed “on hold” for 30 days.

In the third phase, during the 30-day hold NeuLevel would notify all IP claimants of the identity of the registrant and its Whois information. Once notification of a registration was given, the claimant had 20 days to decide whether to contest it by filing a Start-up Trademark Opposition Policy” (STOP) action.<sup>40</sup> If the claimant decided to proceed, it would select either WIPO or NAF as the STOP provider. The claimant would pay a filing fee of \$1500 to WIPO or \$1,150 to NAF – just as with a UDRP action -- before filing a detailed complaint describing its claim. If more than one party filed an IP Claim for the contested domain name, NeuLevel would randomize the claims to determine the order of priority for claimants to proceed with a STOP action.

---

<sup>40</sup> See generally Start-up Trademark Opposition Policy and Rules for .BIZ (revised Sept. 19, 2001)(STOP Policy and Rules), at <http://www.neulevel.biz/ardp/docs/stop.html>. The original name for this proceeding was “Start-Up Uniform Dispute Resolution Process (SUDRP), see Appendix J of the Registry Agreement.

The STOP process was created specifically to resolve disputes for IP parties that had filed an IP Claim during start-up. (Other IP claimants could resort to UDRP to resolve disputes, so long as no relevant STOP proceeding was pending.) To prevail, the STOP claimant had to demonstrate to the provider that:

- The contested domain name is identical to a trade or service mark in which it has rights;
- The respondent who registered the name has no rights or legitimate interests in the name; and
- The respondent has registered or used the domain in bad faith.<sup>41</sup>

If the claimant could satisfy this standard, the provider would transfer the domain name. If the respondent could demonstrate that it had legitimate rights in the name, the provider would instead dismiss the complaint and disallow further STOP challenges. If both the claimant and the respondent were unable to demonstrate legitimate rights to the name, the provider would dismiss the complaint and, as necessary, allow the next priority claimant to file a STOP action. A total of 801 STOP proceedings were filed with WIPO and NAF.

In addition to offering the IP Claim Service, NeuLevel believed that enacting .biz restrictions would help deter speculators and cybersquatters. In accordance with Appendix L of its Registry Agreement, the .biz TLD is limited to those registrations “used or intended to be used primarily for bona fide business or commercial purposes.” Registrations solely for the purposes of selling or trading the name are prohibited (see Chapter 3). ICANN had asked NeuLevel to prohibit all resales, but the Registry felt that such a requirement would be too broad, encompassing also potentially legitimate sales. The Registry therefore agreed to prohibit registrations done solely for the purposes of “selling, trading or leasing the domain name for compensation.” NeuLevel suggested at the time that this provision would do more to help IP owners than the protections offered by any other TLD.<sup>42</sup>

NeuLevel designed the IP Claim Service with the goal of benefiting all IP owners equally, without giving any one of them exclusive rights. It reasoned that because the owner of a trade or service mark does not have the right to prohibit its use in general, but only insofar as use by another would be confusing or misleading, it was necessary to provide a forum for resolving disputes about competing claims. Moreover, the Registry believed that any trademark protection had to be broad enough to encompass the rights of not just IP holders with registered marks, but also those with common law rights. NeuLevel saw this view as consistent with its goal of being a “neutral third party service provider.” The Registry also wanted to avoid concerns that had been raised elsewhere about the fairness of Sunrise periods, echoing questions raised by the U.S. Small

---

<sup>41</sup> STOP Rules, para 4(a).

<sup>42</sup> Testimony of Jeffrey J. Neuman, Director of Law and Policy, NeuStar, Inc., before the Subcommittee on Courts, the Internet and Intellectual Property, U.S. House Judiciary Committee (Mar. 22, 2001).

Business Administration about their disparate impact on small businesses and start-ups. NeuLevel pointed out that it would have been ineligible to register “neulevel.info” during the .info Sunrise because it did not yet have a registered trademark, although it held common law trademark rights and had filed for trademark protection before the cutoff date.

### Land Rush

Parties seeking to register a .biz domain were invited to file a domain name application between May 25 and September 25, 2001. The original filing deadline was September 17, 2001, but it was extended after the September 11 terrorist attacks. The Registry charged registrars a nonrefundable application fee of \$2.00 for each application filed. There was no limit to the number of applications that an applicant could file for each name it sought. The more applications a registrant filed, the better its chance of securing the desired named.

A total of 2,401,609 applications for roughly 280,000 domain names were received by the deadline. 1,278,498 of these applications matched the 80,008 IP Claims that had been filed. These applicants were notified that an IP Claimant was asserting trademark rights in their target registration. In 198,085 cases, the applicant did not proceed to registration: 79,627 applications were cancelled by the applicant and another 118,458 were cancelled by the Registry because the applicant never indicated whether it wished to proceed. 61,629 applicants proceeded to register the names they had sought, which the Registry then placed on hold. In 801 of these cases, the IP claimants filed a STOP action.

At least one registrar had urged potential customers to register in the .biz “lottery.” “[D]on’t forget,” it advertised, “NeuLevel is treating the random registrant selection process like a lottery, so the more applications you submit for a domain name the better your chances will likely be of registering that name.” On July 23, 2001, David Scott Smiley, doing business as Smiley Productions and Skyscraper Productions, LLC, filed a class action suit on behalf of all .biz registrants in California Superior Court using that argument. See Smiley, et al. v. Internet Corporation for Assigned Names and Numbers (“ICANN”), et al., Case No. BC 254659, and ePrize, LLC v. NeuLevel, Inc., et al., Case No. BC 257632 (“Smiley”). The plaintiffs alleged unjust enrichment and violation of competition and consumer protection laws by distributing the TLD through means that constituted an illegal lottery. NeuLevel countered that the goal of the system it designed was to “ensure equal access to domain names for businesses large and small,” and to “avoid exploitation by well-heeled business entities.”<sup>43</sup> (It had also felt that some kind of “gating process” was needed to discourage people from filling huge numbers of duplicate applications, although \$2.00 does not

---

<sup>43</sup> See [Defendant NeuLevel, Inc.'s Corrected Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction](#) (Sept. 17, 2001).

seem to be a sufficient deterrent for large players.) ICANN responded in pleadings that the \$2.00 fee for an application was a processing fee reasonably related to the Registry's expected cost of administering the start-up processes. The plaintiffs moved for a preliminary injunction, which the Court granted. The court found there was reason to believe that the Land Rush system, particularly the \$2.00 fee, violated California's lottery law. The Court granted a preliminary injunction against NeuLevel to stop the award of registrations for all names that had received multiple applications until at least October 12. The injunction was lifted on October 25 after plaintiffs failed to post the requisite bond. NeuLevel maintains the view that it would have prevailed on the merits, but it decided to settle the case for roughly \$3 million (which included refunding the application fees and paying attorneys' fees) in the interests of getting the TLD launched as quickly as possible.

Because of the litigation, NeuLevel divided the applications it had received into four groups:

- Group 1A - Domain names that received only 1 application, and had no IP Claims filed against it: There were 167,816 names in this group.
- Group 1B - Domain names that received only 1 application, and had one or more IP Claims that matched: There were 25,470 names in this group.
- Group 2A - Domain names that received multiple applications from a single party: There were 46,462 names in this group.
- Group 2B - Domain names that received multiple applications, filed by different parties. There were 39,655 names in this group.

The Registry had been scheduled to go "live" with all names on October 1, 2001, but was able to do so only with respect to Group 1A, which included names that received only one application and no IP Claims. On November 7, 2001, the Registry began accepting "first-come, first-served" registrations for available names (i.e., names that were not previously registered, the subject of a STOP proceeding, or part of Group 2B), and experienced no outages or technical problems. On November 19, the names in Group 1B, which also involved just 1 application, and Group 2A, which involved multiple applications filed by the same party, went "live."

Although the Smiley injunction had been lifted on October 25, 2001 because of plaintiffs' failure to post a bond, NeuLevel deferred launching Group 2B until it was able to consult with ICANN and determine the best way to proceed. NeuLevel decided to refund the \$2 application fee, but wanted to find a way to ensure that registrars would pass it back to the registrants. On December 15, 2001, NeuLevel announced the new process for release of the Group 2B names and the refund of money paid for applications. It asked registrars to sign an amendment to the Registry-Registrar Agreement on the proposed round-robin distribution of names, and a certification that the registrar has refunded application fee. The round robin process chosen was similar to the one used by

Afilias. Between February 2 and March 2, 2002, the Registry received 128,015 new applications for the 39,655 names in this group. These names went “live” on April 8, 2002.

## **Assessment**

This section of the Evaluation examines the launch of .biz from the perspectives of effectiveness, impediments to smooth implementation and disputes, pursuant to the questions posed by the Task Force Report.

### Effectiveness

*“How effective have start-up mechanisms been in protecting trademark owners against cybersquatting and other abusive registrations?”*

The IP Claim Service offered all trademark owners -- including those who held common law claims and who had filed for, but not yet received, registrations to protect their mark -- a chance to establish a right to the corresponding domain name. This process did not guarantee registration of the desired mark. For that, they had either to compete with the general public for registration during Land Rush, or prevail in a STOP action. Nonetheless, parties filed 80,008 IP Claims. In 61,629 cases, the applicant went ahead and registered the name. Of these cases, only 801 registrations were challenged in a STOP action.

Of 338 STOP complaints (involving 355 domain names) administered by WIPO, only 107 (31.66%) cases were decided in favor of the Complainant, while 159 (47.04%) cases were denied and 71 (21.00%) cases were terminated. Examining only active cases, in 107 out of 226 (40.2%) cases the STOP challenges were decided in favor of the claimant; in 159 out of 226 (59.8%) cases the prospective registrant prevailed.

NAF also processed several hundred STOP actions, but does not provide information on dispositions. Instead, this Evaluation reviewed approximately 5% of the cases that were decided by NAF more closely. Of the 17 NAF cases reviewed, 10 (59%) cases were decided in favor of the claimant, and in 7 (41%) cases the prospective registrant prevailed. In a number of cases, NAF panels found that bad faith was established when the respondent registered a name after being notified that an IP Claim had been filed against it. While the requirement of bad faith can be difficult to establish, mere notification of an IP Claim should not have been sufficient. Had this standard been interpreted more strictly, a number of cases that found for the claimant would have been dismissed. In addition, some of the cases that involved “generic” terms were not easy to resolve. The better reasoned decisions looked at how well known the generic mark was, and how closely related were the business interests of the claimant and the respondent. Others simply deferred to the trademark registrations.

WIPO also looked at the question of why STOP cases were not more successful in the “WIPO End Report on Case Administration under the Start-Up Trademark Opposition Policy for .biz”. That report found that a significant proportion of the 355 domain names challenged under STOP consisted of “generic” terms, such as “games.biz,” “money.biz,” “bicycling.biz,” “management.biz,” and “realestate.biz.” Such panels were typically reluctant to find the requisite bad faith. Other claimants lost STOP actions because their trademarks were not identical to the textual elements of the contest domain name. Compare, e.g., Fiat Auto S.p.A v. Italienska bil, WIPO Case No. DBIZ2001-00030 (awarding “alfaromeo.biz” to the IP Claimant with trademark rights to “alfa romeo”) with Hotel Lotte Co., Ltd., v Morris Communications Company, LLC, WIPO Case No. DBIZ2002-00024 (finding that “charlotte.biz” was not identical to claimant’s trademark for THE CHARLOTTE SUITE). In the latter case, the claimant might have won under a UDRP action, where the standard for establishing rights is whether the domain name is “identical *or confusingly similar* to a trade or service mark in which the Complainant has rights” (emphasis added).<sup>44</sup>

The relatively low number of STOP proceedings – 801 actions out of 80,008 IP Claims (1%) – is probably the result of several factors. First, there were multiple IP Claims filed, although the Registry does not track how many. Second, in many cases IP holders both filed IP Claims and – as they were supposed to – applications to register those names, and then successfully registered them. Third, the system may have deterred a number of intended registrants, as it was designed to do. Finally, it is likely that anyone who filed an IP Claim that would not withstand scrutiny let it lapse rather than lose the case (and money) at WIPO or NAF, as the system also intended would happen. And an IP claimant who believed that the potential registrant had a possibly persuasive claim to the same name would also have refrained from filing under STOP. Still, if IP holders had been unable to register the equivalent of their trademarked name during Land Rush, or failed to deter prospective registrants through NeuLevel’s notification system, one would have seen a surge in the number of STOP actions filed. The fact that only 1% of all initial IP Claims ended up in STOP proceedings suggest that IP holders fared well. It might also imply that they represented a relatively small number of overall registrants. The fact that IP Claimants lost more cases than they won at WIPO indicates that the system also protected the rights of third parties.

Another indicator of success of the IP Claim process in protecting trademark owners would be to see a relatively low number of UDRP cases. While a STOP proceeding is somewhat similar to a UDRP action, it was intended to be easier to prevail in one important respect.<sup>45</sup> Under STOP, the claimant had to demonstrate that the name was either registered or used in bad faith, whereas

---

<sup>44</sup> Section 4(a) of the Uniform Domain Name Dispute Resolution Policy (UDRP Policy).

<sup>45</sup> It was intended to be more difficult to prevail in another respect. Under STOP, the claimant had show that the mark and the domain name were identical, whereas under UDRP it had to demonstrate only that they are “confusingly similar.”



under UDRP it had to prove both elements. Overall, 169 (.017%) of 1,003,902 .biz registrations have resulted in UDRP action, compared to 11,637 (.043%) of 27,035,869 .com registrations, 1,879 (.042%) of 4,515,550 .net registrations, and 1,065 (.035%) of 3,015,179 .org registrations. While all of these figures are less than 1%, the .biz number is roughly lower than all three existing TLDs by 50%. It is possible that the .biz UDRP figure is low due to changing market conditions and the anticybersquatting legislation enacted in the United States. It also cannot be ruled out that cybersquatting is less prevalent in .biz because trademark holders are not pursuing any of the new gTLDs to the same extent as .com, .net and .org.

It seems clear that the combination of the IP Claim, notification and STOP processes helped a number of IP holders secure contested domain names that they believed would have infringed upon their trademark rights. Those IP claimants that were seeking to protect names that were “generic” (or not identical to their marks) were generally less successful, as was intended. The processes also covered a broader class of IP holders than did the .info Sunrise mechanism. For all these reasons, the .biz IP protections proved generally effective in combating cybersquatting and other forms of abusive registrations.

What is less clear is whether the .biz protections offered IP owners more protection than they already enjoyed under the UDRP, and at slightly less cost. Under UDRP, it is easier for an IP owner to establish legitimate rights to a contested domain name because it need establish only that the name is “confusingly similar,” as opposed to identical, to its mark. While it was supposed to be easier to establish bad faith under STOP on the basis of either registration *or* use, in reality “use” was not an option because the contested domain name had not gone “live.” As a result, in both STOP and UDRP actions, a complainant had to establish registration in bad faith. Under UDRP, of course, a complainant still has to establish use in bad faith, which is not always possible to do. While the cost of STOP and UDRP actions are the same, there is an added cost of \$90 for each IP Claim a trademark holder had to file. The \$90 gave the IP Claimant a chance -- but not a right -- to challenge the prospective registrant, a chance that depended on how many others had filed an IP Claim for the same name, and who was the priority claimant. The more IP Claims a party filed, of course, the better the chance that they would end up as the priority claimant and have the first opportunity to prevail in a STOP action. Some IP owners therefore filed multiple claims in order to have the first – and perhaps only – shot at a STOP action transfer. Given the relative expense and complexity of the .biz system compared to UDRP, it is possible that, if this was explained and they were given a choice, the majority of IP owners would have opted for the system they knew over a new one they did not, even if it provided protection only after Land Rush.

#### Impediments to Smooth Implementation

*“How effective were the different start-up mechanisms employed [from a functional perspective]? To what extent did they achieve their objectives or, conversely, cause consumer confusion, delays, legal issues, operational problems, or other impediments to smooth implementation?”*

The Task Force Report tasked the Evaluation with examining indications of “significant potential registrant confusion,” “registrations that did not conform to the stated ground rules,” “legal disputes that arose regarding the start-up methodologies that resulted in changes,” and “significant numbers of complaints” with respect to the Sunrise and Land Rush phases of the start-up period.

### Confusion

As noted above under the .info discussion, there were reports of significant confusion among actual and potential registrants, registrars and others following launch of the new gTLDs as a whole. Some of it flowed from the “proof of concept” notion to try different start-up mechanisms and from the existing structure of having registrars serve as intermediaries between registries and registrants. This section assesses the extent, if any, to which the .biz IP protection and Land Rush phases heightened general confusion.

A number of trademark holders thought that the .biz process worked well. One noted that it liked being notified directly by email each time a prospective registration matched its IP Claim. While characterizing this approach as “roundabout,” it commended the Registry’s proactive stance. Another IP holder thought that the complexity of the process added to the cost, but it was better than the alternative; while more complex, it was also handled better than others, and therefore more effective to the end-user. A trademark attorney noted that while the process was “too complicated for the general user,” it was better than a Sunrise because it accommodated common law trademarks. An ICANN Board Member thought that .biz did the “best on due diligence” and had designed the “better process.”

One non-commercial organization questioned whether it was possible to gauge consumer confusion when so few consumers knew about launch of the new TLDs. Its representative wondered what had happened to the promised “media blitz.” NeuLevel indicated that it did extensive advertising, spending an average of \$10.48 per registered name. It focused mostly on print and radio advertisement, as it found the cost of television advertisement prohibitively expensive.

People who were aware of the system, however, found it unattractively complex. One trademark holder characterized both the .info and .biz start-up periods as “confusing, disparate and understaffed,” with NeuLevel less reachable and responsive to problems than Afilias. A trade association representative characterized both processes as “confusing and ineffective.” One of that

organization's members described the procedures as a "feeding frenzy" and "waste of time." Another remarked that the shortcomings among all the new TLD mechanisms made some brand owners more enthusiastic about using the UDRP to protect their rights reactively, rather than proactively. WIPO itself characterized the .biz IP protection process as "relatively complex."<sup>46</sup> NeuLevel acknowledged that the STOP process was cumbersome and required an extensive education program for registrars and IP owners. A detailed 4-page flowchart of the interaction between the IP and the STOP processes prepared by ICANN for the Smiley litigation demonstrates -- perhaps unintentionally -- its complexity. See <http://www.icann.org/legal/smiley-v-icann/touton-supp-decl-exhf-05oct01.pdf>.<sup>47</sup>

Many people, including trademark owners, registrars and registrants (actual and potential), were also confused about the Land Rush process, due largely, but not exclusively to the Smiley litigation. For some, it was the "starting and stopping" that made it difficult. For others it was division of the applications for registration into four groups, with a different process and timeline for each one. Moreover, during the round robin used to allocate the group of 2B names, several IP claimants received solicitations from the "BIZ IP Claim Protection Program," which had nothing to do with NeuLevel. Using the lesson learned from the .info Sunrise that the shorter the registrar's queue, the better the chance of success, an enterprising registrar had filed applications for registration in order to learn the IP Claimants' identities. With that information in hand, the registrar offered to help those claimants improve their chances of getting their desired names. NeuLevel determined that it had no legal basis to challenge this practice. The Registrar agreed to stop its solicitations after the Registry and other registrars raised concerns.<sup>48</sup>

### *Non-conforming registrations*

As noted above, verification of IP Claims was conducted by WIPO or NAF during a STOP proceeding. Registrations were also required to comply with restrictions concerning the definition of a bona fide business, which is the subject of Chapter 3. The Registry did not typically prescreen applications for registration for conformity with these restrictions, with one exception. Because of the problems that had plagued both NeuLevel's application system for domain name registration and Afilias' Sunrise mechanism, NeuLevel decided to scrutinize the reallocation of the names in Group 2B. (Group 2B consisted of domain names

---

<sup>46</sup> Section 13 of the "WIPO End Report on Case Administration under the Start-Up Trademark Opposition Policy for .biz," at <http://arbiter.wipo.int/domains/reports/biz-stop/report/index.html> (WIPO .biz Report)

<sup>47</sup> The chart was prepared by ICANN as part of its response to the Smiley litigation. See Appendix F to [Supplemental Declaration of Louis Touton in Opposition to Plaintiffs' Motion for Preliminary Injunction](#) (Oct. 5, 2001).

<sup>48</sup> See email from Bhavin Turakhia, CEO, Directi, to [Registrars@dnso.org](mailto:Registrars@dnso.org) (Mar. 25, 2002) at <http://www.dnso.org/clubpublic/registrars/Arc01/msg02238.html>.

that had received multiple applications from different parties, and therefore had been put on hold during the Smiley litigation.)

On April 8, 2002, NeuLevel announced that it had initiated an inquiry into some of the names that had been registered as part of the round robin, reaffirming that it was committed to “preserving the integrity of the .BIZ domain name space.”<sup>49</sup> NeuLevel used a spread sheet to look for suspicious patterns of activity, such as the name “domains4sale” or suspicious telephone numbers (e.g., “111-111-1111”) on the new registrar lists prepared for the round robin. The Registry found that thousands of the registrations suggested speculative activity or false contact data, or both. It was unclear whether, in some of these cases, registrars had legitimate customers but had not entered their data correctly.

Three days later the Registry announced that it had placed some of these names on registry hold in response to potential abuses.<sup>50</sup> The Registry contacted all affected registrars and indicated they should carefully review their lists or face public scrutiny. As a result, about 11,000 applications out of 39,655 (or 28%) were deleted. These domain names were then allocated on a first-come, first-served basis.

### Legal Disputes Resulting in Changes

As discussed above, the Smiley litigation caused the Registry to abandon its proposed allocation system of randomly awarding domain names on the basis of applications submitted.

Another legal issue that resulted in some change involved the requirement to prove “bad faith” in STOP actions. As noted in the WIPO .biz report:

“in some cases, Panelists took the fact that the Respondent had proceeded to register the domain name in spite of having been notified of an IP Claim as an indication of bad faith (Rodale, Inc. v. Cass Foster, WIPO Case No. DBIZ2002-00148, <menshealth.biz>). Subsequent decisions clarified, however, that the notification was of little relevance where the disputed domain name was a generic or descriptive word, and where there was no evidence that the Complainant’s mark was well-known or at least known to the Respondent (Mohawk Brands, Inc v. iSMER, WIPO Case No. DBIZ2002-00242 <image.biz>; Zentralverband deutscher Konsumgenossenschaften e.V. v. eDesign Japan, WIPO Case No. DBIZ2002-00261 <plaza.biz>).”

---

<sup>49</sup> Statement from Jeffrey J. Neuman, Director, Policy and Intellectual Property (Apr. 8, 2002) at [http://www.neulevel.biz/press/press\\_release/pr\\_archive\\_2000\\_2001/2002.04.08.html](http://www.neulevel.biz/press/press_release/pr_archive_2000_2001/2002.04.08.html).

<sup>50</sup> Statement from Jeffrey J. Neuman, Director, Policy and Intellectual Property (Apr. 11, 2002) at [http://www.neulevel.biz/press/press\\_release/pr\\_archive\\_2000\\_2001/2002.04.11.html](http://www.neulevel.biz/press/press_release/pr_archive_2000_2001/2002.04.11.html).

WIPO is correct that mere notification of an IP Claimant's right to a "generic term" was inadequate to prove that proceeding to registration constituted bad faith. The Registry let the two providers address this question, and it appears the later decisions adopted the better position. As mentioned earlier, NAF panels faced the same issue.

### Complaints

#### IP Claim Service

Complaints to NeuLevel were typically addressed through a multi-step process, involving 7-8 Registry officials. First, many of the complaints came to the customer support office. If they involved a Registry issue and could not be resolved, action would escalate to the head of Customer Support. From there, if need be, action would move up to the Vice President for Operations (Finance/Administration) for assistance. Failing resolution at that level, other Registry officials would be brought in.

NeuLevel, like other registries, does not maintain detailed information on complaints it received. The Registry did, however, respond affirmatively to a request to view the complaint file maintained by its Director for Policy and Intellectual Property. This file contained roughly 400 complaints, of which 10% were reviewed. Registry officials were also helpful in describing as many of the types and numbers of complaints they could remember, and their resolution. Members of the ICANN community also recalled clearly those issues that troubled them most. The complaints can be divided roughly into the following categories:

- Complexity: Registrars complained that the .biz process was "very difficult to explain to people." It also took a lot of trouble to prepare the different phases of the .biz start-up. One asked if it "couldn't be more like .com" (where, of course, there was no start-up period). With respect to Land Rush, registrars were not pleased that they had to submit the entire batch at once and any errors, such as an unusual character, led the entire batch to be rejected.
- "Generic" terms: Non-commercial representatives were concerned that the IP protection system was "poorly conceived" and "abused to give trademark holders pre-emptive control of "generic" terms, to which they do not have rights under trademark law. This is certainly a danger with a Sunrise registration period, and one reason NeuLevel preferred to have any disputes adjudicated on their merits. Indeed, with two providers conducting dispute resolution services, and the diversity of panellists, STOP decisions were not always uniform. In some cases, panels rejected claims by IP owners to "generic" terms (typically because it found bad faith lacking). In other cases, panels found such arguments convincing and transferred the "generic" term to the IP owner. Because the .biz TLD was

intended to provide a name space for businesses, a party that registered a generic name that was subject to an IP Claim had a hard time prevailing in a STOP challenge if it was not a business, or lacked concrete business plans that pre-existed notification of the IP Claim. At the same time, it was shown earlier that complainants lost the majority of STOP case they brought before WIPO.

- Cease and Desist Letters: NeuLevel received approximately 400-500 “cease- and-desist” letters from parties claiming IP rights. The Registry saved some of the letters it received and permitted a review of its file. These letters usually demanded that the Registry preclude any other party from registering the corresponding domain names, and award the names directly to them. Lawyers for Sun Microsystems, for example, sent letters to the Registry and participating registrars demanding that they refuse applications for over 30 domain names from other parties, including “sun.biz,” “enterprise.biz,” and “starsuite.biz.”<sup>51</sup> The Registry did not respond to most letters because of the small size of its in-house legal team and the expense of outside counsel. The Registry did answer telephonic inquiries by reaffirming that the IP Claim Service was the sole route to protect IP rights. Given the revenue that the IP Claim process generated – 80,008 x \$90, or \$7.2 million<sup>52</sup> – it should have been possible for the Registry to respond to further requests for information (beyond standardized replies from Customer Support).
- Registrar Issues: In some cases, according to NeuLevel, registrars collected the IP Claims and did not forward them to the Registry. In many of these cases, although not all, the claimants succeeded in getting the names during Land Rush. In another case, a large registrar was unable to account for 19,000 applications for domain names. It tried to blame NeuLevel’s software, but it was possible to establish that the Registry was not at fault. Other complaints involved a registrar not implementing a STOP decision; a registrar not unlocking a name that had been subject to a STOP proceeding; and a registrar charging for Group 2B domain name applications (DNAs) in violation of the new procedures. Some registrants complained that the Registry was not transferring names promptly, but the Registry found no requests were pending.
- Notification process: There were at last a dozen instances where issues arose with respect to notifying IP Claimants of DNAs. It was obviously important that both domain name applicants and IP Claimants received prompt notification with respect to IP claims and registrations, respectively, because they had to respond within a set period of time. Otherwise, the prospective registrant would lose the desired domain name, or the claimant would lose the opportunity to initiate a STOP action.

---

<sup>51</sup> S. Stellan, “Sun Makes Claims on Domain Names,” The New York Times at C4 (Aug. 29, 2001). See, e.g., Sun Microsystems, Inc. v. Jennifer O. Flynn, WIPO Case No. DBIZ2002-00208 (panel dismissed case requesting transfer of “esun” to claimant).

<sup>52</sup> The Registry has reported that it took in slightly less than this amount, closer to \$6.4 million.

The Registry estimates that, on a least a dozen occasions, registrars submitted incorrect email addresses. The incorrect data became the basis for issuing passwords and user names for access to the IP Claim database to the wrong contact point.

- Round Robin: There were complaints about the Registry's reluctance to publish the list of names available during Land Rush 2 and provide it only to registrars. The Registry responded that it was concerned about advertising the availability of these highly desirable names to speculators. It preferred to leave the decisions of whether, and how, to advertise the round robin to the registrars. The Registry felt this would reduce the potential for abuse. There was public concern that a number of registrars artificially limited the length of their queues so as to improve the chances of those in it, and therefore had higher success rates at getting names for their customers. NeuLevel rejected the idea of using blanks to equalize queue lengths because it would disadvantage smaller registrars. In hindsight, and in light of the .us launch, NeuLevel indicated that it would have advocated "first-come, first-served" instead of allocating names by application or a round robin.

## Disputes

*"Have there been any unusual number of disputes during the start-up period and how well have they been addressed?"*

This section is not intended to duplicate the discussion above concerning complaints or Land Rush litigation. Rather, it is intended to address more general disputes in connection with the start-up process that could have "substantially impaired compliance with the stated objectives of the gTLD." Like Afilias, NeuLevel does not maintain detailed information on the number or status of disputes. What has been possible to obtain through interviews with the registry and with dozens of people involved in the start-up process, is information about the most significant disputes that arose, and how well they were handled. This section also includes any disputes relating to the start-up process that resulted in court action, which may have implications beyond the immediate proceeding. This Evaluation employs a standard of reasonableness in judging whether there was an "unusual" number of disputes, in terms of raw numbers, the nature of the dispute, or other factors.

There were several disputes that resulted in lawsuits. At the beginning of the start-up process, Amazon.com threatened to sue NeuLevel if it did not change its procedures to guarantee that trademark holders would be awarded the corresponding domain name. It also wanted the Registry to prohibit multiple domain name applications for Land Rush, on grounds that such practice constituted an illegal lottery. The Registry responded by suing Amazon in August 2001, seeking a declaratory judgment that the .biz start-up process did not violate any applicable law. See Neulevel, Inc. v. Amazon, No. 01-245 (E.D. Va.

2001), No.01-2432 (4<sup>th</sup> Cir. 2001). The court granted Amazon's motion to dismiss on the ground that it lacked subject matter jurisdiction.

There was also litigation in state court in Arizona, brought by Gregory Crane against NeuLevel over registration of "yellowpages.biz," "music.biz" and other domain names. In Crane v. NeuLevel, Inc., #CV-011245 (Ariz. 2001), the plaintiff sought to prevent the Registry from allowing anyone to register these names on the basis of state trademark registration. NeuLevel believed that the plaintiff had no such rights, and discovered there was a U.S. Federal Trade Commission investigation against him for other business dealings. The plaintiff agreed to dismissal of his case with prejudice.

In a case filed in the Commercial Court of Brussels in May 2002, S.P.R.L. Max and Zoë (MZ) filed suit against NeuLevel and Spacetel Communications, a French company, seeking transfer of "droit.biz."<sup>53</sup> MZ had filed an IP Claim for the name, and was notified that Spacetel sought to register it. It appears that MZ missed the filing deadline for a STOP action, thereby enabling Spacetel to register the name. The Court ruled that NeuLevel was not at fault because its procedures were followed. It enjoined Spacetel, which had defaulted, from making any use of the domain name under penalty of a daily fine of 25,000 Euros.

Schatte v. Sex.biz was filed in April 2003 over rightful ownership of "sex.biz,"<sup>54</sup> following two related STOP actions. The name was registered by a Korean registrant, known as Peter Jeong or "Personal," during the round robin allocation of Group 2B names, and first challenged under STOP by Philatelic.Com. That case was dismissed when the claimant failed to produce evidence of its trademark claim. See Philatelic.Com v. Peter I. Jeong, NAF Case No. FA0204000112547. The domain name was then challenged by Mr Schatte, who had filed an IP Claim for "sex" on behalf of his trademarks for decorated refrigerator magnets. See Marcus R. Schatte d/b/a Sex v. Personal, NAF Case No. FA0209000124756. The second STOP Panel ruled that because Mr. Schatte had legitimate rights and interests in sex.biz and "Personal" did not, the registration should be transferred. It apparently overlooked that the marks had been newly registered several months after the ICANN-NeuLevel Registry Agreement was concluded. The panel cited respondent's lack of a business plan prior to notification of claimant's rights. Under the STOP rules, if the losing party appealed the decision to a national court within ten days, the Registry would have to put a hold on the transfer until the case was resolved. Within a few days, Mr. Jeong filed suit in Korean court to block transfer. Several months later, Mr. Schatte filed suit in U.S. district court in Virginia to enforce the transfer order.

---

<sup>53</sup> Judgment of the President of the Commercial Court of Brussels in the matter Neulevel, Inc. /SPRL Max & Zoë (Oct. 28, 2002).

<sup>54</sup> No. 03-CV-464 (E.D. Va. 2003).



The Korean court issued a default judgement in favor of Mr. Jeong, and the U.S. court issued one in favor of Mr. Schatte. NeuLevel, feeling caught between two jurisdictions, filed a motion for relief from the District Court's judgement. Prior to the court ruling on the motion, Mr. Jeong decided to appear in U.S. court and argue for relief from judgment on grounds that he did not have enough time to prepare his case. At that point, the U.S. court decided to disregard its earlier order and proceed to the merits of the case. Shortly thereafter the parties reached a settlement, with Mr. Jeong retaining registration of the domain.

### Conclusion

NeuLevel's approach to IP protection had strengths and weaknesses. On the plus side, it offered benefits to not just registered trademark holders, but also those with common law claims and newer companies that had filed but not received a trademark registration. It was implemented relatively smoothly for a complex process. In theory, it also gave parties that had no trademark claim a chance to register a desirable name as long as they could prove that they had some right or legitimate interest to it and were operating in good faith. (This was of less utility in .biz, which was intended for commercial registrants, but it could be a more meaningful distinction in other TLDs in the future.) By design, NeuLevel's system was also less susceptible to abusive registrations than a Sunrise period. It is harder to manipulate an IP Claim system where contested names are adjudicated by a third party provider. At the same time, the more IP Claims an IP owner filed, the more likely it would emerge as the first priority claimant authorized to initiate a STOP action and secure the domain name.

On the minus side, however, many people – including sophisticated players – commented on how difficult the IP Claim, domain name applications and STOP processes were to understand. It was a complicated, multi-phase system that left even some trademark attorneys puzzled, as well as many less well-informed registrants. Moreover, the combined cost of an IP Claim and STOP action was greater than filing a UDRP claim alone, for there was a \$90 charge for each IP Claim filed.

Given the relatively small number of STOP actions brought, and the even smaller number in which the result was a transfer decision, one could argue that the cost and complexity of the .biz trademark protections outweighed the benefits. It can also be argued that the relatively few STOP actions filed meant that the system worked as intended, to discourage trademark holders from challenging non-infringing uses of their marks. It is also plausible that the number of legitimate trademark holders was relatively small.

While the .biz IP Claim Service operated more smoothly than the .info Sunrise, a better functioning Sunrise period could prove to be simpler and more cost-effective to administer. Common law IP holders and those with awaiting trademark registration, of course, would not fare as well under Sunrise. Yet there

are ways, outlined in the previous section on .info, to better protect this class of IP holders. The real concern would be that those who do not hold IP rights would have difficulty registering desirable names in which they might have legitimate interests (e.g., Susan Sun registering “sun.\*,” or Ivan B. Moore registering “ibm.\*.”

Even simpler and fairer than a Sunrise, and consistent with the views of a few members of the IP Community would be to rely on UDRP alone, without start-up mechanisms. Indeed, were NeuLevel to launch a new gTLD again, the Registry and some IP holders might well conclude that the simpler, less expensive option would be to use UDRP as both a deterrent and a remedy. Drawing on the .biz experience, it could make sense to include also a notification provision similar to the IP Claim process. This would put potential registrants on notice of any IP claims, and hence the risk of going forward. It would also afford IP holders an opportunity to begin preparations for a UDRP Complaint, if need be.

With respect to Land Rush, the Smiley litigation forced NeuLevel to change its allocation mechanism from a random drawing to the round robin system. Under that system, the Registry took a randomly selected name from each registrar’s list in round robin fashion until all the requested domains were awarded. As with .info, there were several concerns expressed about this approach. First, the round robin method favored smaller registrars at the expense of larger ones because desired names that appeared on shorter lists had a better chance of being awarded the registration. Second, because of this situation, some registrars limited the length of their list, or the list of an affiliated registrar, and offered spots to preferred customers at premium prices. As noted above, the question of other options for name allocation, in a manner consistent with stability, fairness and other values important to the ICANN community, is an important issue that needs to be addressed.

## **.name**

On August 1, 2001, ICANN and Global Name Registry (GNR) entered into a Registry Agreement under which ICANN granted the Registry the right to operate the .name TLD. Appendix J of the Agreement established a start-up plan for beginning registry operations, which included intellectual property (IP) protection and Land Rush allocation. The focus of this Evaluation is on the registration of domain names during start-up, although occasional mention may be made of the Registry’s other core product -- email addresses.

### IP Protection

Under the GNR system, intellectual property (IP) holders with trade or service marks of national effect could submit a “defensive registration” (DR) for the

corresponding domain name. These registrations were not the equivalent of a “live” domain name registration, for they did not resolve within the DNS. Rather, they blocked a particular name and precluded others from obtaining certain registrations. During the first phase of the process, (i) a DR had to match the textual elements of the mark; (ii) the mark had to have national effect; and (iii) the mark had to have been registered before April 16, 2001. The cutoff date was chosen so as to be reasonably after selection of .name as a new TLD, but sufficiently before Registry operations commenced. During the second phase of defensive registration, it was not necessary to meet these requirements. After June 13, 2002, any entity could apply for a DR to protect any name, or combination of names.

Section 2(b) (iv) of Appendix L (Registration Restrictions) made it clear that “[n]either the Registry Operator nor the ICANN-Accredited Registrars will review the information provided . . . prior to issuing a Phase I Defensive Registration.” During the second phase of DR, there were no eligibility requirements and thus no information to even consider verifying.

A defensive registrant had a choice of blocking at the second level of a domain name (e.g., anything.blocked<sup>55</sup>); at the third level (e.g., blocked.anything); or both (e.g., blocked.blocked). If just the second level were blocked, it would not preclude registration of “blocked.anything.name.” If just the third level were blocked, it would not preclude registration of “anything.blocked.name.” For the most protection, a defensive registrant had to purchase a second level *and* a third level defensive registration, so that the corresponding domain name would be fully blocked at both levels. In other words, if AT&T registered “att” at the second and third levels, both “jane.att” and “att.jane” would be blocked. This kind of registration was called a “premium” DR. It was sold to registrars at \$1,000 and retailed for around \$2,000<sup>56</sup> for a ten-year term. It was distinct from a “combined second and third level DR,” which (despite its name) offered the least amount of protection by blocking only the identical domain name. For example, the DR “att.att” would prevent a registrant from registering only att.att.name, but not “jane.att.name” or “att.jane.name.” The “combined” option was called a “standard” defensive registration. It cost registrars \$150 and generally retailed for \$500 for a ten year term.

It was possible to obtain overlapping defensive registrations, as well as multiple DRs for the same blocked registration. A DR, however, would not be granted if it would conflict with an existing registration, or a reserved word or string. If, for example, “jane.smith.name” had been registered, then neither “everything blocked.smith” nor “jane.everythingblocked” could be defensively registered.

---

<sup>55</sup> The TLD is not part of these registrations because they do not dissolve. In this example, therefore, “blocked” is the SLD.

<sup>56</sup> See, e.g., pricing offered by EnCirca, Inc. during the first quarter of 2004, at [http://www.encirca.biz/Merchant2/merchant.mv?Screen=PROD&Store\\_Code=E&Product\\_Code=2](http://www.encirca.biz/Merchant2/merchant.mv?Screen=PROD&Store_Code=E&Product_Code=2).

A registrant seeking to register a name that was already protected defensively would receive a notice, through its registrar, to that effect. If the prospective registrant wished to register anyway, it would have two options. First, it could seek consent directly from the defensive registrant. Alternatively, it could challenge the defensive registrant's eligibility under the Eligibility Requirements Dispute Resolution Policy (ERDRP). If the consent route was chosen, the defensive registrant had several days to decide whether to agree or refuse the registration.<sup>57</sup> A party is not permitted to receive any compensation in connection with a decision to grant consent. If the defensive registrant does not consent, the disappointed party may file an action under the ERDRP. The filing cost is similar to UDRP – \$1,500 at WIPO and \$1,150 at NAF.

If a challenge succeeds, the party may proceed to register the domain (or email address) and the defensive registrant would receive a "strike." If the strike is against a second level or a third level DR, and it is the third "strike," the Registry would cancel the DR. If the strike is against a combined second and third level DR, which is by definition identical to the desired registration, the DR would also be cancelled. The consent process is intended to provide an incentive to preclude defensive registrants from blocking legitimate registrations of personal names that are similar to their trademarks. The Registry's instructions to defensive registrants emphasize that "[g]ranteeing consent to an individual with legitimate rights in a certain name will minimize the . . . number of successful strikes against your Defensive Registration, helping you to maintain your Defensive Registration intact."

The Registry also offers protection in the form of a "NameWatch" Service, under which subscribers are notified if a third party registers a particular name. The wholesale cost of this service is \$50.00 a year, or \$300.00 for ten years. Its retail price is about \$149 a year, or \$990 for ten years.

The Sunrise period ran concurrently with the preparations for Land Rush, which took place between August 15 and December 14, 2001. During the start-up period, the Registry received 1,212 defensive registrations, and 257 NameWatch Service submissions. The Consent Process was used 15 times, leading to approval in about half of these cases. At present, there are 1,461 DRs and 132 NameWatch Service subscriptions. A sample of 10% of these subscriptions indicates that 31% of them are also the subjects of a defensive registration. As of March 30, 2004, there were no challenges to Phase 1 or Phase 2 Defensive Registrations. 21 (1.4 %) of the names currently under defensive registration have duplicate submissions, with the highest multiple being 4. The Registry does not track the number of "alerts" on registrations under Name Watch.

---

<sup>57</sup> The ten-day requirement was changed to five days when Appendix L was amended to accommodate the second-level. These procedures become even more complex if there are multiple defensive registrants, and some consent while others refuse to grant a request. Such a situation forces all defensive registrants into an ERDRP proceeding, with the amount of any challenge fee put into escrow. See section 2(g)(iii).

## Land Rush

From August 15 to December 14, 2001, individuals were invited to register a personal web address, such as [www.jane.smith.name](http://www.jane.smith.name), or a personal email address, such as [jane@smith.name](mailto:jane@smith.name). Global Name Registry utilized a “random queue system” that filtered each registrar’s queue to eliminate duplicate submissions. Some registrars monitored their queue lists themselves and rejected duplicate submissions. Others made a conscious decision to let the Registry create the list of unique entries, so as not to favor one customer over another. The “unique entries” from each registrar’s queue were merged into a single pool. For any duplicates, one unique entry was selected at random and entered into the same pool. There was thus no inherent advantage to being on the list of a smaller registrar, or on the “preferred” list of a larger registrar, since all preferences were combined into a single pool. There was still, however, an advantage to be gained by simultaneously being in as many registrar queues as possible.

The Registry received 24,298 applications before the deadline of December 14. After a one month “quiet period,” on January 15, 2002, the Registry moved to two-week batch processing periods. This phase of the start-up period continued until June 26, 2002, when the EPP interface was opened and the Registry moved to “live” SRS.

## Assessment

This section of the Evaluation examines the launch of .name from the perspectives of effectiveness, impediments to smooth implementation and disputes, pursuant to the questions posed by the Task Force Report.

### Effectiveness

*“How effective have start-up mechanisms been in protecting trademark owners against cybersquatting and other abusive registrations?”*

There were relatively few complaints about the effectiveness of the .name start-up period in protecting trademark owners from cybersquatting and other forms of abusive registration (other than concern about the complexity and cost of the defensive registration process, discussed below). One IP holder stated that “[w]e did not experience any difficulties in protecting our IP rights.” Those IP holders that took maximum advantage of the defensive options by registering one or more strings at the premium level, for example, at \$2,000 for ten years (\$200 a year) were relatively well protected. Those IP holders that purchased only a standard defensive registration, for example, at \$500 for ten years (\$50 a year) left themselves more vulnerable to registration of variations of their marks. The Registry enabled common law trademark holders to benefit from protection by allowing them to register during Phase II.

NameWatch let a party purchase fewer defensive registrations, but remain vigilant about cybersquatting. At the retail price of about \$149 a year, or \$990 for ten years (\$99 a year), this option offered a slightly less expensive way to try to protect a brand than a premium defensive registration.

There were at least two cases where the defensive registration system failed to operate as planned, and both situations were remedied promptly. One registrant succeeded in registering “estee.lauder.name.” A different registrant, using a different registrar, was able to register “chanel.brand.name.” Both strings, however, were the subject of defensive registrations at the second and third levels, which should have prevented registration of any variation. When the Registry investigated, it discovered an error in the business logic used by the VeriSign system operating the EPP front-end. Global Name Registry exercised its authority to cancel the conflicting registrations and ensure the problem was fixed.

Parties, including trademark holders, are able to challenge a registration on grounds that it does not meet the eligibility requirements of being a “personal name.” Such challenges are adjudicated under the Eligibility Requirements Dispute Resolution Policy (EDRDP). As of March 30, 2004, a total of six EDRDP actions have been brought before NAF and WIPO. Four of the cases involved personal names, such as “michael.douglas.name” and “donald.trump.name.” Two of the cases involved company or product names, namely “instant.messenger.name” and “mini.name.” In all six cases, the complainants were successful. With respect to the “instant.messenger.name” case (which included “aim5.instant.messenger.name”), the registrations were cancelled. The registration “mini.name” was converted to a defensive registration.

If Global Name Registry’s trademark protection options had not proven effective, one would expect to see a large number of UDRP actions. In fact, there were none at WIPO or NAF. This is not to suggest that the database does not contain other kinds of registration abuses, but rather that cybersquatting has not been a major problem. As will be shown in Chapter 3, there are a number of registrants that have registered dozens of names, including several unlikely to survive a UDRP challenge (e.g., kim.basinger.name or renee.zellweger.name). Studies show that 36 registrants hold more than 100 names, 8 hold more than 500 names, and 2 hold more than 2,500 names. It is possible that a few of the registrants are companies registering on behalf of individuals, but certainly not all.

While the .name mechanisms succeeded in deterring significant abuse of trademarks, it is also plausible that the allure of cybersquatting is less attractive in a personal name space (other than with respect to famous names). Moreover, it cannot be ruled out that cybersquatting has been less of a problem in .name

because neither cybersquatters nor individual registrants are pursuing any of the new gTLDs to the same extent as .com, .net and .org.

### Impediments to Smooth Implementation

*“How effective were the different start-up mechanisms employed [from a functional perspective]? To what extent did they achieve their objectives or, conversely, cause consumer confusion, delays, legal issues, operational problems, or other impediments to smooth implementation?”*

The Task Force Report tasked the Evaluation with examining indications of “significant potential registrant confusion,” “registrations that did not conform to the stated ground rules,” “legal disputes that arose regarding the start-up methodologies that resulted in changes,” and “significant numbers of complaints” with respect to the Sunrise and Land Rush phases of the start-up period.

### Confusion

Aside from general confusion flowing from the “proof of concept” notion and the existing structure of using registrars as intermediaries between registries and registrants, a number of people reported particular confusion surrounding the .name rules on defensive registrations. Members of one trademark association found .name IP protection procedures more complicated than .biz and .info, and noted that “only really big companies did it.” An individual user stated simply that .name was “too complicated.”

Part of the problem lay in the novelty of accepting registrations only at the third level (sometimes called the “two dot” requirement, as in abc.xyz.name”), rather than just at the second level. Indeed, Global Name Registry and ICANN recently amended their Agreement to allow for second level registrations. As the Registry noted in a press release about the change, “[o]pening the .name second level solves the complexities that .name has had with its third level product. It has over the past 12 months been hard or difficult for registrars and resellers to adapt their systems and products to integrate with the third level registrations that was [sic] previously the only available, i.e. domain name registrations like 'first.last.name' and email addresses of the type 'first@last.name'” (<http://www.nic.name>). It is now possible to register simply “abc.name,” or “xyz.name,” rather than merely abc.xyz.name.

Several factors compounded initial unfamiliarity with the third level naming convention during start-up. First, the Registry conducted the registration process in two stages – Phase I and Phase II – with different eligibility requirements. Second, the Registry offered two different types of defensive registrations -- premium and standard – with different degrees of protection as a result of the structure of the third-level naming structure. Finally, the goal of encouraging defensive registrants to acquiesce to non-infringing uses of their trademarks

though the Consent Process was commendable but added a degree of complexity and uncertainty for prospective registrants. Interestingly, the Consent Process was used only in about 15 out of over 1200 cases of a blocked registration (1.2%), with permission granted in about 50% of them. While it is possible that prospective registrants were dissuaded from seeking consent from trademark holders, the more likely explanation is that there were fewer conflicts between personal name registrations and trademark registrations. As one would predict in a TLD geared to individuals, there was less overlap between trademark registrations and legitimate .name registrations.

In addition, introducing so many new products at once did not help people understand the individual processes. It also took a toll on the Registry in terms of finding the resources necessary to explain the new procedures repeatedly. Coming on the heels of the launch of .info and .biz, .name was the third new TLD to enter the market in just a few months. A GNR official suggested it would make more sense for a Registry to stagger product launch in the future. This comment should be broadened to TLDs as well: it would make sense to stagger the launch of registries, with more than just a few months between them.

#### *Non-conforming registrations*

The Registry did not attempt to validate defensive or domain name registrations. Given the more expensive price of defensive registrations, and the fact that they did not resolve in the DNS, there was little incentive for non-trademark holders to purchase them illegitimately. The Registry saw little point to even considering authentication. It also had no obligation to do so, as section 2(b)(iv) of Appendix L of its Agreement with ICANN clearly stated: “[n]either the Registry Operator nor the ICANN-Accredited Registrars will review the information provided by the Phase I Defensive Registration prior to issuing” it. The issue of non-conforming domain name registrations is discussed further in Chapter 3.

#### *Legal Disputes Resulting in Changes*

No legal disputes arising from the Registry’s start-up methodologies were discovered during the Evaluation.

#### *Complaints*

There were relatively few complaints about the .name start-up process that came to light. As described above, there were concerns from registrants – actual and potential -- about the complexity of the third level naming convention, the options offered for defensive registration, and operation of the Consent Process. There were also complaints about the prices charged by the Registry for these products, which are \$1,000 for a ten-year premium defensive registration, \$150 for a standard defensive registration, and \$50 a year for NameWatch. Broken down on a yearly basis, the registry price for a premium DR is \$100 a year,



whereas a standard DR costs \$15 a year. These prices are not unreasonable, even with a 100% markup by registrars. (Indeed, the Registry's Agreement with ICANN authorizes it to charge up to \$6,000 for a premium 10-year registration, which would be a yearly rate of \$600.) At the same time, a trademark holder often had to purchase more than one defensive registration in order to obtain full protection. Indeed, some trademark holders preferred the less expensive option of registering their company name as a domain name, such as "plc.pearson.name," even if they could not certify that it was a personal name.

One IP holder complained that the NameWatch subscription service was a "waste of money" because it did not catch instances of cybersquatting that were flagged by other services. Another IP holder, whose company name is a common English surname, did not believe the information about defensive registrations was clear, or that it received effective communications about the ones it held. The problems cleared up after it held a conference call with the Registry.

There were also minor complaints involving registrars, ranging from the time taken for accreditation to concern over the length of documents that had to be signed prior to accrediting.

### Disputes

*"Have there been any unusual number of disputes during the start-up period and how well have they been addressed?"*

This section is not intended to duplicate the discussion above concerning complaints. Rather, it is meant to address more general disputes in connection with the start-up process that could have "substantially impaired compliance with the stated objectives of the gTLD."

Like Afilias and NeuLevel, Global Name Registry does not maintain detailed information on the number or status of disputes. During the course of interviews with the registry and with dozens of people involved in the start-up processes, no evidence of an unusual number or type of dispute emerged. As noted, this Evaluation employs a standard of reasonableness to judge whether there were an "unusual" number of disputes, in terms of raw numbers, the nature of the dispute, or other factors.

This section would also include any disputes relating to the start-up process that resulted in court action, which may have implications beyond the immediate proceeding. Registry officials indicated that there were no such disputes, and no evidence was found to the contrary.

## Conclusion

The .name start-up mechanisms appeared to be relatively effective at protecting trademark owners against cybersquatting and other forms of abusive registrations. Perhaps not surprisingly in a TLD intended for individuals, there were only 1,461 defensive registrations, as compared to 82,163 domain name registrations, or a ratio of 1:56. There were only 132 NameWatch subscriptions, or a ratio of 1:622. Even among these relatively small numbers, there were few complaints about the effectiveness of the start-up mechanisms. There were, however, concerns expressed about the complexity and cost of the defensive registration options. Spreading out launch of the new registries would have mitigated some of the confusion people reported, although not the inherent complexity of the DR regime.

The .name Land Rush mechanism worked smoothly from a functional perspective, although operationally the Land Rush period lasted longer than that of other unsponsored TLDs. The Land Rush allocation process was viewed as fairer than the round robin process used by other registries because it randomised the queues submitted by individual registrars in one large pool, thereby equalizing any advantage that smaller registrars or queues would otherwise have had. There were no complaints about this aspect of the start-up plan.

## **.museum**

On October 17, 2001, ICANN and the Museum Domain Management Association (MuseDoma) entered into a TLD Sponsorship Agreement (Agreement) under which ICANN granted MuseDoma the right to sponsor the .museum top-level domain.<sup>58</sup> MuseDoma selected the Internet Council of Registrars (CORE) as its Registry Operator. Attachment 8 of the ICANN-MuseDoma Agreement established a start-up plan for beginning registry operations in three phases, including (i) naming conventions development and demonstration, (ii) start-up registration and (iii) full operations.

## Start-up

The .museum TLD was created to serve the needs of the international museum community. MuseDoma is responsible for establishing registration requirements consistent with its Charter. The .museum Charter provides that "registrations

---

<sup>58</sup> Generally speaking, a "sponsored" TLD is a specialized TLD that has a sponsor representing the particular community that is most affected by the TLD. The sponsor carries out delegated policy-formulation responsibilities over many matters concerning the TLD. See, e.g., <http://www.icann.org/tlds/agreements/museum>.

shall be granted only to entities that are museums, professional associations of museums, or individuals who are professional museum workers." The definition of a "museum," from the Statutes of the International Council of Museums (ICOM), provides that "a museum is a non-profit making, permanent institution in the service of society and of its development, and open to the public, which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, material evidence of people and their environment."

Applicants for a .museum domain name must apply first to its Eligibility and Name Selection (ENS) Service for a Community ID before seeking to register a domain name. The Community ID signifies that the registrant qualifies as a "museum" under the .museum Charter. To receive an ID, applicants that are members of a professional museum association often provide their membership number. Applicants that are not members are asked to provide detailed information about the nature and scope of their museum activities. If a membership number is given and appears suspicious, MuseDoma checks it against the relevant organization's database. If no membership number is provided, and the information is otherwise insufficient to conclude that the applicant is legitimate, MuseDoma will request additional information from the applicant. This result usually happens in less than 20% of all cases and is intended to initiate a dialogue between the applicant and MuseDoma, rather than constitute rejection. Applicants have one year to satisfy the Sponsor that it qualifies as a museum under the Charter.

If MuseDoma still cannot confirm eligibility, it will ask the applicant whether it wishes to address the outstanding issues, or instead refer the case to either ICOM or an independent expert panel for review. At ICOM, the question is referred to the Secretary General, who is on a subcommittee designated by the Executive Council for addressing such issues. The Secretary General may refer the matter to an ICOM national committee in the relevant country for further review. MuseDoma has referred less than 20 cases to ICOM for review. No applicant has yet selected the alternative option of constituting an independent panel, but MuseDoma is ready to call upon the services of legal experts in the museum community if needed.

Questions concerning an applicant's proposed registration are distinct from those regarding its initial eligibility. Determining a proposed string's consistency with the .museum naming conventions may also involve a dialogue between MuseDoma and the registrant. In one case, an entity that was clearly a museum wanted to use "the" as its third-level label, as in "the.xxxxxxx.museum." At the time, "the" was not an approved third-level label. Upon reconsideration, and confirmation that there was no other museum known by that name, MuseDoma approved the registration.

Once MuseDoma accepts a registration, formal concerns about a registrant's eligibility may be resolved through the Charter Eligibility Dispute Resolution Policy ("CEDRP"). There have been no CEDRP challenges to date.

MuseDoma monitors the continuing eligibility of registrants through random checking to determine whether a museum is using its .museum name in accordance with the initial determination of eligibility.

MuseDoma reported that there has been one transfer of a .museum domain name. The Sponsor assesses the eligibility of the potential registrant in the same manner as it reviewed the original applicant.

MuseDoma began accepting requests for registrations in July 2001, before it signed its Agreement with ICANN. These names began resolving on November 1, 2001. Another phase of the start-up period formally began on April 1, 2002 with charging for the ENS Service, and ran until the end of that year. MuseDoma estimates that there have been approximately 2,000 applications for ENS, less than 1,000 Community IDs granted, more than 1,000 domain name applications, and over 2600 domain names awarded. Approximately 30 applications for a domain name are awaiting the receipt of supplementary information. The wholesale price of a .museum name is USD \$60.00, and a registration generally retails for USD \$100.00. Four registrars are currently offering registration services in .museum: Domain Bank, Inc., domainregistry.de, Nominalia and Tuonome.it.

## Assessment

This section of the Evaluation examines the launch of .museum from the perspectives of effectiveness, impediments to smooth implementation and disputes, pursuant to the questions posed by the Task Force Report.

### Effectiveness

*“How effective have start-up mechanisms been in protecting trademark owners against cybersquatting and other abusive registrations?”*

The strict eligibility restrictions designed to provide the museum community with an online identity have proved effective in protecting trademark owners against cybersquatting and other forms of abusive registration. Every registrant is required to obtain a Community ID before registering a .museum domain name. The basis for eligibility to register in .museum is judged by the ICOM definition of museum and is restricted to genuine museums, museum associations and individual members of the museum profession. The Sponsor carefully reviews applications for a Community ID with these restrictions in mind and, subsequently, specific domain names for compliance with the naming conventions.

Three other measures helped deter abuse. First, the Sponsor's eligibility requirements state that: "[n]o entity will be permitted to register the name of any other entity at its own initiative." Further, "every name registered in .museum must be clearly and recognizably derived from the name by which the entity to which it is assigned is otherwise widely known." Third, at start up individual members of the museum profession were only able to register personal domains "in a suitably labeled second-level domain," such as "firstname.secondname.conservator.museum" or "name.curator.museum." Finally, a ".museum name must specifically designate the entity to which it is assigned. A name containing only two labels *may not contain a generic term or a location designation as the second-level label*" (emphasis added). As a result, each registration must correspond to the name of the registering entity. There have been only a few dozen cases where an entity, such as an ISP, tried to register on behalf of a museum. When they were informed of the rules, they either obtained the museum's permission or declined to press the issue. Generic terms, and country, city and other geographic identifiers, could also not be registered without additional descriptive terms.

The .museum TLD does not offer protective registrations for trademark holders. However, corporate entities that are operating museums, or intend to do so, are welcome to register. The Sponsor has urged interested companies to register at the third level in order to preclude others from doing that later, although few have. The domain name "national.corvette.museum," for example, resolves to a website for the National Corvette Museum, located in Bowling Green, Kentucky, which has no evident connection to the car manufacturer. As a result, MuseDoma checked with the car manufacturer before accepting the registration. One trademark holder who was interviewed indicated that her company had registered in .museum and the process had gone smoothly.

The absence of UDRP filings supports a conclusion of little abuse. Of the 2,665 domain names MuseDoma indicates were awarded since launch, there have been no UDRP proceedings. Given that no examples of trademark problems have arisen, it is possible to conclude that cybersquatting has not been a problem in .museum. This finding is consistent with the data contained in the "Report on Compliance by Sponsored gTLDs with the Registration Requirements of their Charters" prepared by Summit last year, see <http://www.icann.org/committees/ntepptf/stld-compliance-report-25feb03.htm> (2003 sTLD Compliance Report).

#### Impediments to Smooth Implementation

*"How effective were the different start-up mechanisms employed [from a functional perspective]? To what extent did they achieve their objectives or, conversely, cause consumer confusion, delays, legal issues, operational problems, or other impediments to smooth implementation?"*

The Task Force Report asked the Evaluation to examine indications of “significant potential registrant confusion,” “registrations that did not conform to the stated ground rules,” “legal disputes that arose regarding the start-up methodologies that resulted in changes,” and “significant numbers of complaints” with respect to the Sunrise and Land Rush phases of the start-up period.

### Confusion

As noted in previous sections, there was a significant degree of confusion surrounding launch of all the new gTLDs inherent in the “proof of concept” of testing different start-up mechanisms, all within a relatively short period of time. Some of the confusion stemmed from the need for registries and registrants to communicate about new mechanisms and procedures through registrars, rather than directly. With sponsored TLDs, the whole notion of “sponsorship” was also new. It was not entirely clear what ICANN’s “delegated authority” over policy development would mean in practice. In addition, in the sponsored communities there was less familiarity with the role of registrars, and a marked preference for being able to deal with a Sponsoring Organization that was familiar (and precisely the reason why the Sponsor was selected by ICANN in the first place).

In the .museum TLD, this general confusion was heightened by the strict eligibility requirements and naming conventions. The Sponsoring Organization readily admits that “people were plenty confused” and notes that the launch of .museum – the first of the new sponsored generic TLDs (sTLDs) – was more intricate than anything tried before. Underlying the strict requirements for eligibility and registration was MuseDoma’s belief that it was better to begin with constraints and loosen them later, rather than the reverse. As noted above, the Sponsor has relaxed some naming conventions and now even permits certain second level registrations. (This move was precipitated by the decision to enable internationalized domain names (IDNs) to be registered in .museum.) MuseDoma has also interpreted the definition of “museum” flexibly to permit “virtual museums” to qualify for registration.

There was some confusion over the fact that MuseDoma started operations with a “Phase 0” stage, focused on receiving “expressions of interest” in names from museums and testing the proposed naming conventions. There was no charge for ENS Services or registrations made during that time. When MuseDoma moved to the formal start-up phase, those museums that wanted domain names to resolve in the DNS had to pay for ENS Services and registration. Some registrants were genuinely confused by this change, and others sought to delay the inevitable. In retrospect, MuseDoma believes it was a mistake not to charge for ENS and registration services during the testing phase. Some of the registrants that joined without payment have neglected or refused to pay. As a result, there are a number of registrations with no activity or services. This confusion was heightened by the need for all registrants to migrate to ICANN-accredited registrars.

### Non-conforming registrations

No examples of non-conforming registrations came to light during examination of the start-up phase. One of the registrations about which the 2003 sTLD Compliance Report raised a question – “ramsey.art.museum” – is no longer registered. To guard against the possibility of non-conforming registrations, MuseDoma continues to check each application for a domain name to ensure that it comes from a bona fide member of the museum community, and that it complies with the naming conventions. As noted above, there have been no cases alleging inappropriate registration filed under the Charter Eligibility Dispute Resolution Policy (“CEDRP”).

### Legal Disputes Resulting in Changes

No legal disputes arising from the Sponsor’s start-up methodologies were discovered during the course of the Evaluation.

### Complaints

Like other registries, MuseDoma does not maintain detailed information on complaints. It does, however, actively maintain an open listserv that performs almost the same function. Overall, there were relatively few complaints about the .museum start-up process. Some registrants complained that the naming conventions were more complex and expensive than the alternative of purchasing an unsponsored TLD, such as org, for “a mere \$15.00.” As noted above, others complained when the free registration services they had enjoyed during MuseDoma’s testing phase ended, and they had to pay for the privilege of using a .museum TLD. Some registrants also confused the ENS fee with the registration fee, and wondered why they had to “pay twice.” Others, who were internationally recognized museums, balked at paying MuseDoma to verify their status. As a result, MuseDoma recently began dispensing with the \$100 ENS charge when an application can be verified solely on the basis of the information it contains.

There were also two issues where members of the community held different views, and MuseDoma did its best to resolve them. First, there were differences of opinion over use of the .museum “index” of nearly 700 registrants. The Index is a useful directory for finding categories of museums in a particular location, see <http://index.museum>. Some members, however, did not wish to maintain the index if it meant that they could not register second level domain names. They argued that such domains had been branded in other TLDs, often at considerable expense, and therefore ought to be “freely transportable” to the new TLD. Others argued that .museum was not intended to mirror existing TLDs, but open up new opportunities for the .museum community. In a sense, the first argument prevailed when .museum changed its policies to allow for second level registrations, although the change was motivated by the decision to offer IDNs.

A second issue of some contention among the .museum community concerned the treatment of digital activity. The registration policies provide that a digital museum, whether or not operated in conjunction with a physical site, must register under the second level “virtual.museum” or some such identifier. Virtual museums found this rule too restrictive and discriminatory, while more traditional museums believed it to be too liberal. The present rule tries to strike a balance between the two views, while awaiting further discussion within the community on the subject.

### Disputes

*“Have there been any unusual number of disputes during the start-up period and how well have they been addressed?”*

This section is not intended to duplicate the discussion above concerning complaints. It is instead intended to address more general disputes in connection with the start-up process that could have “substantially impaired compliance with the stated objectives of the gTLD.” Like other registries, MuseDoma does not maintain detailed information on the number or status of disputes. During the course of interviews with MuseDoma and dozens of people involved in the start-up processes, no evidence of an unusual number or type of dispute arose. This section would also include information about any disputes relating to the start-up process that resulted in court action, but none in this category have been found.

### Conclusion

The .museum start-up mechanisms proved extremely effective at protecting trademark holders against cybersquatting and other forms of abusive registrations, although that was not their primary purpose. The requirements of having to obtain a Community ID prior to registration, and a domain name consistent with strict .museum naming conventions, had the result of also limiting the potential for cybersquatting. The naming conventions in particular preclude registrations that do not correspond to the name of the registrant, as well as generic terms unless it is part of a third level registration (e.g., “whitney.art.museum”). MuseDoma’s first-come, first-served method of domain name allocation also proceeded without incident. The fact that the number of registrations was smaller than expected may have contributed to its success in this regard.

### **.coop**

On November 21, 2001, ICANN and DotCooperation LLC (“dotCoop” or “DCLLC”) entered into a TLD Sponsorship Agreement (Agreement) under which



ICANN granted dotCoop the right to sponsor the .coop top-level domain. DotCoop selected Poptel as its Registry Operator. Attachment 8 of the ICANN-DotCoop Agreement established the start-up plan for beginning registry operations in five phases, including system testing; developing support from larger cooperatives through a "Founder Program;" developing support from smaller cooperatives through an "Innovators Program;" full launch and registry service support; and registrar implementation. The .coop start-up plan was implemented largely as described in the Agreement. The main exception was the decision to combine the Founder and Innovators programs because there was less interest from smaller cooperatives in direct investment in the start-up process than initially expected.

### Start up

The .coop TLD was established to serve the needs of the international cooperative community. The .coop Charter defines a "cooperative" as an organization satisfying the definition and committed to the values and principles set forth in the Statement on the Co-operative Identity adopted by the International Co-operative Alliance ("ICA Statement")(see <http://www.coop.org/ica/info/enprinciples.html>). The ICA Statement defines "cooperative" as "an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise." It states that "[c]o-operatives are based on the values of self-help, self-responsibility, democracy, equality, equity, and solidarity. In the tradition of their founders, co-operative members believe in the ethical values of honesty, openness, social responsibility, and caring for others." The seven principles that guide operation of co-operatives are: voluntary and open membership; democratic member control; member economic participation; autonomy and independence; education, training and information; cooperation among cooperatives; and concern for community.

The .coop Charter specifies the following groups as eligible for registration:

- (a) members of the National Cooperative Business Association (NCBA);
- (b) members of ICA [the International Co-operative Alliance];
- (c) organizations formed as and/or considered cooperatives under applicable local law;
- (d) associations comprised of cooperatives;
- (e) organizations that are committed to the seven cooperative principles;
- (f) organizations that are controlled by cooperatives;
- (g) entities whose operations are principally dedicated to serving cooperatives; and
- (h) for no more than 5000 registrants, persons or entities whose use of a .coop domain name would, in the opinion of the DCLLC Board, advance

the interests of the cooperative sector in general or would assist in the development of cooperatives worldwide.

DotCoop uses various technical and operational means of verification to limit registrations to genuine cooperatives and other eligible entities. First, a statistical sampling of all registrations is done as they are added to the registry system. If an applicant is found within the .coop database (i.e., its name has already been listed as a cooperative by a partner organization), approval is automatic. If the applicant is not found within the .coop database, dotCoop may ask the Verification Partner in the registrant's country for confirmation of eligibility. If the Partner cannot provide such confirmation, it is given the names of two Verification Sponsors supplied by the registrant at the time of registration. The Verification Partner and dotCoop may check with these Sponsors for additional information to verify eligibility. If these contacts cannot provide confirmation, the applicant will be asked to provide supporting documentation (such as a copy of the organization's bylaws, its most recent annual report or a list of its members).

Second, dotCoop actively reviews registrations on a daily basis and performs "spot checks" of registrations that have inconsistent or incomplete information. Third, dotCoop investigates any registrant based on a third party complaint about eligibility. If the Sponsor determines that an applicant is ineligible for registration, the applicant has thirty days to challenge the decision. Once a registration is accepted, any concerns about eligibility are resolved through the Charter Eligibility Dispute Resolution Policy ("CEDRP"). There have been no such challenges to date. DotCoop is proud that "there is an element of trust with dotCoop because of the verification process. When consumers see a .coop Internet name they can rest assured they are dealing with a real co-op."

With respect to continuing eligibility, dotCoop has encouraged registrants to let them know if they become ineligible. For example, a cooperative notified dotCoop when it converted into an investor-owned group and had to relinquish its .coop name. Where questions have been raised about continuing eligibility, dotCoop places the name "Under Investigation" until it is able to verify that the registrant is indeed eligible.

DotCoop is in the process of implementing an automated process to support the transfer of domain names between registrants. This process will alert the registry to any transfer so that the registry can verify whether the "transferee" registrant has already been verified or has to go through the process.

Once an applicant is judged to be a cooperative and therefore eligible to register, dotCoop does not place restrictions on which names it may hold. DotCoop does not, for example, review whether a proposed registration is "appropriate" to that registrant. It might, however, warn a registrant that a particular name is trademarked by another party, which could then challenge the registration.

Nothing, for example, would bar an eligible cooperative from registering "ibm.coop," but the registrant would be warned that IBM strongly defends its trademarks.

DotCoop does offer entities that are not cooperatives a service to protect their intellectual property. The "Brand Safe Reservation Program" allows holders of trademarks, service marks and trade names to request dotCoop to block them from registration. The IP holder can apply to protect (i) a trademark registration for the name in at least one OECD country, allowing for reasonable variation; (ii) a name that is reasonably similar to the company's trade name and is widely recognized among potential customers; and (iii) a name that is an established and widely recognized trademark or service mark in use for more than one year. Five companies have registered for the program, at the cost of \$2,000 for 5 years. Brand Safe registrations are verified and require original or certified copies of the trademark documents as evidence.

DotCoop began accepting requests for registrations in July 2001, four months before conclusion of its Agreement with ICANN, for cooperatives that were founding members. The .coop TLD went live on January 9, 2002, and opened registration to all cooperatives on January 31. DotCoop began registrar-based services with Poptel as its first accredited registrar in October 2002. Two additional registrars joined in January 2003. By April 2003, dotCoop moved all registrants over to registrar-based registration through, where necessary, random allocation between the two registrars that were then eligible. By December 31, 2003, the Sponsor had 7,852 registrations.

The annual wholesale price of a .coop name – which includes the verification fee – is USD \$64.00 for a two-year initial registration. A registration generally retails for about USD \$100.00, with two-year registrations the norm. Five registrars are currently offering registration services in .coop: CORE, Domain Bank, Poptel, Secura GmbH, and Tuonome.it.

### Assessment

This section of the Evaluation examines the launch of .coop from the perspectives of effectiveness, impediments to smooth implementation and disputes, pursuant to the questions posed by the Task Force Report.

#### Effectiveness

*"How effective have start-up mechanisms been in protecting trademark owners against cybersquatting and other abusive registrations?"*

The eligibility restrictions designed to limit registration to cooperatives also proved effective at protecting trademark owners against cybersquatting and other forms of abusive registration. When the 2003 sTLD Compliance Report was

drafted, dotCoop manually verified many, but not all, registrations. As a result of that Report, the Sponsor now checks every name that does not clearly match a known cooperative.

As noted above, dotCoop offers companies concerned about protecting their trade names or trademarks the “Brand Safe Reservation Program.” At the cost of \$2,000 for five years, or roughly \$400 per year, the fee is not onerous for most companies. Yet it seems high for a non-resolving product, and double the cost of a similar service offered by .name. The program has only five registrations: hunterdouglas.coop, rolex.coop, tudor.coop, tudorwatch and urbania.coop. The low number is probably due to the fact that most brand owners are not that worried about the prospect of cybersquatting in a sponsored TLD that is operated for and on behalf of a defined community. While the number of companies registered under the Program is small, the Sponsor also watches carefully for registrations that might be considered infringing. For example, when the Coca Cola Federal Credit Union wished to register “cocacolafcu.coop,” dotCoop checked first with the Coca-Cola Company.

The absence of UDRP filings supports a conclusion of little abuse. Of the 7,852 domain names awarded since launch, there have been no UDRP proceedings. Given that no examples of trademark infringement have been found, it is possible to conclude that cybersquatting has not been a problem in .coop. This finding is consistent with the data contained in the 2003 sTLD Compliance Report.

#### Impediments to Smooth Implementation

*“How effective were the different start-up mechanisms employed [from a functional perspective]? To what extent did they achieve their objectives or, conversely, cause consumer confusion, delays, legal issues, operational problems, or other impediments to smooth implementation?”*

The Task Force Report asked the Evaluation to examine indications of “significant potential registrant confusion,” “registrations that did not conform to the stated ground rules,” “legal disputes that arose regarding the start-up methodologies that resulted in changes,” and “significant numbers of complaints” with respect to the Sunrise and Land Rush phases of the start-up period.

#### *Confusion*

As noted in previous sections, there was a significant degree of confusion surrounding launch of all the new gTLDs inherent in the “proof of concept” of testing different start-up mechanisms, all within a relatively short period of time. Some of the confusion stemmed from the need for registries and registrants to communicate about new mechanisms and procedures through registrars, rather than directly. A significant number of people had never registered a domain before, and were doing so for their cooperative for the first time. Particularly in

the sponsored TLD communities, there was less familiarity with the role of registrars, and a marked preference for being able to deal with the Sponsoring Organization that was familiar (and selected by ICANN, in part, precisely because of that relationship). With sponsored TLDs, the whole notion of “sponsorship” was also new. It was not entirely clear what ICANN’s “delegated authority” over policy development would mean in practice.

In the .coop TLD, this general confusion was heightened by several factors. First, the ICANN-DotCoop Agreement required allocation of all registrations maintained initially only by Poptel, which was also the Registry Operator. The Sponsor viewed the TLD as “touching a different market” and was concerned that a number of registrants were already confused about the role of registrars. Such registrants became further befuddled by the need to change registrars, notwithstanding the Sponsor’s efforts to explain and simplify the process. Those registrants that did not voluntarily change registrars – about 800 – were then randomly distributed between Poptel and another registrar. In hindsight, a better method would have had the registrants changing registrars at renewal time. Newly accredited registrars could then compete on the basis of price and other services for their business.

Second, the method of allowing members of the Founding cooperatives to reserve names led to some confusion because a few registrars unscrupulously offered “preregistration” advertisements. These were not valid pre-registrations, which could only properly be done through the dotCoop pre-qualification program. DotCoop warned any site that it discovered to cease such activity. One registrant lost a name that it mistakenly thought it had “preregistered” in this manner.

### *Non-conforming registrations*

The Sponsor estimates that approximately 76 applications for verification have been denied, 3,809 applications have been accepted, and 6 are pending. As noted above, dotCoop verifies every application, even if the Verification Sponsors appear legitimate. While it is possible to do that at the current rate of registration, it is not clear if this method could be sustained with significant growth.

In one case that made the news in December 2002, the registrant of “email.coop” lost his registration because he did not qualify as a cooperative.<sup>59</sup> What made the case of interest was that the Registry Operator, Poptel, subsequently registered the domain name. The former registrant – an individual named Frederick Harris – accused the Sponsor and Registry Operator of “common theft” of his property and warned that “we are in for a protracted conflict.” The name was supposed to have been on the Sponsor’s reserve list, but had been deleted

---

<sup>59</sup> Rod Dixon, “Domain Name Theft Part II: Did ICANN Leave Foxes Guarding the Chicken COOP?” CircleID (Dec. 4, 2002).

accidentally before Mr. Harris registered it. When dotCoop discovered that Mr. Harris was not an eligible cooperative, it revoked the name. Poptel, which was considering a relevant product offering, registered it. After Poptel offered to transfer the name to Mr. Harris if he could prove he was a cooperative, he dropped the issue.

As noted above, there have been no cases alleging inappropriate registration brought under the Charter Eligibility Dispute Resolution Policy ("CEDRP").

### *Legal Disputes Resulting in Changes*

No legal disputes arising from the Sponsor's start-up methodologies were found during the course of the Evaluation.

### *Complaints*

There were relatively few complaints about the .coop start-up process. Approximately ten complaints were formally tracked, but there might have been an additional ten that came in by telephone. Some complaints concerned the lack of choice among registrars, and the fact that registrants were forced to select a new registrar when they were still satisfied with Poptel.

What might have generated complaints, but did not because of the Sponsor's foresight, was how to deal with registrants that could not or would not use credit cards for payment. DotCoop knew this would be an issue for some registrants, and therefore developed a process to handle both wire transfers and bank draft payments. Most registrants from India, for example, used these alternative payment methods.

There were some complaints about the price of a defensive registration. As noted above, charging \$2,000 for a non-resolving product, albeit for five years, seems high. While it may not be a huge sum for many companies, its justification is unclear.

### Disputes

*"Have there been any unusual number of disputes during the start-up period and how well have they been addressed?"*

This section is not intended to duplicate the discussion above concerning complaints. Its purpose is instead to address more general disputes in connection with the start-up process that could have "substantially impaired compliance with the stated objectives of the gTLD." Like other registries, DotCoop does not maintain detailed information on the number or status of disputes. During the course of interviews with dotCoop and dozens of people involved in the start-up processes, one unusual dispute surfaced.

DotCoop gave the cooperatives that had served as Founders and provided seed money preference when it came to registration before going “live.” The first Founder to register had priority, but it could take its members several weeks or months to request a domain name. In the meantime, a member of a subsequent Founder could try to register the same name and succeed because it was still available. Under the start-up rules, the Sponsor was supposed to still give priority to members of the first Founder. A name had to be revoked under these priority rules, which displeased the Founders. The process did not work as dotCoop had planned, and so it ended the program.

This section would also include information about any disputes relating to the start-up process that resulted in court action, but none in this category have appeared. There was one situation where an eligible registrant threatened legal action, but did not follow through. A registrant held trademarks for names that another eligible cooperative had registered, but subsequently closed its relevant business unit and so did not pursue a claim. In another case, a registrant threatened to sue when his name was revoked on grounds of eligibility, and he did not receive a refund. It is generally against the Sponsor’s policy to issue refunds based on revocation. In this case, however, a review determined that some of the information posted on the .coop website about eligibility at the time of registration was not as clear as a subsequent clarification made it. Accordingly, a refund was deemed appropriate.

### Conclusion

The .coop start-up mechanisms proved extremely effective at protecting trademark holders against cybersquatting and other forms of abusive registrations, although that was not their main purpose. The verification requirements and process had the result of limiting the potential for cybersquatting. The Land Rush allocation method of first-come, first-served worked well, and better than the initial idea of giving Founders’ members priority. The fact that the number of registrants was smaller than expected may have contributed to a smooth start-up. The relatively small size of the registry also enabled the Sponsor to be particularly responsive to the few start-up issues that did arise.

### **.aero**

On December 17, 2001, ICANN and the Société Internationale de Télécommunications Aéronautiques SC (SITA) entered into a TLD Sponsorship Agreement (Agreement) under which ICANN granted SITA the right to sponsor the .aero top-level domain. SITA is a cooperative association owned and operated by the Air Transport Community ("ATC"), with a history of providing services to the air transport industry. SITA selected SITA Information Networking

Computing B.V. (SITA INC) as its Registry Operator. SITA INC outsources operation of the Registry to the Internet Council of Registrars (CORE). Attachment 8 of the ICANN-SITA Agreement established the start-up plan for beginning registry operations in six phases, including policy development, testing, attribution of names, real-time registration, staged introduction of community sectors and full operation.

### Start-up

The .aero TLD is intended to serve the global aviation community. SITA, also known as the "Sponsoring Organization," manages the TLD in accordance with the Charter that is part of its Agreement with ICANN ("Charter")<sup>60</sup> and in the interests of the global aviation community. Under the terms of the .aero Charter, the TLD is "restricted to people, entities and government agencies which: (1) provide for and support the efficient, safe, and secure transport of people and cargo by air; and (2) facilitate or perform the necessary transactions to transport people and cargo by air." SITA is responsible for establishing registration requirements consistent with its Charter.

SITA publishes the specific policies and procedures governing registration in "Domain Management Policy" (version 5.2, dated April 26, 2004) (the ".aero Policy") (see <http://www.nic.aero/policy/aerodmp.htm>). The Policy divides the aviation community into nineteen "Registrant Groups," which correlate to the groups enumerated in the Charter. The nineteen groups are:

- Aerial works (government agencies; general aviation)
- Aerospace
- Air freight & logistic companies
- Air navigation services providers (air traffic)
- Air safety, medical and certification (general aviation)
- Air sports (aviation clubs)
- Airlines and aircraft operators (airlines; general aviation)
- Airports
- Aviation distribution systems (global distribution systems)
- Aviation education and research (education & information providers)
- Aviation industry associations
- Aviation media
- Aviation professionals
- Aviation suppliers & service providers
- Business aircraft operators (charter & private aircraft operators)
- Civil aviation authorities
- Government organizations linked to aviation

---

<sup>60</sup> See Attachment 1 to ICANN-SITA Agreement, at <http://www.icann.org/tlds/agreements/aero/sponsorship-agmt-att1-20nov01.htm>.



- Pilots
- Recreational aviation (general aviation).

Registration in the .aero domain is a two-step process consisting of (1) identification; and (2) registration. Identification consists of recognition of the registrant by the aviation community through assignment of an "Aviation Community Membership ID" (Community ID). Every applicant for a registration is required to obtain the ID prior to trying to register a .aero domain name. The applicant must establish that it belongs to one of the listed Registrant Groups in order to receive a Community ID.

SITA uses different means to verify identity and eligibility. They include designation by a .aero partner association of which the applicant is a member, and application to the .aero Office through a Registrar or the .aero website. If the potential registrant takes the application route, it must provide information regarding its identity, select the Registrant Group to which it belongs, provide relevant supporting credentials, and warrant that it meets the eligibility requirements. Supporting credentials depend on the Registrant Group category chosen, and may include an air operating certificate for an airline, a license for an air navigation services provider, a website for aviation media, or an explanatory letter for a recreational user.

SITA has indicated that it currently screens every application for a Community ID. If an application raises a question that has not yet been addressed by the published Domain Management Policy, SITA seeks advice from the aviation community as represented by the members of the Dot Aero Council (DAC). The DAC membership includes representatives of several key organizations: the Airports Council International (ACI), the Civil Air Navigation Services Organisation (CANSO), the Federation of Airline General Sales Agents (FAGSA), the Fédération Aéronautique Internationale (FAI), the International Air Transport Association (IATA), the International Civil Aviation Organization (ICAO), and the National Business Aviation Association (NBAA), in addition to SITA. SITA relies on the advice of the DAC in all matters pertaining to eligibility and registration restrictions.

Once a prospective registrant receives a Community ID, it can register names on a first-come, first-served basis – with some exceptions -- within the applicable Registrant Group. To ensure compliance with the registration restrictions, SITA has implemented an automated verification procedure that compares every registration request against the required credentials. Certain names have been reserved by SITA as "Special Industry Names." Some of these might be termed "generic" in an unsponsored TLD, such as "hotel," or "news." These names can be allocated only by a proposal from the prospective registrant, explaining how it would use the name for the "best benefit of the aviation community." Decisions on such proposals are made by SITA following consultations with the DAC.

SITA estimates that it has rejected about 300 applications for a .aero Community ID. Between 30-40% were rejected as duplicate submissions, and the rest were refused mostly because the application failed to indicate a valid email address or to respond to SITA's request for additional information.

A prospective registrant denied a Community ID or deemed ineligible to register for a particular domain name may challenge SITA's decision under the Eligibility Reconsideration Policy ("ERP"). None have yet done so. If a party does invoke the ERP procedure, WIPO would convene a panel of aviation experts to decide the issue.

If a third party has concerns about the eligibility of a registrant, it may file a claim with WIPO under the Charter Eligibility Dispute Resolution Policy ("CEDRP"). No actions under CEDRP have yet been filed.

During the start-up phase – which took place from March 18 to September 2, 2002 – the Registry awarded 2,561 domain name registrations on a registrant group-by-group basis. When Land Rush opened in March 2002, SITA asked registrants to specify which of six types of domain names they were applying for. The choices were:

- Industry Code (domains intended to be used exclusively in a structured format, as in [xx.aero](#), where “xx” is the IATA 2-character airline designator).
- Registered Entity (domains intended to be used for brand visibility and allocated in a form consistent with an entity's name, e.g., [company.aero](#)).
- Trademark (domains allocated to trademark holders in a format consistent with the registered trademark, as in [trademark.aero](#)).
- Allocated Sub Domain (reserved to specific Registrant Groups at second level, as in [charleslindbergh.pilot.aero](#)).
- Special Industry Name (allocated by proposal to Sponsor, as described above).
- Unregulated Name (without restrictions other than “[anything.aero](#),” to begin after start-up).

To qualify as a “Registered Entity,” a registrant had to have the right to the commercial name, or a name that was registered with a recognized government or industry authority. SITA made it clear that the domain name could be revoked if the registrant changed the underlying entity name or lost the right to use it. For a “Trademark” registration, the registrant had to demonstrate that the name was a registered trademark in a jurisdiction in which it carried on business. In addition, the domain name had to be identical to the word component of the trademark. The registration could be revoked if the right to use the trademark were to terminate. During this period, SITA revoked three registrations because the registrants were unable to demonstrate that they were derived from a registered entity or a trademark.

SITA made it clear that all registrants had to continue to meet the eligibility requirements during the entire term of the registration. SITA enforces this provision through spot-checks and the investigation of any information it receives regarding compliance.

Prior to January 1, 2004, SITA did not allow the transfer a .aero domain name between registrants. A registrant would instead have to let its registration lapse, and then another party could register the name. It is now possible to transfer registrations, subject to registrant eligibility review.

SITA retains the authority to revoke a registration if the name, or use of the name, "is not in the best interests of the aviation community" at any time. It has not yet used this authority.

Five registrars are currently offering registration services in .aero: Domain Bank, Nominalia, Namebay, Secura GmbH and Tuonome.it. As of December 31, 2003, the size of the TLD was 3,480 registrations. The wholesale price of a .aero name is USD \$59.00. A registration generally retails for about USD \$100.00.

### Assessment

This section of the Evaluation examines the launch of .aero from the perspectives of effectiveness, impediments to smooth implementation and disputes, pursuant to the questions posed by the Task Force Report.

#### Effectiveness

*"How effective have start-up mechanisms been in protecting trademark owners against cybersquatting and other abusive registrations?"*

The start-up mechanisms, combined with the strict eligibility restrictions, proved generally effective in protecting trademark owners against cybersquatting and other forms of abusive registration in the .aero TLD. Every registrant was – and is -- required to obtain a Community ID prior to registering a .aero domain name. The IDs are centrally issued, following a request from an applicant or nomination by a .aero partner association and individual review by SITA.

Registration was further restricted during the start-up period by several measures. Perhaps most important, initial registrations were limited to certain categories, such as company name or trademark. Although SITA did not require submission of trademark certificates, registrars were supposed to check, and at least some did. There were nonetheless three registrations made in contravention of the .aero policies. Upon discovery, SITA revoked each of them. One of them involved a trademark held by another party. The other two qualified as neither a trademark nor company name of the registrant, but were "generic"

terms. SITA offered protection for not only trademarked names, but also for company names, thereby providing coverage to common law IP holders.

Three additional measures also deterred abusive registration. First, certain names, including Special Industry Names and Country Names, were placed on reserve and available only to qualified registrants upon case-by-case review. Second, transfers of any registered names were prohibited until January 1, 2004, which reduced any incentive among members of the aviation community to speculate. Third, industry groups were invited to register in sequential order, rather than all at once. Airlines and aircraft operators; airports; aviation industry associations; and civil aviation authorities, for example, were eligible to register first. This enabled the Sponsor to test the efficacy of its Eligibility and Name Selection (ENS) Service and registration processes gradually.

The absence of UDRP filings supports a conclusion of little abuse. A total of 3,480 domain names have been awarded between start-up and December 31, 2003. There have been no UDRP proceedings. With only one registration out of a few thousand determined to involve the trademark of another party, it is possible to conclude that cybersquatting has not been much of a problem in .aero. This finding is consistent with the data contained in the sTLD 2003 sTLD Compliance Report.

#### Impediments to Smooth Implementation

*“How effective were the different start-up mechanisms employed [from a functional perspective]? To what extent did they achieve their objectives or, conversely, cause consumer confusion, delays, legal issues, operational problems, or other impediments to smooth implementation?”*

The Task Force Report asked the Evaluation to examine indications of “significant potential registrant confusion,” “registrations that did not conform to the stated ground rules,” “legal disputes that arose regarding the start-up methodologies that resulted in changes,” and “significant numbers of complaints” with respect to the Sunrise and Land Rush phases of the start-up period.

#### Confusion

As noted in previous sections, there was a significant degree of confusion surrounding launch of all the new gTLDs inherent in the “proof of concept” of testing different start-up mechanisms, all within a relatively short period of time. Some of the confusion stemmed from the need for registries and registrants to communicate about new mechanisms and procedures through registrars, rather than directly. In the case of sponsored TLDs, the problem was more acute. SITA reported that some registrants found it difficult to understand why they had to deal with intermediaries who were not involved in the aviation industry. These registrants expected SITA, as a membership organization, to perform this role for

them. SITA also pointed out that registrars do not always understand the eligibility rules they are trying to enforce, especially since they have no experience in the aviation industry. For these reasons, SITA's application to ICANN to sponsor a TLD had assumed that it would use a community-specific distribution channel, such as industry associations.

The notion of "sponsorship," combined with the strict registration restrictions, also contributed to some of the confusion. SITA acknowledges that operation of a TLD with registration restrictions was a new area for itself as well as registrars and the aviation community. The Sponsor readily admits that the eligibility and registration restrictions were "relatively complex compared to typically first-come, first-served domain name registration" in other TLDs. The payment system also needed some tweaking. SITA had explained to registrars that it was important to offer .aero customers the option of paying by invoice, although not all did so. Many members of the .aero community, particularly from the developing world where currency controls exist, are used to settling charges via the IATA settlement system, or a similar process. In one case, an airport (located in the developed world) registered its name but was then surprised – and miffed -- to learn that it was supposed to pay for the option.

#### *Non-conforming registrations*

The Sponsor found six to seven allegations of improper registrations that did not conform to the start-up procedures. As mentioned above, three were found not to be compliant with the rules, and they were revoked. The others, which tended to involve members of the aviation community eligible to use an abbreviation as a domain name, were resolved on the basis of the first-come, first-served principle.

As noted above, there have been no cases alleging inappropriate registration brought before WIPO under the Charter Eligibility Dispute Resolution Policy ("CEDRP").

#### *Legal Disputes Resulting in Changes*

No legal disputes arising from the Sponsor's start-up methodologies were found during the course of the Evaluation.

#### *Complaints*

There were relatively few complaints about the .aero start-up process.<sup>61</sup> SITA does not track whether comments it receives are complaints, believing that it is not "practicable and commercially viable" for a registry of its size to do so. SITA

---

<sup>61</sup> Mr. Edward Hasbrouck has raised on several occasions, including prior to conclusion of the ICANN-SITA Registry Agreement and in Reconsideration Request 01-7 (denied), his concern that SITA's Charter was narrower than its proposal and might have precluded him from participating in community policy-making

emphasizes that it is in frequent communication with registrars and receives varying feedback through those channels, which includes complaints, suggestions and general comments, as well as compliments. Complaints by registrars included the time taken for .aero accreditation and concern over the length of the documents that had to be signed prior to accreditation. One registrar complained about the availability of technical support at the time of launch.

From registrants, SITA received several complaints about double charges on their credit cards. It also received one complaint about the modification of host information by the registrar, without authorization. All of these complaints were resolved to the registrants' satisfaction.

From prospective registrants, SITA received many questions, including on the definition of industry groups, the proof required to register under different categories, and the schedule for different groups. In addition, SITA received some unfavorable comments about the scope of information requested by its ENS Service. SITA also received a few complaints that ENS requests were not processed in a timely fashion. SITA investigated and found that its reliance on email notifications meant an occasional message would fail to be delivered, or be unintentionally deleted by an applicant.

### Disputes

*“Have there been any unusual number of disputes during the start-up period and how well have they been addressed?”*

This section is not intended to duplicate the discussion above concerning complaints. It is instead intended to address more general disputes in connection with the start-up process that could have “substantially impaired compliance with the stated objectives of the gTLD.” Like other registries, SITA does not maintain detailed information on the number or status of disputes. During the course of interviews with the registry and with dozens of people involved in the start-up processes, no evidence of an unusual number or type of dispute arose. This section would also include information about any disputes relating to the start-up process that resulted in court action, but there do not appear to be any in this category.

---

decisions. Subsequently, in the context of the New TLD Evaluation Process Public Forum, Mr. Hasbrouck recommended that the Task Force include in its proposed monitoring program the issues of (i) how Sponsoring Organizations have exercised their delegated authority, (ii) ICANN's oversight of the processes, and (iii) what, if any adjustments, would need to be made in the underlying agreements. The monitoring phase recommended by the Task Force Report is separate from this Evaluation.

## Conclusion

The .aero start-up mechanisms were generally effective at protecting trademark holders against cybersquatting and other forms of abusive registrations. The requirement of having to obtain a Community ID prior to registration, while designed for other purposes, was probably the factor most responsible for limiting the potential for cybersquatting. This requirement, in combination with the start-up rule that a registered name reflect either a trademark or a company name, the prohibition on transfers, and the gradual phase-in of registrations, led to only one instance – out of more than 2,500 registrations during start-up – of a misappropriated trademark.

SITA's first-come, first-served method of Land Rush allocation also proceeded smoothly. Part of the success stemmed from its decision to use a phased-in method, which processed registrations by industry group. The only criticism came from industry groups that had to wait a few weeks until registration for their sector opened. As with other TLDs, the lower than expected registration volumes had some benefit in terms of facilitating land rush. They also had the benefit of enabling SITA to continue to have a personal relationship with many registrants in the .aero community, and resolve issues quickly when they arose.

### ***Conclusion: Start-up***

The start-up mechanisms proved generally effective in protecting legitimate trademark owners against cybersquatting. Conclusions about the strengths and weakness of each method are discussed above, by registry. For the sponsored TLDs, trademark abuse was less of an initial concern and did not prove to be a problem. For the unsponsored TLDs, the methods employed raised concerns, in varying degrees. Underlying the experiences of these six new gTLDs is the question whether there should be protections for trademarks beyond that currently afforded by the UDRP. If the question continues to be answered in the affirmative, then there is now more information available about what works well and what does not.

Afilias' use of a Sunrise registration period without screening or verification led to serious abuses and problems, including an unusually high number (43%) of disputed registrations. NeuLevel's development of an IP Claim process, which gave prospective registrants and claimants a chance to reconsider their actions before disputes would be settled by WIPO or NAF, operated more smoothly but was far more complex. It also enabled non-trademark parties to successfully defend registrations if they could demonstrate legitimate interests or rights. The Global Name Registry offered trademark holders the option of defensive registration for names that would not resolve, but the concept was complicated by its initial naming conventions and a consent procedure that enabled individuals with names similar to trademarks to still register them. Also, defensive registrations may make sense in the context of a TLD meant for

individuals (or, in the case of dotCoop, for cooperatives), but they are not necessarily consistent with broader expansion of the DNS to accommodate new users and uses.

With respect to Land Rush, there was concern about the round robin process used by Afiliacorp and NeuLevel (for “Group 2B”), which randomly selected a name from the top of each registrar’s list. This method was criticized as unfair because it favored shorter lists and, as such, opened the door to manipulation of the process. Some registrars either limited the length of their own lists, offering the coveted spots to premium customers or others willing to pay for them, or limited the lists of registrars they controlled. Global Name Registry instead chose to randomly eliminate duplicates on each registrar’s list, combine the lists, and then select registrations randomly. This eliminated the advantage of submitting artificially small lists, but it did not guard against registrants submitting the same request to multiple registrars. NeuLevel’s first choice distribution system – filing domain name applications for \$2 a piece prior to determining the registrant by random selection – was halted by a lawsuit and does not offer a recommended option for future gTLDs. The various methods tried suggest that the combination of uniqueness plus randomization, or reverting to a “first-come, first-served” process, might be fairer. They also highlight the need for a broader discussion within the ICANN community of the advantages and disadvantages of the various allocation options, including what the goals and priorities of the process should be.

A few general observations are in order. First, the Task Force Report was geared towards ensuring that trademark holders are protected, beyond current remedies available under the UDRP. While this reflects the prevailing view in the ICANN community, it should be recognized that it does not reflect all views. Some have pointed out a contradiction, for example, between trying to attract new users and uses to the DNS, and allowing trademark holders to claim priority registration of the same names in new TLDs. The UDRP, they believe, does a better job of striking a balance between protecting IP holders from abusive registrations and not precluding other parties from registering names as long as their use is not infringing.

Second, as we have seen, the desire to map trademarks, which are local in nature, to domain names, which are global in scale, is challenging to implement. Many trademark holders would prefer to protect their marks in a Sunrise process, albeit one that would be verified. Non-trademark holders, however, believe this method is unfair because it precludes them from a chance to register those names that have uses other than with respect to trademarks. Such persons may have legitimate interests or rights in such names. As the famous U.S. Supreme Court Justice Oliver Wendell Holmes observed years ago, “[a] trademark does not confer a right to prohibit the use of the word or words . . . [by others] . . . . A



trademark only gives the right to prohibit the use of it so far as to protect the owner's goodwill against the sale of another's product as his."<sup>62</sup>

Finally, the number of Sunrise registrations made in two TLDs that used the option has turned out to be much smaller than anticipated. Afilias had been expecting about 300,000 Sunrise registrations, which would have represented approximately 30% of the registry. Instead only about 29,000 qualified registrations, out of 1,164,136 registrations overall, were made during Sunrise, representing 2.5%. During the Sunrise period for the .us ccTLD, NeuStar had expected to receive between 30,000 and 40,000 Sunrise registrations. It instead received about 15,000 Sunrise registrations out of 750,000 registrations overall, or 2.0%. These figures do not in any way diminish the importance of devising appropriate safeguards to protect the rights of trademark holders and other parties, both during and after launch. At the same time, this need should not be interpreted to overshadow other important considerations in building a new gTLD.

---

<sup>62</sup> Prestonettes, Inc. V. Coty, 264 U.S. 359 (1924).

## CHAPTER 3: COMPLIANCE WITH REGISTRATION RESTRICTIONS

The question asked in the Task Force Report is:

- *How often and how successfully have advance filtering and other mechanisms for enforcement of registration restrictions been used, both in sponsored gTLDs and in restricted unsponsored gTLDs?*

### **Objective**

The question of compliance with registration restrictions for sponsored, restricted gTLDs - .museum, .aero, and .coop – has been answered by Summit's "Report on Compliance by Sponsored gTLDs with the Registration Requirements of their Charters" (2003 sTLD Compliance Report)

(<http://www.icann.org/committees/ntepptf/std-compliance-report-25feb03.htm>).

That Report found no evidence indicating that the sponsored gTLDs have had significant problems in verifying the conformity of applications for registration with their charter requirements, or that these three TLDs have become havens for cybersquatting or other registration abuses.

This Evaluation examines compliance by the two unsponsored, restricted gTLDs -- .biz and .name – with their respective registration restrictions. In accordance with Appendix L ("Registration Restrictions") of the ICANN-NeuLevel Registry Agreement, the .biz TLD "must be used or intended to be used primarily for bona fide business or commercial purposes."<sup>63</sup> The Agreement further states that "registering a domain name solely for the purposes of (1) selling, trading or leasing the domain name for compensation, or (2) the unsolicited offering to sell, trade or lease the domain name for compensation shall not constitute a 'bona fide business or commercial use' of that domain name."<sup>64</sup> As noted in Chapter 2, ICANN had asked NeuLevel to prohibit all resales of .biz domain names to help deter speculation, but the Registry felt that such a requirement would be

---

<sup>63</sup> Appendix L defines a "bona fide business or commercial use " as "the bona fide use or bona fide intent to use the domain name or any content, software, materials, graphics or other information thereon, to permit Internet users to access one or more host computers through the DNS:

1. To exchange goods, services, or property of any kind;
2. In the ordinary course of trade or business; or
3. To facilitate (i) the exchange of goods, services, information, or property of any kind; or, (ii) the ordinary course of trade or business."

<sup>64</sup> Names also may not be registered exclusively for personal, non-commercial use, or exclusively for the expression of non-commercial ideas (e.g., abcsucks.biz).

unreasonably broad by including potentially legitimate sales. The parties therefore agreed on a definition of ‘bona fide business or commercial use’ that excludes speculators.<sup>65</sup> Appendix L further states that the “Registry Operator will not review, monitor, or otherwise verify that any particular domain name is being used primarily for business or commercial purposes.” It also provides that “[n]one of the violations of the Restrictions will be enforced directly by or through Registry Operator.”

The .name gTLD, in accordance with Appendix L (“Registration Restrictions”) of its Registry Agreement, is limited to registrations of a “personal name.”<sup>66</sup> That term is defined as “a person’s legal name, or a name by which the person is commonly known.” It includes a pseudonym used by an author or painter, or a stage name used by a singer or actor. In addition, a person or entity holding relevant trademark or service mark rights may register the personal name of a fictional character. Appendix L further states that “[v]iolations of the Eligibility Requirements . . . will not be enforced directly by or through Registry Operator . . . . Registry Operator will not review, monitor, or otherwise verify that any particular Personal Name Registration was made in compliance with the Eligibility Requirements . . . .”

## ***Methodology***

This Evaluation used a variety of means to assess whether the .biz and .name registries have complied with their registration restrictions. Registrations in each registry were numerically selected and sampled. Key officials from each registry were interviewed about their policies and procedures. Specific GNSO constituencies were also surveyed to gauge their awareness of any problems.

Data sampling was used in the following way. First, 1,000 registrations in each registry were sampled to see if, on their face, any indicated a suspicious registration that might be inconsistent with the relevant charter, such as “domains4sale.biz” or “the.sharperimage.name.” Second, if there was a question, the registration was examined by reviewing publicly available information, such as the Whois database or, if available, the registrant’s website. Third, if this information suggested that the registration might not be in compliance with the restrictions, the Registry was offered an opportunity to examine the data, as well as to offer an explanation of why the registration might be legitimate.

---

<sup>65</sup> A study conducted by Ben Edelman of the Berkman Center during summer 2002 found approximately 4,000 .biz domain names that indicated they were for sale, see “Survey of Usage of the .BIZ TLD,” available at <http://cyber.law.harvard.edu/tlds/001/>.

<sup>66</sup> The Berkman Center also conducted a study of “.NAME Registrations Not Conforming to .NAME Registration Restrictions,” available at <http://cyber.law.harvard.edu/people/edelman/name-restrictions/>, which found several thousand registrations that appeared to be inconsistent with the Registry Agreement.

In addition, key officials from each Registry were interviewed about their policies and procedures for addressing compliance issues. They were given the option of responding orally or in writing, within a mutually agreed time frame. The questions included:

- What policies and procedures are currently in effect to review registrations to verify whether registrants meet the criteria defined in the ICANN-Registry Agreement (the “Agreement”)?
- To what extent do you believe that registration restrictions have been effective in limiting abusive registration practices?
- To what extent do you believe that the Registry Agreement language stating “Registry Operator will not review, monitor, or otherwise verify” whether registrations were made in compliance with eligibility requirements could have affected the number of questionable registrations?
- Would it be feasible to check registrations from any person or entity that exceeded a certain number (e.g., 100, 1,000 or 5,000)?
- Have there been instances in which the Registry has cancelled a registration for non-conformance with the eligibility restrictions?
- Have there been any complaints concerning the registration restrictions, with respect to their existence or enforcement, from ICANN-accredited registrars, potential or actual registrants, or others?

Finally, surveys were also be made of key GNSO constituencies -- including the Business Constituency and the Intellectual Property Constituency -- as to whether they had any information suggesting .biz or .name registrations did not conform to their relevant requirements. Similar inquiries were made of several registrars providing services in the two TLDs.

### ***Analysis***

Interviews with members of the Intellectual Property and Business constituencies of ICANN indicated concern with enforcement of the registration restrictions. Although questioned separately, they generally concurred in their view that numerous registrations did not conform to the restrictions. A survey of several registrars providing services in the two gTLDs thought that most registrations probably did conform to the restrictions, but that it was impossible to determine with certainty. One registrar estimated that perhaps 2% of the databases were non-conforming. All recognized that language in the agreements making it clear that the Registry will not monitor enforcement of the registration restrictions may have increased the level of abusive registrations.

The results of the random sampling of each registry database, review of established policies and procedures for each registry, and interviews with registry officials are detailed below.

## **.biz**

A sample of 1,000 registrations was randomly selected to see if any registrations, on their face, indicated a reason to investigate further.<sup>67</sup> Of this sample, 303 registrations were determined to warrant further checking by reviewing publicly available information, such as the entry in the Whois database or, if available, relevant websites. This analysis indicated that 148 of the sub-sample appeared to be connected to a bona fide business or commercial purpose.<sup>68</sup> This judgment was made after reviewing whether (i) each domain resolved to a recognized commercial site; (ii) if the name did not resolve, the Whois data established that it was registered to a known business; or (iii) if the Whois data did not confirm it was a business, other research did. Another 41 registrations were judged to be “probable” bona fide business or commercial entities. In such cases, the registrant organization may have appeared to be a business because, although not well known and lacking sufficient publicly available information, it did use suffixes typical of a business, such as “LLC,” “AG” or “Ltd.” Because of the subjectivity of this test, any doubts were resolved in favor of concluding that the registration was connected to a business.

Analysis of the data sample revealed 17 registrations that may be inconsistent with the .biz restrictions because they are clearly for sale for compensation. Examples of names in this category include “domainsforsalebyowner.biz,” “ilook.biz,” and “verboten.biz.” It is, of course, difficult to tell whether these names were definitively registered “solely for the purposes” of selling them, but they do raise suspicions in this regard. One name, “marjorieconnellysucks.biz” appears to have been registered for the “expression of noncommercial ideas.”

This study labels 78 of the registrations as “unclear” because it could not be determined if they were likely to have been registered for business purposes. Typically, names in this category did not resolve or were “parked,” and there was no additional information available, including in other TLDs. The registration “caveman.biz,” for example, was registered to an individual, and there is no Registrant Organization field or further information available.

---

<sup>67</sup> The data sample was provided by BBS International Consulting using the following methodology: (1) Obtained zone file from registry; (2) Eliminated any duplicates and, where detectable, registrations by registry; (3) Obtained a list of unique random numbers; (4) Merged that list with the zone file, thereby assigning a random number to each domain name (“new list”); (5) Sorted new list of domain names in ascending order (of the random numbers); and (6) Selected the first 1,000 domain names on the new list as the random sample. This methodology has been validated by Mitofsky International (MI), a global survey research firm. MI has determined that the sample has a confidence level of 95%, +/- 3 percent.

<sup>68</sup> Appendix L defines a “bona fide business or commercial use” as “the bona fide use or bona fide intent to use the domain name or any content, software, materials, graphics or other information thereon, to permit Internet users to access one or more host computers through the DNS:

1. To exchange goods, services, or property of any kind;
2. In the ordinary course of trade or business; or
3. To facilitate (i) the exchange of goods, services, information, or property of any kind; or, (ii) the ordinary course of trade or business.”

Another 18 of the registrations were labeled as “unclear, registered to an individual.” This category is more likely to contain registrations that are not consistent with business or commercial purposes since they were registered to individuals and there were no distinguishing characteristics of business or commercial use. It included names that were registered to individuals and contained the word “unknown” or “none” in the field for “Registrant Organization.” For example, the name “looneygoons.biz” was registered to an individual who is also the “Registrant Organization” and no substantiating information was found.

Overall, 88.6% of the names in the sample appeared to be bona fide business or commercial enterprises. In 9.6% of the cases, it was unclear whether there was a business purpose to the registration, but it was not possible to conclude that there was no such purpose. In 1.7% of the sample, the names were clearly for sale, suggesting that they might have been registered for that purpose. In one case (.1%), the domain name appeared to have been registered for noncommercial purposes. These statistics do not suggest a significant pattern of abuse, although clearly there are some registrations that do not conform to the restrictions. The 2% figure that one registrar provided for the number of possible non-conforming registrations correlates to the 1.8% of names that appear to be for sale and for personal use. The total number of registrations that appear not to conform to the registration restrictions could therefore be somewhere between 2% and 11%. It is somewhat surprising that the number of clearly suspicious registrations does not appear to be higher, given that enforcement depends on self-certification by registrants or actions filed by third parties, and not by verification by the Registry or registrars. This analysis also confirms the difficulty of determining definitively what does, and does not, constitute a bona fide business or commercial purpose.

**Table 1: .biz Restrictions**

<b>Classification/Label</b>	<b>Number</b>	<b>Percentage (sample=1000)</b>
Not reviewed (b/c appeared bona fide)	697	69.7
Bona fide business or commercial purposes	148	14.8
Probable bona fide business/commercial	41	4.1
<b>Total (appeared bona fide)</b>	<b>886</b>	<b>88.6</b>
Domain listed for sale	17	1.7
Domain for personal use	0	0
Free speech use	1	.1
<b>Sub-total (questionable)</b>	<b>18</b>	<b>1.8</b>
Unclear	78	7.8
Unclear but registered to individual	18	1.8
<b>Sub-total (unclear)</b>	<b>96</b>	<b>9.6</b>
<b>Total (questionable or unclear)</b>	<b>114</b>	<b>11.4</b>

In addition to the random sample, a survey was made of how many registrants hold large blocs of names. There may of course be bona fide reasons for such a situation, such as blocs held by large corporations, web hosting services, or domain proxy services. But such a pattern can also indicate more nefarious purposes, especially in a database that is intended to exclude speculators. There are at least 16 registrants in .biz holding more than 500 domains each, with eight of those holding more than 1,000 registrations, but none holding more than 5,000. These statistics do compare favorably to one of the more established registries, which had 70 registrants holding more than 500 domains each, 25 of those holding more than 1,000 names, and three of those holding more than 5,000 registrations.

Interviews were conducted with Registry officials about the requirements of Appendix L and the enforcement process. As noted above, Appendix L states that the “Registry Operator will not review, monitor, or otherwise verify that any particular domain name is being used primarily for business or commercial purposes.” It also states that “[n]one of the violations of the Restrictions will be enforced directly by or through Registry Operator.” It is therefore up to the registrant to indicate that the domain name will be used “in a manner consistent with the [r]estrictions” and “is reasonably related to the registrant's business or intended commercial purpose at the time of registration.”

Alleged violations of the registration restrictions are dealt with on a case-by-case, fact specific basis. Any allegation by a third party that a name is not used primarily for business or commercial purposes is enforced by recourse to the “Restrictions Dispute Resolution Process (‘RDRP’).” An RDRP action may be brought before WIPO or NAF on its own, or as part of a UDRP proceeding, for the same fees. For the RDRP complainant to prevail, it must prove that the contested domain name “is not being or will not be used primarily for a bona fide business or commercial purpose.” WIPO has processed 12 combined UDRP/RDRP actions, with 7 (58.3%) decided in favor of the complainant, 2 (16.7%) in favor of respondent, and 3 (25%) terminated. NAF has processed 8 cases, involving 10 .biz domains, but does not provide statistics on disposition. Overall, there were 20 RDRP cases brought out of a database of approximately 1 million registrations, which is an extremely small number.

NeuLevel believes that this system of enforcement is the only practical alternative. The Registry contends that it is difficult to distinguish between registrations made for bona fide commercial purposes and those that are not.<sup>69</sup> It maintains that unless there is a “domain4sale” sign on the registration, it is hard to distinguish the use of popular names as a way to generate highly trafficked websites or attract legitimate business. Indeed, this assertion is born out by

---

<sup>69</sup> When NeuLevel was asked why the TLD is subject to restrictions that seem to be honored more in the breach, the Registry replied honestly that it did not think the TLD would have been selected otherwise.

analysis of the random sample described above. At the same time, it is clear that NeuLevel is not taking any action to address registrations that appear suspicious, such as “domain4sale.biz” or “domainsforsalebyowner.biz.” The only time that the Registry has threatened to cancel suspect registrations was in the context of Land Rush 2, described in the previous Chapter.

## **.name**

A sample of 1,000 registrations was randomly selected to see if any registrations, on their face, raised suspicion as being inconsistent with a personal name registration (including a nickname).<sup>70</sup> Of this sample, 134 registrations were determined to warrant further checking by reviewing publicly available information, such as Whois data entries or, if available, relevant websites. Of this group, 8 names appeared to indeed be personal names. One name appeared to be a legitimate registration for a fictional character: “marge.simpson.name” was registered by Twentieth Century Fox. Another 11 names appeared to be using their .name registration for family websites, as in “jones.family.name.” While this is not technically authorized by the strict .name naming conventions, which require a first and last name (as in “first.last.name”), they will be considered personal registrations for purposes of this Evaluation.

There were 89 names in the sub-sample that were judged unlikely to be a personal or fictional name. This judgment was made on the basis of whether the domain name sounded like a name according to standards used in North America, Latin America and Europe, and with respect to the Romanization of Asian names. This method is, of course, subjective, and any doubt was resolved in favor of the registrant. Examples of names in this category included “bad.host.name,” “big-island.hawaii.name,” “e.marketing.name” and “for.rent.name.” While it is possible there are individuals known by these and the other names in this category, it is probably unlikely. Another 17 names initially appeared to be unclear, but closer examination revealed that they were part of several patterns of non-conforming registrations. One of these registrants, who appears to be an individual, registered nine domain names, all of which are for sale, including “name.albert.name,” “name.brian.name,” “name.chester.name,” “name.kenny.name,” “web.david.name,” “name.arnold.name,” “p.rry.name,” “the.robinson.name,” and “c.rmen.name.” Absent the pattern discovered, several of these names might have been classified as unclear. Under the circumstances, they are instead listed as “unlikely” to be registered as a personal name. Eight other registrations are in the “unclear” category because they raised suspicions,

---

<sup>70</sup> The data sample was by provided by BBS International Consulting using the following methodology: (1) Obtained zone file from registry; (2) Eliminated any duplicates and, where detectable, registrations by registry; (3) Obtained a list of unique random numbers; (4) Merged that list with the zone file, thereby assigning a random number to each domain name (“new list”); (5) Sorted new list of domain names in ascending order (of the random numbers); and (6) Selected the first 1,000 domain names on the new list as the random sample. This methodology has been validated by Mitofsky International (MI), a global survey research firm. MI has determined that the sample has a confidence level of 95%, +/- 3 percent.



but there was insufficient information available to determine if they were personal names.

Overall, a total of 887 (88.7%) names in the sample appeared to be bona fide personal or fictional character name registrations. There were 89 cases where the registration did not appear to be bona fide. There were another 17 cases where either the registration was questionable or unlikely to be a personal name because the registrant had registered other similar names, such as those of celebrities or historical figures. It therefore appeared that a total of 106 (10.6%) registrations raised questions of compliance with the registration restrictions.

**Table 2: .name Restrictions**

<b>Classification/Label</b>	<b>Number</b>	<b>Percentage (sample=1000)</b>
Not reviewed (b/c appeared bona fide)	866	86.6
Personal name of individual	8	0.8
Personal name of fictional character	1	0.1
Family name	11	1.1
<b>Total (appeared bona fide)</b>	<b>886</b>	<b>88.6</b>
Not a personal name/fictional character	89	8.9
Unlikely to be personal name/fict. character	17	1.7
Unclear	8	.8
<b>Total (questionable/unclear)</b>	<b>114</b>	<b>11.4</b>

Data sampling and analysis also revealed suspicious patterns of registration. Overall, five registrants registered more than three domain names each, for a total of 43, or 4.3% of the sample. The “Yahoo Japan Corporation,” for example, has registered 14 names, including “big-island.hawaii.name,” “bluetulip.tomo.name,” “earth.earthstation.name,” “hon-na.book.name,” “icelook2tom.mya-rakumon.name,” “indigo.blue.name,” “kato-yoshikazu.golf-course-architects.name,” “mappie.tfm.name,” “namiki.dance.name,” “porsche911.speedster.name,” “super-guitarist-t.play-loud.name,” “yama.mail.name,” “yoshie.children621.name” and “yama-soft.gose.name.”

A second registrant, who appears to be an individual, registered a total of eight domain names, including “18.holes.name,” “dds.dentist.name,” “dr.phd.name,” “drug.pharma.name,” “eva.peron.name,” “liberty.usa.name,” “michel.nostradamus.name” and “thrill.ride.name.” A third individual registered a total of six domain names, including “bloodymary.bloodymary.name,” “don-juan.don-juan.name,” “mother.earth.name,” “man.friday.name,” “john-bull.john-bull.name,” and “major.domo.name.” A fourth registrant registered six domains, including “kim.basinger.name,” “renee.zellweger.name,” “prince.pavlos.name,” “princess.antoINETTE.name,” “princess.tsuguko.name,” and “king.fahd.name.” The last registration appears to be used as an official website for King Fahd of Saudi

Arabia. The nine names registered by a fifth individual were already noted above under discussion of the domain names listed for sale (e.g., name.albert.name; name.brian.name).

The analysis also revealed that several entities appeared to be registering their companies or organizations in the TLD, presumably in lieu of the more expensive option of a defensive registration. The six names registered in this manner are “education.pearson.name,” “ortho.micronor.name,” “plc.pearson.name,” “ubs.private.name,” “ubspainwebber.thankyou.name,” and “weight.watchers.name.”

Interviews were conducted with Registry officials and focused on the requirements of Appendix L and the enforcement process. Section 1(c)(iv) of Appendix L states that “[v]iolations of the Eligibility Requirements . . . will not be enforced directly by or through Registry Operator . . . Registry Operator will not review, monitor, or otherwise verify that any particular Personal Name Registration was made in compliance with the Eligibility Requirements . . . .” Any third party may challenge a registration on grounds that it does not meet the eligibility requirements (or violates the UDRP). Such challenges are adjudicated under the Eligibility Requirements Dispute Resolution Policy (EDRDP) on the basis of the eligibility requirements listed above. If the registration is found not to have met the criteria and the challenger does, then the name is transferred. If the challenger also does not meet the criteria, then it is offered the opportunity to register the same as a defensive registration. As of March 30, 2004, a total of six EDRDP actions have been brought before NAF and WIPO. The names in dispute ranged from “michael.douglas.name” and “donald.trump.name” to “instant.messenger.name” and “mini.name.” In five out of the six cases, the respondent defaulted. In all six cases, the complainants were successful. The remedies ranged from transfer (e.g., jerry.garcia.name) to cancellation (e.g., aim5.instant.messenger.name) to defensive registration (e.g., mini.name).

When asked about enforcement efforts to weed out registrations that do not appear to belong in a personal name space, officials at Global Name Registry responded that it is impossible to distinguish a genuine personal name from one that is not. It points out, for example, that “the” is a common first name in some parts of the world, and that “company” is a last name in Spain. Unlike in the sponsored TLDs, there is no list to check to verify registrants or international partners that can vouch for an entity. The idea of spot checks had been considered in the past, but not implemented. Requesting identification, of course, is an option, if the resources are available to verify it. It is certainly easier, and more cost effective, for the Registry to rely instead on self-certification by registrants and case-by-case enforcement by third parties than screening before or after registration. It does not, however, deter those determined to secure a .name registration that does not correspond to their personal name(s).

The Registry also pointed out some limitations of using website content to categorize registrations. While helpful, it is not determinative because the eligibility requirements are unrelated to website content. It is also possible that websites have restricted access, preventing unauthorized persons from entering. The Registry also stressed that nicknames are an acceptable registration, and “vary widely amongst different groups of people.” The Evaluation fully acknowledges these limitations and, as noted above, resolved any doubts in favor of the registrant.

### **Assessment**

Since both databases contain some non-conforming registrations, the question becomes whether this is a problem and, if so, what should be the remedy. The majority of people interviewed did not think that the problem was important enough to command significant attention or resources. Some pointed out that even if it was deemed to be a serious problem, a solution would be difficult, if not impossible, to impose under the current financial structure of a maximum registry price of \$5.30 and \$6.00 for .biz and .name, respectively, per registration. Two people who have served on the ICANN Board thought that the organization had more important issues to worry about and that in any case it would be unfair to impose a verification system on a Registry under a \$6.00 cap. They preferred to address any enforcement problems on a case-by-case basis, as envisioned by the text of the registry agreements.

Some members of the IP community took exception to this view. They felt that screening was important for several reasons. First, requirements should generally be enforced across the board, and not selectively. A lackadaisical approach to enforcement risks undermining confidence in the broader system. GAC representatives who were interviewed similarly believed that the restrictions should be enforced because to ignore them could set a bad precedent.

Second, the .name registry in particular has been accorded more leeway with respect to privacy concerns and Whois issues on grounds that it is designed as a personal name space. If the restrictions are not enforced, then it is misleading to characterize .name as a TLD for individuals. In the words of one IP lawyer, it is “behaving merely as a TLD for parties that say they are individuals.” The view is that if .name is essentially an unrestricted domain, then it ought to be treated that way. He summarized his argument by stating that “.name was promised to be only for individuals. I never would have agreed to a different Whois system if .name was for all registrants.”

Third, verification is not impossible. For a business, there are numerous databases, including those used for tax collection purposes. For individuals, there are drivers’ licenses and other forms of official identification. In any case, some form of random screening could be done, and the cost need not be high. A large registry could review every 1000th registration on a cursory basis, and

every 5000th registration for actual verification. For .biz, this would mean cursory review of about 1,000 registrations, and a more detailed review of about 200 registrations, which should not be a burden. A smaller registry might review every 100th registration in a cursory fashion, and every 500th registration in detail. For .name, this would translate into about 800 and 160 registrations, respectively. While it might be difficult to retrace the past, these steps could be applied to all new registrations and renewals.

Another option would be to trigger manual review whenever a particular registrant registered more than a certain number of names. The number could be set, for example, at 50, or much higher. If review determined that any of the registrations were not compliant, they would all be cancelled. Under either option, the fact that some form of closer oversight would occur is likely itself to have a deterrent effect. Enforcement does, however, create tension for a for-profit registry. Detering abusive registrations and threatening to cancel those that exist does not boost registration numbers, at least not in the short term.

The point is well taken that if registration restrictions exist, they should be enforced. If the idea of enabling third parties to conduct enforcement is not working, then either new methods should be used, or the restrictions should be reexamined. Since the number of enforcement actions has been extremely small – in the single digits for .name and about double that for .biz – other, reasonable alternatives should be considered. Although not legally required by the registry agreements, the registries could adopt such steps in an effort to demonstrate their concern and determination to address the situation. The other solution is to recognize the difficulty of enforcing restrictions on global registries that include tens of thousands of registrations in one case, and over a million in the other case. Just as the .com, .net and .org registries were initially intended to serve specific communities -- commercial interests, networks operators, and non-profit institutions, respectively – today they are not so restricted. They therefore provide a model for resolving the challenge of enforcing restrictions in unsponsored, global registries. In such a case, it would of course be hard to argue that .name (or .biz) should be eligible for different treatment on the basis of being a restricted name space.

### ***Conclusion***

Under the current system, enforcement depends on self-certification and third party enforcement action. There have been relatively few formal enforcement actions, and informal enforcement by the registries is largely non-existent. Neither registry monitors registrations for compliance, either before or after they are made.

Random sampling of the .biz registry suggested that at least 88.6% of registrations appear to be bona fide business or commercial enterprises. In only 1.8% of the cases does there appear to be no legitimate basis for the

registration. In another 9.6% of registrations, it was not possible to tell whether the registrations were connected to business entities. These statistics are lower than expected given that there is little enforcement. At the same time, there are clearly a number of registrations that do not conform to the restrictions. Based on the sample and given the size of the .biz database, it could mean that there are at least 20,000 registrations that fail to satisfy the registration requirements. The methodology also demonstrated the difficulty of determining definitively what does, and what does not, constitute a bona fide business or commercial purpose.

Examining the random sample for .name indicated that 88.6% of registrations appeared to be bona fide personal or fictional character names. Analysis indicated that 10.6% of registrations raised questions of compliance with the restrictions. In only .8% of the cases was it too difficult to assess whether the registration was bona fide. It should be noted that it was somewhat easier to estimate when a registration did not appear to be a personal name than when it did not appear to be a legitimate business, (even when recognizing that it could be a nickname).

Also of concern were indications that 4.3% of the .name sample were registrations by parties registering blocs of registrations, which did not appear to be their personal names or nicknames. If the sample is extrapolated to the entire database, it would suggest that there are at least 8,709 registrations that might not qualify as personal names, with 3,533 of these names are held in large blocs, suggesting possible speculation or cybersquatting.

Comprehensive pre-screening of registrations by unsponsored databases of the size of .biz and even .name could be challenging to implement. There are, however, more manageable options available that could limit abuse. These include random screening, and screening for large blocs of registrations belonging to the same party. It could still be tricky to judge what constitutes a legitimate business, or what is a genuine personal name (or nickname), but there are ways to do so.

In light of the enforcement challenge and current budget climate, other options could also be explored. The notion of designating a TLD to serve the needs of a particular community, but not exclusively so, has its origins in the way the .com, .net and .org TLDs operate today. While originally intended to serve commercial interests, networks operators, and non-profit institutions, respectively, today they accommodate far more interests. The same may happen with the two new gTLDs, with .biz designed to serve the business community and .name selected to serve as a personal namespace, but neither exclusively so.

## CHAPTER 4: EFFECT OF NEW GTLDS ON COMPETITIVENESS IN THE DOMAIN NAME MARKET

The Task Force Report posed the question:

- *What effect have the new gTLDs had on the scope and competitiveness of the domain name market, in terms of opening new markets, and in their effect on existing TLDs and registrants?*

### **Objective**

The Task Force Report suggested this question be addressed by comparing with projections the number and character of the domain names in each registry, classified according to whether (1) they are entirely new registrants or existing registrants (that is, in some other registry); and (2) they have established websites or are using the domain name for other "productive" purposes."<sup>71</sup> The term "other 'productive purpose'" appears to include, at minimum, use of the domain name as an email address. The Report further suggests that the Evaluation attempt to determine whether, if an existing registrant is using the new domain name for a productive purpose, that use is a *new* purpose (rather than, for example, simply pointing to an existing website). The Task Force Report suggestions are helpful in terms of assessing whether the new gTLDs have indeed opened up new markets. It is also useful to consider other factors affecting the impact of the new gTLDs on the scope and competitiveness of the market. This includes general market conditions, specific characteristics of the new gTLDs, and the nature of competitiveness in this context.

### **Methodology**

Several methods were used to assess the impact the new gTLDs have had on the scope and competitiveness of the domain name market in terms of opening new markets and their effect on existing TLDs and registrants. One method was *market research* on general trends and conditions in the domain name industry. This research included examining a number of indicators, such as renewal rates; growth rates; and the difference between projected and actual registrations.

Another method was extensive *interviews*, with registry operators, registrars and users on their views of general and specific market conditions. These representatives were asked to comment on competitiveness factors, including consumer choice, substitutability, pricing, registry innovation, and distribution channels. Registry operators were also asked which TLD – or TLDs - they view

---

<sup>71</sup> It should be noted that applicants' projections typically did not distinguish between attracting existing or new registrants, or among potential uses of domain name registrations.

as their primary competition. A sample of registrars<sup>72</sup> was also asked whether the new TLDs have changed their business models. Users were asked about the name recognition of the new TLDs and the reasons they chose to register, or not to register, in them.

A third method of assessment relied upon *data sampling and statistical analysis* to estimate the extent to which new gTLDs are attracting first-time registrants, and understand the reasons why registrants selected a particular new gTLD. It was determined that the least intrusive way to obtain this information was to send a brief survey to a random sample of registered name holders in each new TLD, in furtherance of ICANN's interest in learning more about what registrants wanted out of the DNS and to help inform upcoming decisions about further expansion. The survey asked whether the registration belonged to a first-time registrant, and the purpose for which the domain was being used.

Assessment also included efforts to discover the rationale for new TLD registrations by examining how much overlap exists between each new gTLD and existing gTLDs, and how many of these "duplicate" domain names appear to belong to the same registrant. For example, in how many cases is a domain name string registered in the .info TLD still available in .com, thereby suggesting that the .info domain name was the registrant's first choice? In how many cases are identical strings registered by the same party, thereby suggesting that the newer registration could be protective in nature? Each new gTLD is required by its agreement with ICANN to include such information in its "Evaluation of Concepts Report."

## **Analysis**

### **General Market Conditions**

Industry reports indicate an overall growth rate of 16% during 2003, with over 60 million domain name registrations worldwide.<sup>73</sup> The last quarter of 2003 and the first quarter of 2004 have demonstrated continued growth, bringing the overall number of registrations to over 63 million.<sup>74</sup> The .com gTLD represents about 45% of the total TLD market. Two country code TLDs (ccTLDs) have the next largest market shares, with .de (Germany) at 12% and .uk (United Kingdom) at 8%. The next two largest shares are held by existing gTLDs: .net at 8% and .org at 5%. They are followed by .info, .nl (The Netherlands), .biz and .it (Italy), at roughly 2% each. The combined market share of the new TLDs on a global

---

<sup>72</sup> As noted earlier, a sample of registrars was selected for interviews on all the Evaluation questions on the basis of size, location and extent of service in the new gTLDs. After preliminary consultation with the Chair of ICANN's Registrar Constituency, the following registrars were selected: Domain Bank, Inc., Nominalia, PSI-Japan, Inc., Register.com, Tuonome.it and Tucows Inc.

<sup>73</sup> See e.g., VeriSign, "The Domain Name Industry Brief" (Feb. 2004).

<sup>74</sup> See e.g., VeriSign, "The Domain Name Industry Brief" (June 2004). Supplemental statistics in this section were provided by, or derived from information provided by, the relevant registries and, in some cases, their monthly reports to ICANN.

scale – including ccTLDs – is therefore approximately 4%. Of the top ten TLDs, including .us (United States), exactly half are gTLDs and half are ccTLDs. ccTLDs have been growing for a number of reasons, including greater confidence in registrant agreements and websites subject to local law, distance from any stigma of the “dotcom” crash and national pride.

Looking at only the gTLD market, which most of the new gTLDs view as their primary competition, changes the picture.<sup>75</sup> As seen in the chart below, the market share of .com is 73%, a jump from 45%. The market shares of .net and .org, increase to 12% and 8.2%, respectively. The market shares for .info and .biz increase by a smaller margin, to 3.3% and 2.7%, respectively. The market shares for .name and the three sponsored gTLDs are .3% and .01%, respectively. The combined market share of the six new gTLDs is therefore less than 7%, while the market strength of .com, .net and .org is more than 93%.

**Table 3: gTLD Registrations and Market Share<sup>76</sup>**

TLD	.com	.net	.org	.info	.biz	.name	TOTALS
<b>Volume (M)</b>	27.0	4.5	3.0	1.2	1.0	.1	36.8
<b>Volume (%)</b>	73	12	8.2	3.3	2.7	.3	99.5%
<b>Combined % (by Registry Operator)</b>	85 (VeriSign)	11.5 (Afilias)		2.7 (NeuLevel)		.3 (GNR)	99.5%

Given the relatively small impact that the new gTLDs have had on overall market share, it is not surprising that most of these registries view the industry with some pessimism. One new registry characterized the outlook as “negative,” noting that “the new TLDs lack market power in terms of both brand awareness and in terms of real economic scale.” Another registry characterized the situation as “moribund,” but noted that beginning deployment of internationalized domain names (IDNs) offered hope. Only one registry sounded a more positive note, expressing the view that the industry “continues to present opportunities.”

In contrast, the .com and .net registry operator, VeriSign, views the market more optimistically. The company stated recently that the “outlook for continued expansion remains positive.”<sup>77</sup> The .org TLD operator, the Public Interest Registry, also views market opportunities positively, predicting stable growth over the next few years.

<sup>75</sup> This calculation does not include figures for .edu, .gov, .int or .mil.

<sup>76</sup> The sTLDs are not included in this chart because their combined market share is less than .02%.

<sup>77</sup> VeriSign, “The Domain Name Industry Brief” (June 2004) at 2.



## Scope of New gTLD Market

While the new gTLDs have not made great strides in terms of increasing market share, there are encouraging trends in other areas. First, their introduction has doubled the number of gTLDs, from seven to fourteen (although registration in some of the existing and new TLDs is restricted). As noted at the beginning of this Evaluation, prior to the award of the new gTLDs in November 2000, there were only seven gTLDs in operation: .com, .edu, .gov, .int, .mil, .net, and .org (excluding .arpa). The new gTLDs presented registrants with significantly greater choice, at least in terms of initial registration. The degree of genuine choice is discussed below.

Second, despite the challenge inherent in launching any new business, compounded by slow recovery from the burst of the “dotcom bubble” and continued economic uncertainty, half of the new registries appear to be approaching a financial break-even point or better in terms of revenues matching expenses. One of these registries – a sponsored gTLD – is reporting a profit. One of the unsponsored registries is also profitable, although it is not clear that profit relates to its operation of a new gTLD.

Third, some of the initial renewal rates for the new gTLDs appear encouraging. Two caveats, however, are in order. First, registries can calculate renewal rates differently, as there is no standardized formula. Indeed, this is an area where it might be useful for ICANN to suggest guidelines, since the rates are often compared without any indication that they are measuring the same data. Second, the new gTLDs have only recently begun to come up for renewal. The new TLDs had initial registration periods of two years, plus a grace period. The first renewals for .info, .biz and .name did not occur until winter 2003, and the first renewals for .aero, .coop and .museum did not start until spring 2004. At this point, it is still premature to draw any definitive conclusions about trends. As seen in Table 2, .coop and .aero had renewal rates higher than the existing registries of .com/.net and .org. The renewal rates of the three unsponsored registries are roughly comparable to the rate for .com/.net and .org.

**Table 4 - Recent Renewal Rates  
(2003 data unless otherwise indicated)**

<b>.info</b>	<b>.biz</b> <sup>78</sup>	<b>.name</b> <sup>79</sup>	<b>.museum</b> <sup>80</sup>	<b>.coop</b>	<b>.aero</b>	<b>.org</b>	<b>.com/.net</b>
56%	57%	66.7	n/a	65% <sup>81</sup>	78% <sup>82</sup>	60%	60% <sup>83</sup>

<sup>78</sup> The monthly renewal rates for .biz for 2004 ranged from 50% to 89%.

<sup>79</sup> There are reports that the .name renewal rate for 2004 is lower.

<sup>80</sup> The renewal period for .museum has not yet begun.

<sup>81</sup> Renewals did not begin until 2004.

<sup>82</sup> Renewals did not begin until 2004, and this figure represents an average of the renewal rates for March, April and May.

<sup>83</sup> See VeriSign Domain Name Industry Brief (June 2004), reporting the renewal rate for domain names in their first renewal cycle.

Looking at growth rates, the picture is more mixed. While it is not realistic to compare the gross size of the new and existing TLD databases, it is possible to compare their relative rates of growth. Examining data from June 2002 at six-month intervals (Q2 and Q4) to the present indicates that all of the registries except .aero have experienced a negative growth rate at one point during this period. The .com, .net and .org TLDs experienced negative growth during the first half of 2002, when the new gTLDs were beginning their growth. There does not appear to be a direct relationship between the two indicators, but it is possible that launch numbers would have been stronger if general economic conditions had been better. The .biz and .info TLDs have experienced recent dips coinciding with the beginning of their renewal periods, but they seem able to sustain their registries at near the one million mark. The .name TLD saw a sharp drop the first half of 2003, and has seen its growth rate improve with the offering of second level registrations. The combined .com/.net TLD growth rate has been quite robust, which is probably attributable more to .com than .net.

**Table 5 – Growth Rate (Percent)**

	<b>biz</b>	<b>info</b>	<b>name</b>	<b>aero</b>	<b>coop</b>	<b>com</b>	<b>net</b>	<b>org</b>
<b>Jan – Jun '02</b>	44.6	17.8	190	n/a	n/a	(-8)	(-16.1)	(-16.9)
<b>Jul – Dec '02</b>	17.3	19	122	127	22.4	3.5	2.2	3.7
<b>Jan – Jun '03</b>	16.6	12.1	(-12)	22.2	7.8	7.6	5.3	7.2
<b>Jul – Dec '03</b>	2.3	0.97	2.2	16.4	4.2	8.1	7.4	6.7
<b>Jan - Jun '04*</b>	**0.82	0.34	14	9.6	***(-17.9)	13.2	12.4	****2.4

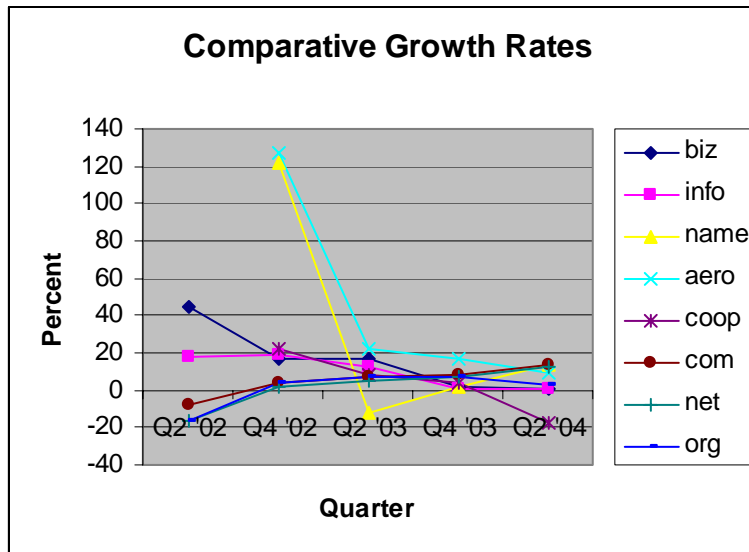
\* Q2 '04 estimates were extrapolated from doubling the actual growth rates for Q1 '04, calculated on the basis of the March 2004 Monthly Reports.

\*\* The .biz growth rate for Q1 '04 was (.56%); the growth rate for January-May 2004 was .82%.

\*\*\* The .coop growth rate for Q1 '04 was (-17.9%)

\*\*\*\* The .org growth rate for Q1 was (2.6%); the growth rate for January-May 2004 was 2.4%.

**Table 6**



Indeed, current volumes are far below the rosy predictions made during the 2000 gTLD application process. The numbers of registrations are significantly less than even the “low” projections made then by each of the unsponsored registries, as indicated by the Table on Projected vs. Actual Registrations. These projections were overly optimistic for several reasons. These registries were trying to compete with .com. They probably did not foresee the slowdown in the global economy in general, and the information technology sector in particular. In addition, the expectations were unrealistic to begin with, given the amount of capital investment required to launch the type of marketing campaign necessary to brand a new TLD on a global scale. The .biz TLD was the most realistic, and has come in, at the end of its second year in operation, at 61% of its projections notwithstanding the factors just mentioned. The .name TLD was the least realistic, and has achieved just 2% of its low-end projections. The figure improves slightly (to 4%) if its other product, email addresses are factored in.

**Table 7 - Projected vs. Actual Registrations  
(As of Q4 '03)**

TLD	.info*	.biz	.name
<b>Projected - Low</b>	2,969,000	1,650,000	3,554,985
<b>Actual</b>	1,164,136	1,003,902	82,163
<b>Actual as % of Projections</b>	39%	61%	2%

\* These projections were for .web, Afiliias' first choice string in November 2000.

Fourth, there are indications that a respectable number of the new gTLD registrations have attracted new users to the DNS, and that these new registrations are being actively used. Although the Task Force Report believed

that it was critical to answer these questions, it provided little guidance on the best method of doing so. While putting together a focus group, or conducting random telephone interviews might have elicited the most complete information, it was deemed too intrusive a method for gathering data. Instead, a survey of roughly a dozen multiple choice questions was sent to a random sample of new gTLDs registrants.<sup>84</sup> 2,412 responses were received, and a copy of the survey is contained in Appendix B. The responses, tabulated in the following Tables, indicate that:

- 20% of the respondents are new to the DNS, whereas 80% are not. The .name TLD had the highest proportion of new registrants, at 44%. The .biz and .info TLDs had the lowest number of new registrants, at 16% and 14%, respectively.
- Of those respondents that had registered previously, the majority of respondents had registered between 2 and 20 other domain names. The highest number of registrants that hold over 100 other domain names belonged to respondents in .biz and .info, and the lowest number from .coop and .museum.
- 55% of respondents indicated that their new gTLD registration was for a different string than those they had registered in other TLDs, whereas 45% indicated that it was for the same string.
- 60% of respondents indicated that they registered the domain for active use while 41% indicated that their registration was defensive (including 61% of .museum, 52% of .biz, 43% of aero and 41% of .info respondents). 11% indicated that their first-choice string in another TLD had been taken. (This data is consistent with answers to the question of whether the domain is in active use: 60% said yes, and 40% said no.)
- 41% of respondents indicated they had registered the new gTLD for business use (including 9% of .name respondents) and 34% said that they registered the name for personal use (including nearly 8% of .biz respondents). (These statistics are consistent with the analysis in Chapter 3 of the extent to which registrations in these TLDs may not comply with the registration restrictions.)
- Interestingly, 33% of respondents indicated that they use their registrations for email, 28% use it for an active website in the TLD and 22% use it for a website that redirects to another TLD, while 5% have the

---

<sup>84</sup> ICANN sent the survey out so as to make clear its official nature and minimize the risk that it would be discarded as spam or viewed as a marketing ploy. In order to obtain a decent response rate, the survey was sent to all registrants in .aero, .coop and .museum because of their relatively small size, and to a random sample of 10,000 registrants from the .biz, .info and .name TLDs. 2,412 responses were received, which at 6% is an average response for a web-based survey. The data samples were provided by BBS International Consulting, using the same methodology as for sampling for Chapter 3 (Registration Restrictions) and validated by Mitofsky International (MI). The 95% confidence levels are as follows :

	aero	biz	coop	info	museum	name
count	243	484	268	512	89	816
+/-	6%	4%	6%	4%	10%	3%

name for sale. (Note: the results of this question may be influenced by the heavy .name response rate (representing 34% of all respondents) and the fact that email is one of the products offered by the registry.) Although respondents could indicate more than one type of usage, the data still indicates that somewhere between 28% and 61% of respondents are using their registrations actively -- for a website in the TLD or email service, or both.

**Table 8 - Previous Registrations (Survey Questions 1 & 2)**

\* Top row indicates number of overall responses per gTLD.

<b>TLD</b>	<b>.info/512*</b>	<b>.biz/484</b>	<b>.name/816</b>	<b>.museum/89</b>	<b>.coop/268</b>	<b>.aero/243</b>
<b>First time</b>	61	65	251	12	54	48
<b>1 previous registration</b>	18	12	61	7	37	22
<b>2-20 previous</b>	132	144	394	49	154	11
<b>21-100 previous</b>	101	101	62	8	16	14
<b>More than 100 previous</b>	201	162	48	13	9	48
<b>.com registration</b>	193	227	59	3	56	81
<b>.net registration</b>	153	186	36	2	45	48
<b>.org registration</b>	136	151	35	5	60	32
<b>ccTLD registration</b>	54	75	24	0	17	26
<b>Other registration</b>	122	157	36	2	25	69

**Table 9 - Purpose of Registration (Survey Question 5)**

<b>TLD</b>	<b>.info</b>	<b>.biz</b>	<b>.name</b>	<b>.museum</b>	<b>.coop</b>	<b>.aero</b>
<b>Active use</b>	272	210	533	60	201	170
<b>Defensive</b>	210	252	276	54	92	104
<b>First choice n/a</b>	89	85	64	1	9	14
<b>Business</b>	227	295	75	38	177	174
<b>Personal</b>	69	37	708	1	2	14
<b>Expression</b>	17	15	37	16	17	3
<b>Resale</b>	38	14	5	0	3	0
<b>Other</b>	45	25	43	7	12	20
<b>Don't</b>	13	9	10	2	2	2

<b>Know</b>						
-------------	--	--	--	--	--	--

**Table 10 – Current Use of Registration (Survey Question 7)**

<b>TLD</b>	<b>.info</b>	<b>.biz</b>	<b>.name</b>	<b>.museum</b>	<b>.coop</b>	<b>.aero</b>
<b>Active site</b>	118	104	157	24	165	82
<b>Redirect</b>	120	102	110	35	59	89
<b>Email</b>	61	77	437	6	110	67
<b>Defensive</b>	43	58	84	25	19	40
<b>Resale</b>	18	7	2	0	0	0
<b>Other</b>	34	18	38	4	9	10

Fifth, another method to assess the extent to which the new gTLDs are opening up new opportunities for registrants is to look at the overlap between new and existing gTLD registrations. The new gTLDs are requested to provide information on the extent of corresponding registrations in their Concepts Reports to ICANN. Four registries have provided this information: .info, .biz, .name and .coop.

**Table 11 – Duplicate Registrations in .com/.net/.org**

<b>TLD</b>	<b>.info</b>	<b>.biz</b>	<b>.name</b>	<b>.coop</b>
<b>.com</b>	89%	85%	12%	33%
<b>.net</b>	81%	47%	17%	22%
<b>.org</b>	75%	34%	16%	36%

**Table 12 – Same Registered Name Holder in .com/.net/.org**

<b>TLD</b>	<b>.info</b>	<b>.biz</b>	<b>.name</b>	<b>.coop</b>
<b>.com</b>	11%	42%	11%	33%
<b>.net</b>	10%	31%	9%	22%
<b>.org</b>	7%	32%	2%	36%

The data –which is based on an extremely small sample of only 100 names for .biz and .info -- suggests that .name has the least amount of overlap with existing TLDs. This is not surprising, given its unique naming conventions. Where there is significant overlap, as in .biz and .info, the interesting question is whether the registrant is the same. If not, then the TLD has succeeded in opening up more choice and options. The statistics for .info indicate that only 11% of registrants hold the same name in .com, which suggests that .info has created significant new opportunities. With .biz, 42% of duplicate registrations appear to be registered to the same party, thereby suggesting that they are protective in nature.

Finally, the number of active websites in use in the new gTLDs also provides an indication of their impact on users. This is a question that several of the new gTLDs track, including .info, .aero and .coop. The following Table on Resolution Rates uses that data where available, and classifies it in terms of whether the names (i) resolve to an active website in the new gTLD; (ii) redirect to a website in another TLD; (iii) are “parked” or (iv) are inactive. The Table also includes comparative data for .com, .net and .org.

**Table 13- Resolution Rates**

<b>TLD</b>	<b>.info<sup>85</sup></b>	<b>.biz<sup>86</sup></b>	<b>.coop<sup>87</sup></b>	<b>.aero<sup>88</sup></b>	<b>.org<sup>89</sup></b>	<b>.com/.net<sup>90</sup></b>
<b>Active Website in gTLD</b>	35%	31%	49.6%	36%	44%	64%
<b>Redirect</b>	15%	16%			12.4%	
<b>Sub-Total</b>	<b>50%</b>	<b>47%</b>	<b>49.6%</b>	<b>36%</b>	<b>52.4%</b>	<b>64%</b>
<b>Parked</b>	15%	21%	(same)	n/a	n/a	8%
<b>Inactive</b>	31%	33%	50.4	n/a	29.7%	28%

As Table 13 indicates, the number of active sites in the new gTLDs that track solely that information is 20-20% lower than the figure for .org (44%). If redirects are counted, then roughly half of .info, .biz and .coop websites are resolving to an active website. This figure is comparable to .org (52.4%) and only somewhat lower than .com/.net (64%).

Notwithstanding these encouraging trends – registries approaching or surpassing the break-even point, possibly encouraging renewal rates; 20% of registrants new to the DNS; 55% of registrants registering different strings than in other TLDs; and 60% of registrations in active use – current volumes are far below the rosy predictions made during the 2000 gTLD application process and growth trends are still uncertain. It is also unclear if any of the new gTLDs have, or are willing to spend, the level of capital investment required to conduct the type of marketing campaign necessary to brand a new TLD on a global scale. Launching the new gTLDs in 2000 proved not only to be an experiment for ICANN in terms of the “proof of concept,” but presumably also a sobering lesson for others interested in starting new registries.

<sup>85</sup> These figures were provided by Afiliis for June 2003.

<sup>86</sup> These figures were provided by NeuLevel for June 2004.

<sup>87</sup> This figure from dotCoop is for 2004. It includes all active websites in .coop and redirects to other TLDs.

<sup>88</sup> This figure from SITA was measured in 2003. It includes all active websites in .aero and redirects to other TLDs.

<sup>89</sup> The .org figures are based upon an analysis done for the Public Interest Registry by Pegasus DomainSCAN, an independent consultancy that performs domain name analysis.

<sup>90</sup> VeriSign, “Domain Name Registrant Profile” (June 2004), at <http://www.verisign.com/nds/naming/domainbrief/>.

## Competitiveness Factors

In assessing the effect of the new gTLDs on the scope and competitiveness of the domain name market, it is useful to consider what competition means in this context, and how it should be measured. Although it has been clear since ICANN's inception that one of its main purposes would be to promote competition across the industry, neither the term nor its measurement has been defined with precision. While answering these questions is outside the scope of this Evaluation, an overview of the unique factors that characterize the industry is helpful to understand the specific impact of the new gTLDs.

From the 1998 "White Paper" issued by the U.S. Department of Commerce (DOC) that lay the cornerstone for ICANN, to subsequent memoranda of understanding between ICANN and the DOC, to ICANN's own policy documents, the presence of competition is deemed an important goal. The opening sentence of the White Paper proposed privatization of the domain name system in a manner that "allows for the development of robust *competition*." It goes on to state that "[w]here possible, market mechanisms that support *competition* and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction" (emphasis added).<sup>91</sup> In the most recent Amendment to the Memorandum of Understanding between the DOC and ICANN, the DOC "reaffirms its policy goal of privatizing the technical management of the DNS in a manner that promotes stability and security, *competition*, coordination, and representation." ICANN, in turn, "reaffirms its commitment to maintaining security and stability in the technical management of the DNS, and to perform as an organization founded on the principles of *competition*, bottom up coordination, and representation."<sup>92</sup>

ICANN itself recognizes that one of the primary reasons it was created is to foster competition. The ICANN Bylaws characterize "[i]ntroducing and promoting *competition* in the registration of domain names where practicable and beneficial in the public interest" as a "core value."<sup>93</sup> The core values further state that "[w]here feasible and appropriate," ICANN will depend "on market mechanisms to promote and *sustain a competitive environment*." In August 2000, ICANN published "Criteria for Assessing TLD Proposals" that gave examples of competitive issues to consider during the new gTLD selection process. Some of the examples focused on creating competition with new and existing TLDs on the basis of pricing, service and innovation. More recently, ICANN issued a Request

---

<sup>91</sup> "[Management of Internet Names and Addresses](http://www.icann.org/general/white-paper-05jun98.htm)," 63 Fed. Reg. 31741 (1998), at <http://www.icann.org/general/white-paper-05jun98.htm>

<sup>92</sup> Amendment 6 to ICANN/DOC Memorandum of Understanding (Sept. 17, 2003), at <http://www.icann.org/general/amend6-jpamou-17sep03.htm>.

<sup>93</sup> See generally ICANN Bylaws at <http://www.icann.org/general/bylaws.htm#1> (Oct. 13, 2003).



for Proposals for new sTLDs in December 2003 that included competition as a criterion. The sTLD RFP implied a definition based on the element of consumer choice. It is similar to the White Paper in emphasizing that: “[o]ne purpose of creating new TLDs is to enhance competition in registry services.” Applicants are asked to “demonstrate that their proposal . . . [a]ttracts new supplier and user communities to the Internet and delivers choice to end users; and [e]nhances *competition* in domain-name registration services, including competition with existing TLD registries.”

ICANN has acknowledged that TLD registry operators “inevitably acquire some attributes of monopoly power” because of the “technical impracticality of having more than one operator” for a TLD.<sup>94</sup> The situation is reinforced by the economic lock-in that occurs when an individual or entity begins to use a particular domain name. As a registrant establishes an online presence, it makes an investment – both tangible and intangible – in that registration. Indeed, for a large company, that investment can represent a substantial asset, not unlike more traditional forms of intellectual property. For a smaller company, that investment can be the most critical part of its business, without which it would fail. Because of the lock-in effect, and out of concern that a registry operator might abuse its sole-source position to take advantage of the registrant, ICANN has developed constraints on operating a TLD that are embodied in each Registry Agreement.<sup>95</sup> These generally uniform constraints are intended as protective measures against potentially abusive behavior, and are not supposed to affect unrelated business decisions. For example, the price caps on the fee a registry may charge registrars for a registration can be adjusted downwards, but not upwards. Registries, for the most part, have accepted these constraints as part of the privilege of operating a TLD.

While the definition of exactly what constitutes a competitive market in the domain name industry has not been defined precisely, ICANN has been clear about some of the ways to achieve greater competition. One is to separate the registrar function from registry operations, and seek to create a competitive registration environment. Many believe ICANN has succeeded in this effort. As of September 30, 2003, there were over 151 ICANN-accredited registrars contributing to ICANN's budget, offering consumers much greater choice of services and prices than before ICANN was established. Back then, Network Solutions, Inc. was the sole registrar (and registry), and for a period of time it charged \$50.00 per year for a two-year registration. While Network Solutions remains the largest registrar in terms of volume, its market share has been

---

<sup>94</sup> See, e.g., General Counsel's Analysis of .name SLD E-mail Forwarding Service (July 30, 2001) at <http://www.icann.org/minutes/report-name-tld-31jul01.htm>

<sup>95</sup> Registries are of course free, in the same way as other businesses, to offer services not related to their position as a sole-source provider. It is only the services that a registry operator could provide because it has been appointed a TLD operator that are subject to regulation by ICANN. These services are termed “registry services” in the Registry Agreements.

declining. There is now fierce competition on price, which among the largest ten registrars ranges from \$8.95 to \$35.00, and averages \$21.60 a registration. At least 19 registrars accredited by ICANN offer registration for \$15.00 or less.<sup>96</sup> Some registrars charge even less than the \$5-6 they must pay the registry for each registration, hoping to profit from value-added services, such as web-hosting and email. ICANN's other method of fostering competition is to award new gTLDs and rebid the delegations of .org and .net. As a practical matter, ICANN has sought to lay the foundation for a competitive environment through the promotion of greater choice, and sought to achieve such choice by increasing the number of registrars and registries.

A threshold question is whether increasing the number of gTLDs has made the industry more competitive. A traditional and widely accepted method for measuring competition in the context of proposed mergers is the Herfindahl-Hirschman Index (HHI), which is based on market share. The HHI is calculated by summing the squares of the individual market shares of the companies in the industry. In this formula,  $HHI = S_1^2 + S_2^2 + S_3^2 + S_4^2 + S_5^2 + \dots + S_n^2$ , where "S<sub>i</sub>" is the market share of the "ith firm." The advantage of the HHI is that it reflects both the distribution of the market shares of the top companies and the composition of the rest of the market. Looking at the gTLD market in terms of .com, .net, .org, .info, .biz and .name and using the market shares calculated above, there are two ways to compute the HHI. First, treating .com and .net, .org and .info, and the other gTLDs separately, yields the following result:

$$HHI = (73 \times 73 + 12 \times 12 + 8.2 \times 8.2 + 3.3 \times 3.3 + 2.7 \times 2.7 + .3 \times .3) = 5,558.51$$

Considering the .com and .net registries (operated by VeriSign), and the .org and .info registries (operated by Afilias) as a single market share, gives a different result:

$$HHI = (85 \times 85 + 11.5 \times 11.5 + 2.7 \times 2.7 + .3 \times .3) = 7,364.63$$

The HHI ranges from 10,000 (i.e., a pure monopoly) to a number approaching zero. The higher the HHI, the more concentrated is the industry in the hands of the dominant players. In this case, viewing the top six gTLD registries – .com, .net, .org, .info, .biz and .name -- and their market shares individually yields an HHI of 5,558. Any HHI higher than 1,800 is considered "highly concentrated" under the U.S. Department of Justice and Federal Trade Commission guidelines for horizontal mergers.<sup>97</sup> In evaluating proposed mergers, an HHI above that level is carefully scrutinized because of its potentially adverse competitive consequences. When market share is measured in terms of company control, rather than by TLD, the HHI jumps to 7,364. This number indicates an even

---

<sup>96</sup> Registrar information compiled by RegSelect, at <http://www.regselect.com/dotcomtable.html> (May 2004).

<sup>97</sup> "Horizontal Merger Guidelines," U.S. Department of Justice and the Federal Trade Commission, at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/toc.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html).

more highly concentrated market. Indeed, under this method the gTLD market is divided among just four registry operators, with VeriSign having an 85% market share, Afilias 11.5%, NeuLevel 2.7% and Global Name Registry .3%. Together, the two companies with the largest market share have a combined total of 96.5%. In addition, reports indicate that the largest company – VeriSign – has an ownership interest in the 2<sup>nd</sup> largest company – Afilias – in excess of 5%.<sup>98</sup>

Another method of calculating market concentration in an industry is to calculate the “four firm” concentration ratio. In the registry market, as just demonstrated, the top four firms control nearly the entire commercial market. The combined market share of the new sTLDs – .aero, .coop and .museum – constitutes much less than 1%.

Traditional models are useful in assessing relative market shares and market concentration. But they are not necessarily the best indicators of whether the new gTLDs have helped create a broader, more competitive market. Each registry is by definition itself a monopoly in its distinct market. As noted above, that situation justifies the imposition of price controls, which limit the potential for competition on this basis. With price caps, the only pricing flexibility is downwards, from the \$5-6 wholesale fee registries charge registrars. This relatively low fee does not leave much margin for price competition. In any event, lowering the wholesale price a registry charges the registrar may not have any effect on the price the registrar charges the user. While there has been pricing competition at the registrar level, the retail price does not appear sensitive to changes in the wholesale price. Registrars, for example, typically do not distinguish between .com and .info registrations, although their wholesale prices differ slightly. Even without price caps, demand among existing registrants is likely to remain relatively inelastic at most imaginable price points because of the lock-in effect. For potential new registrants, there is some cross-elasticity of demand across gTLDs. The .info TLD could, for example, serve as a substitute for a .com, .net or .org registration. But by the same token, a .org registration could be preferred by a museum or a cooperative. Users are likely to be influenced by price considerations only if the difference is meaningful and they – as opposed to registrars -- are able to pocket it. Ironically, the relatively high wholesale and resale prices of sponsored TLDs, which they justify by their eligibility and verification requirements, make price competition against .com, .net, .org and .info unrealistic for those TLDs.

---

<sup>98</sup> This share had been held by Network Solutions, Inc., which was a subsidiary of VeriSign until it was sold in 2003. Reports indicate that NSI's share of Afilias has remained with VeriSign.

**Table 14 - Wholesale Registration Fees (USD \$)**

<b>.biz</b>	<b>.info</b>	<b>.name</b>	<b>.aero</b>	<b>.coop</b>	<b>.museum</b>
5.30	5.75	6.00 -4.00 <sup>99</sup>	59.00	64.00	60.00
<b>.com</b>		<b>.net</b>		<b>.org</b>	
6.00		6.00		6.00	

Moreover, the gTLD registries each offer a differentiated product, which undermines direct competition. Neither the TLDs generally, nor registrations specifically, are fungible. On the contrary, TLDs are often imbued with a particular meaning and identity, which is precisely what makes them attractive to a user in the first place. Former ICANN Board Member Jonathan Cohen described the gTLD registries as “parallel monopolies.” He acknowledged that there was much emphasis on the notion of competition, which was understandable given the reasons for ICANN’s creation. But, he indicated, “genuine market-based competition is difficult when the products are different, the prices controlled, and there are switching costs.” For many existing registrants, substitutability is therefore not a realistic option. Only a party contemplating a new registration has the full freedom to select in which TLD to register.

If only market concentration, pricing policies and product competition are considered, the picture is incomplete. There are other areas that are indicative of competitiveness among gTLD registries. These include: consumer choice, back-end competition, innovation and distribution channels.

### Choice

The degree of choice for a new registrant has certainly improved. Users have a greater selection of TLDs to register in today, as compared with only three years ago. Anyone can choose to register in “.info,” if the desired string is available. Businesses have also the option of selecting “.biz.” Individuals have also the choice of “.name” for registering personal names. Cooperatives, museums and members of the aviation community have these choices, as well as the relevant sponsored gTLD. The .pro TLD has started to offer professionals additional options. But two important caveats make the actual choice narrower than it first appears. First, once the initial selection is made, the switching costs generally discourage changing that decision later. As noted above, these costs can be quite substantial. It is therefore rare to find registrants that have switched from an existing TLD to a new gTLD. It can happen, for example, when a registrant has a cumbersome .com registration and can find a shorter, more memorable name in a new gTLD. In such a case, the benefit of the new domain name outweighs the switching costs. The difficulty of switching TLDs raises an

<sup>99</sup> The price for a third-level registration varies between \$5.25 and 4.00, depending on volume. The price for a second-level registration is \$6.00.

important question as to what constitutes the “relevant market” for discussion. One official at the European Commission commented that the relevant market should be defined solely in terms of new registrations.

Second, notwithstanding greater choice, .com remains the TLD of first choice for a majority of gTLD registrants, including new registrants. Indeed, the decision whether to select a new gTLD is often dictated by the availability of .com. In nearly every interview, registrants, users and registries acknowledged a preference for the .com version of a registration if it is available. The .info TLD is perceived as having the widest appeal after .com, .net and .org because it is the most “generic” of the new gTLDs in that it is not identified with a particular group. Market statistics support these views. The number of new .com registrations grew by just over 2 million during the last two quarters of 2003, an 8.2% increase. In the 4<sup>th</sup> quarter of 2003 alone, the number grew by almost 1.2 million, a 4.6% increase over the previous quarter. To compare this growth to the new gTLDs, the quarterly increase of 1.2 million was more than the size of the largest new gTLD database (.info), and the gain during both quarters was roughly the size of all of the new gTLD databases combined. As one ICANN official suggested, the new gTLDs offer users a choice – albeit a real choice only prior to initial registration -- but not direct competition with existing gTLDs on that basis.

New gTLD registry operators do not view themselves as being in direct competition with .com today, having adjusted to market realities and tamed once wildly high projections. They consider, in the words of one large registry, that “.com is king.” They cite its overwhelming “first-mover” advantage, resulting in a relatively solid base of 25+ million registrations that grew dramatically when there was no competition. Afilias, for example, stated that it is not trying to duplicate .com, but develop new uses for .info registrations. It cited its own market study finding that there are over 400,000 active .info websites, representing about 35% of registrations. NeuLevel views its business model as providing a niche market for businesses. It advertises the .biz TLD as a desirable place for entities whose preferred domain name is no longer available in .com, as well as for those seeking to protect registrations in other TLDs. Global Name Registry views its primary competition as the free email services that are offered by Hotmail and Yahoo!.

The sponsored gTLDs were never intended to compete directly with .com, or even each other as they aim to fulfill specialized needs of different communities. MuseDoma sees its strongest competition from .org rather than .com. SITA views itself as competing with .com to a limited extent but, more importantly, offering new services to the aviation community. It is proud that more than a third of its registrations are represented by active websites. The .coop Sponsor views its primary competition as ccTLDs, and its secondary competition as .com and .org.

The difficulty of competing directly with .com has led at least one unsponsored registry to seek changes to its Registry Agreement with ICANN. As discussed more in the next Chapter, the change is intended to level the playing field on the Agreement's renewal provision. The .com Registry Operator – VeriSign -- was given a presumption of renewal, whereas the new registries were given a fixed term, with the possibility of renewal. A number of the new competitors believe that the .com presumption disadvantages them at a time when they should have been treated equally, if not better. The concern is that the difference negatively impacts on competition for new investment, since there is uncertainty for the new gTLDs as their contracts begin to expire in the next few years. One of the new sponsored registries is uncomfortable accepting registrations for a period longer than the term of its agreement with ICANN. It also characterized the different treatment as meaning that “we worry about staying in line” and “do not stray.”

A choice of TLDs has thus far been unable to overcome the advantages the .com TLD enjoys. It is debatable whether, and how, these advantages could be overcome. One member of the non-commercial community believes it would be hard, but not impossible to do so. He noted that during the three years it took ICANN to introduce new TLDs, the price of a .com registration dropped and the TLD attracted millions of new registrants. The costs for many of the millions of registrants in .com to switch to a new gTLD are simply too high to happen. He suggested that had gTLDs been created before ICANN was formed, during the 1996-1998 timeframe, the market might have had a chance to become more balanced by now. But he believes that there is still demand for additional TLDs. As others have done, he singled out one area with tremendous growth potential: IDNs, he surmised, might stimulate the same demand as there has been for .com.

Another member of the same community believes that it is possible to overcome the advantages enjoyed by .com. In an unusual but instructive analogy, he pointed out that there was no demand for “Cheez Whiz” before it was invented, and heavily marketed, by Kraft Foods. Similarly, there could be a TLD name, not yet proposed or selected by ICANN, which could generate the same demand as .com and other older TLDs. Such a proposal would have to include significant budgets for global branding and marketing campaigns. Many people interviewed noted that none of the new gTLDs launched such a campaign – which requires an estimated \$100 million investment -- nor appear to have the resources or inclination to do so now. This would amount to \$100 per registration for the larger gTLDs, and the \$1 to \$10 per name that they have spent thus far does not come close to this amount.

### Facilities-based Competition

While the new gTLDs have not had much impact on competitiveness on the basis of market concentration, price or choice, they have had a significant effect on two related aspects: facilities-based competition and innovation. Indeed, the

most important development resulting from the introduction of the new gTLDs is with respect to competition for new registry operators, i.e., on the basis of their capacities, or facilities. The ICANN community now has several registry operators, as opposed to just one provider, which is able to operate a global registry of significant scale. Before introduction of the new gTLDs, VeriSign was the only gTLD entity operating at this level. Since the November 2000 decision to launch the new TLDs, Afilias and NeuLevel have emerged as viable competitors, thereby tripling available options. Today the three companies compete for the ability to provide registry services to new and existing TLDs, both in the gTLD and ccTLD markets. They are joined by smaller registry operators, such as Poptel and CORE, which are providing support to the new sponsored TLDs.

The competition among new registry operators was seen clearly with the rebid of the .org registry upon expiration of VeriSign's contract. Afilias, NeuLevel and VeriSign, among others, competed. The award went to a joint proposal developed by Afilias and the Internet Society, which led to creation of the Public Interest Registry, with Afilias as the Registry Operator. The contenders competed on the basis of many criteria, including price and service. The competition had a positive impact on market concentration because with divestiture of .org, VeriSign's market share dropped from 93.2% to 85%. Indeed, it was fortuitous that .org was even up for competitive rebid: under VeriSign's previous Registry Agreement with ICANN, if it had decided to sell Network Solutions in 2001 instead of 2003, it would have been able to keep the .org and .net registries until 2007.

Capacity competition in the gTLD industry has also improved choice for ccTLDs and potential new TLDs, which now have a choice of providers from which to select for back-end service. Operation of the .us TLD, for example, was awarded to NeuStar, the parent company of NeuLevel, in 2001. Of the ten proposals for new sTLDs currently under consideration by ICANN, three of them involve support from Afilias, two from VeriSign, one from NeuLevel and one from CORE. As a result, 40% of them involve bids from new gTLD registry operators, whereas only 20% of the bids directly involve the incumbent provider.

### Innovation

Another area where the new gTLDs have had an impact beyond their size or market share is in terms of innovation. There were several examples of innovative behavior mentioned during interviews. Vint Cerf, Chairman of the ICANN Board, singled out "a fair amount of innovation," pointing in particular to VeriSign's new ATLAS system, a platform for database look-ups that interacts with DNS, SIP, SS7 and other protocols. Another ICANN Board Member, Michael Palage, pointed to the evolution of insurance requirements for registrars. VeriSign used to require that each registrar post a \$100,000 surety instrument. The new gTLDs replaced this requirement with a comprehensive general liability

insurance policy naming the Registry Operator as a specific insured.<sup>100</sup> As a result of the new gTLD practice, VeriSign changed its policy to adopt the new, more registrar-friendly method.

Another example mentioned was “real-time updates.” Today the new gTLDs use resolution techniques that are almost instantaneous, whereas VeriSign updates its database just twice a day. Just recently, VeriSign announced that it would move to a system of “rapid updates” before September 2004. The fourth example involves SITA, which has developed a new pilot program based on the value of “predictive space.” SITA has pre-registered thousands of 3-letter location codes for allocation to airports and airlines to help users know where to look for quick information about a flight or airport. If, for example, the airport code is LAX, for Los Angeles, one need only type “lax.aero” into a browser to find information about the airport. This is preferable to the alternative of guessing which of several TLDs Los Angeles Airport might be using.

### Distribution channels

With respect to distribution channels, the two key questions are: (i) to what extent, if any, have the new gTLDs helped support a competitive distribution system; and (ii) to what extent, if any, has the distribution system promoted competition in the gTLD market. The launch of new gTLDs coincided with a period in which the number of ICANN registrars increased significantly. As of September 30, 2001, there were 93 accredited registrars counted as contributing to ICANN budget. One year later, with .info, .biz and other new TLDs live, the number increased by 34% to 125. The next year, the number jumped to 151, 21% increase over the previous year, and a 62% increase over 2001. There are, of course, other factors that help explain the rise. These include new opportunities in the .com, .net and .org markets, as well as new approaches to the secondary market.<sup>101</sup> But launch of the new gTLDs cannot be discounted as a factor in this growth. Indeed, interviews with a sample of registrars serving the new gTLDs indicated that their decision to enter the new market turned out to be a profitable one, especially with respect to sponsored gTLD registrations.

The other question – to what extent have distribution channels promoted competition in the gTLD arena – has a less clear answer. Registrars and registries indicated that the accreditation of more registrars in the new gTLDs led to lower prices, at least for longer-term registrations. At the same time, some of the registries, particularly the sponsored TLDs, were uncomfortable with their

---

<sup>100</sup> Compare, e.g., Section 2.13 of Appendix F (Registry-Registrar Agreement) of .net Registry Agreement with Section 7 of Appendix F (Registry-Registrar Agreement) of .info Registry Agreement.

<sup>101</sup> See, e.g., R. Jackson, “\$23,000 Sale of GourmetCoffee.com Provides the Perfect Blend for Pool's Bottom Line,” Domain Name Journal (June 23, 2004) at [http://www.dnjournal.com/archive/domainsales/domainsales06\\_29\\_04.htm](http://www.dnjournal.com/archive/domainsales/domainsales06_29_04.htm).



ICANN-imposed dependence on registrars as the sole distribution channel. According to SITA, “using current ICANN-accredited registrars who have little aviation experience and knowledge of the market as a backbone of the distribution channel is ineffective and restricts the potential of the .aero TLD . . . .” See Proof of Concepts Report of Jan. 17, 2003, at <http://www.icann.org/tlds/agreements/aero/poc-sita-17jan03.pdf>. It is certainly true that a participating registrar is unlikely to have the specialized knowledge that a sponsor organization does. Moreover, forcing registrants to travel to another website (or two) to complete purchase of a registration can leave the registrant with a “buyer experience” that is “broken.” This problem is indeed a particular concern for sponsored gTLDs, where the registrant is more likely to be purchasing a domain name for the first time.

Registrar issues were discussed briefly during the ICANN Board’s approval of the .museum Sponsorship Agreement at the Montevideo Meeting. The subject was whether the resolution of approval should be changed to accommodate the MuseDoma proposal that it be exempt from using competitive registrars if its registrations do not exceed 10,000 names. At the time, Dr. Cerf expressed the view that “any registry would benefit from having multiple competitive registrars,” which made the proposed exemption “ill considered.”<sup>102</sup>

Because of a lack of experience in working with the sponsored communities, and the complexity involved in doing so, most registrars turned out not to be interested in serving as distribution channels for them. DotCoop expressed disappointment that none of the ten largest registrars worldwide had any interest in serving its market. It described itself as being the “wallflower at a dance” because “no one wants us, they won’t look at us, at least not the big ones.” The registry is delighted that Domain Bank, Inc., one of the ten largest registrars in the United States, is working with them.

Indeed, the new sponsored gTLDs are harder to support than .com, .net or .org because of their verification and compliance requirements. They sometimes require development of unique front-end interfaces and testing, as well as the training of registrar staff with the expertise necessary to answer customer questions. In registrars’ defense, these new procedures and mechanisms do not lend themselves to quick study, and margins in the registrar market are not large. This is the chief reason that sponsored TLDs have argued, with some sympathy, that they ought to be able to use community-based entities as registrars for certain purposes. While appreciating the historical reasons underpinning the current registry-registrar division of labor, they feel it is time to imbue sponsoring organizations with greater flexibility to address different community needs. They

---

<sup>102</sup> Minutes, Regular Meeting of the Board (Sept. 10, 2001), at <http://www.icann.org/minutes/minutes-10sep01.htm>.

point to the registrar practice of allocating names on a first-come, first-served basis as important for unsponsored gTLDs, but potentially in conflict with sTLD efforts to create predictive name spaces, such as the SITA test program of reserving airport and airline codes.

These issues are not unique to sTLDs. Global Name Registry had similar concerns because there was reluctance among some registrars to work with its more complex naming conventions and email product. The company therefore decided to open its own registrar channel, calling it “Personal Names.” The decision caused a stir in the Registrar Constituency, which spurred discussion of whether its membership should exclude entities whose primary relationship with ICANN is as a registry.<sup>103</sup> This discussion led to amendment of the Constituency’s bylaws to exclude such entities. A few months later, GNR sold the registrar to another company. GNR officials noted in an interview that the experience of operating a registrar had provided the registry with valuable information to make .name more responsive to user needs. In August 2003, the Registry sought ICANN’s approval to offer registrations at the 2<sup>nd</sup> level, instead of only at the 3<sup>rd</sup> level. Counting the .name TLD, four of the six new gTLDs in operation have expressed questions, directly or indirectly, about whether the current distribution model supports a fully innovative TLD environment.

The distribution model is intended to have a strict line drawn between the registries and the registrars. Several people pointed out that the separation is more illusory than real because of significant cross-ownership. Although a registry operator is not allowed to act as a registrar with respect to its TLD,<sup>104</sup> there are few rules in effect about cross-ownership. A number of new gTLDs were organized in whole or in part by registrars, or have registry operators associated with registrars. For example, Afilius was founded as a consortium of registrars, including Network Solutions, Inc., which was part of VeriSign. NeuLevel was started as a joint venture between Melbourne IT, a registrar, and NeuStar, although MIT’s current share is only 10%. DotCoop’s registry operator, Poptel, is also a registrar. CORE, which operates back-end support for .aero and

---

<sup>103</sup> The Registrar Constituency subsequently amended its Bylaws as follows:

“2.1. [Membership]

Eligibility - Only ICANN Accredited Registrars are eligible for membership in the Registrar Constituency (“Members”). In keeping with the selective membership criteria of other GNSO constituencies, the Registrar Constituency represents the interests of a specific sector, specifically those of ICANN Accredited Registrars. Therefore to avoid conflicts of interest, this typically excludes entities whose primary relationship with ICANN is as a TLD Registry Operator.” Section 3.2, of the Charter of the Business Constituency, for example, contains a similar provision, which excludes registries, as well as registrars and “other groups whose interests may not be aligned with business users.”

<sup>104</sup> A registry is not, however, precluded from having an affiliate act as a registrar so as long as it does not treat that affiliate any differently than other registrars. See, e.g., Section 3.5.3 of the ICANN-Afilius Registry Agreement.

.museum, is an association of registrars. Global Name Registry, in which VeriSign has a minor investment, was not previously affiliated with a registrar, but did operate one independently for several months. The .pro TLD, which is starting to become operational, was founded by Register.com. Each of the seven new gTLDs, therefore, had or has ties to a least one registrar. These kinds of relationships are not that surprising in an industry that ranks small in overall size. While outside the scope of this Evaluation, the subject of the appropriate line between registries and registrars, in terms of both operational requirements and ownership, is one that would benefit from more discussion in the community.

### ***Conclusion***

The concept of competitiveness has not been defined or measured with precision in the domain name industry. At the same time, ICANN has understood from the outset that promoting – and achieving -- competition is one of its core goals and values. It has tended to interpret this part of its mission in terms of increasing the number of accredited registrars and registries. Indeed, many view the registrar market today as highly competitive on the basis of price, choice and diversity of suppliers. Determining the state of the new gTLD market today is more complex. Looking at traditional indices of competition, particularly market share, suggests that the new gTLDs have not yet had significant impact. This view is reinforced, intentionally or not, by new registries that feel they lack the advantages of .com in terms of first-mover advantage and its contractual presumption of registry renewal.

Assessing the competitive environment in terms of other important factors provides a more positive picture. The most significant contribution of the new gTLDs to competitiveness so far has been the development of facilities-based competition. As a result, new providers of registry services have been able to compete effectively with the incumbent registry, VeriSign. This form of competition is an important development that is just starting to have an impact on the market. In addition, there is evidence of new users and indications that a good number of new registrations are in active use.

Innovation has played a supporting role, and may become increasingly important as the three largest registries work to distinguish themselves from one another. Distribution channels have not yet had a major impact on promoting competition among gTLDs, but that may change.

## CHAPTER 5: REASONABLENESS OF THE LEGAL FRAMEWORK

The subject of this Chapter is:

- *“How well do the agreements provide a reasonable framework for the addition of future TLDs?”*

### **Objective**

The obligations that run between ICANN and the gTLD registries are embodied in their registry agreements. The term “legal framework” in this Chapter refers to the registry agreements in force between ICANN and the seven new gTLDs, including their roughly two dozen appendices and attachments. These agreements are similar, but not identical. Each agreement contains key elements of the proposals that were submitted to ICANN for consideration, and which formed the basis for ICANN’s selection of these particular gTLDs. The agreements also reflect general ICANN policies and procedures. Yet there are differences, in particular, between the model used for unsponsored registries (.biz, .info, .name and .pro) and the model used for sponsored registries (.aero, .coop and .museum). Because the .pro agreement was concluded within a few months of the last sponsored gTLD, that new gTLD is included in this analysis.

This Chapter assesses how well the agreements provide a reasonable framework for implementing ICANN’s goals, as described in the Task Force Report. The goals were that:

- The agreements should assist in implementation of existing ICANN policies to the extent the TLD’s operation is relevant to those policies.
- The agreements should facilitate the implementation of future ICANN policies.
- The agreements should require adherence to the material provisions of the proposals that were selected by the Board.
- The agreements should be as uniform as feasible given the above considerations, so that similarly positioned registry operators and sponsors are treated in similar ways.
- The agreements should be enforceable by ICANN and avoid inappropriate risks of liabilities on ICANN's part.
- The agreements should avoid requirements not justified by the above considerations.

The Task Force originally posed a broader question for this Evaluation: “How well do the agreements provide a framework for the addition of future TLDs?” It suggested the Evaluation review several issues related to the goals ICANN sought to achieve in negotiating the agreements: Did ICANN introduce

“unnecessary complexity into the agreements over and above what is required?” Were ICANN’s goals “the appropriate goals for such agreements?” Should “any goals be added, modified or dropped?” Is “the separation between Sponsored and Un-sponsored, Restricted and Unrestricted, the most appropriate way to differentiate between different classes of TLDs?” And “how well do the goals tie into ICANN’s overall mission?” The Task Force also suggested some related areas where it believed input was needed, even if the subject was outside the scope of the evaluation: First, if the agreements conformed to ICANN policies, do those policies “need to be revised?” Second, irrespective of whether the agreements conformed to the initial proposals, were the specifications for the proposals “insufficiently precise?” Third, “are there types of gTLDs for which the existing agreements are not suitable?”

Prior to the beginning of this Evaluation, former ICANN President Lynn, who had chaired the Task Force, advised ICANN that it was not feasible to answer these questions within reasonable time and resource constraints. ICANN therefore narrowed the query to the more pertinent question of whether the legal framework provides a *reasonable* basis for going forward with additional TLDs. Specifically, did the legal agreements provide a reasonable framework for implementing the goals and objectives set by the Board for the “proof of concept?” As a result, this Chapter does not focus on whether the six goals described above were the right goals; whether the initial request for proposals was confusing; the future suitability of the sponsored/unsponsored and unrestricted/restricted distinctions; or how well the goals of the agreements tie into ICANN’s overall mission. It does discuss whether the agreements were unnecessarily complex, as well as the extent to which they provide a reasonable framework for the addition of future gTLDs.

This is perhaps the first time that the nature of these seven basic agreements and their two dozen appendices (which altogether number more than 160) has been subject to rigorous independent analysis.

### ***Methodology***

The methodology for answering the question posed was to assess the seven new gTLD agreements and their numerous appendices against the overall goals of the process described above, on the basis of textual analysis, contextual factors and interviews with personnel involved in the negotiating processes. The agreements were measured against the six goals outlined above: (1) assistance in the implementation of existing ICANN policies; (2) the flexibility to adapt to future ICANN policies; (3) adherence to the material provisions of the proposals selected by the Board; (4) relative uniformity, notwithstanding essential differences among the new gTLDs; (5) degree of enforceability by and protection for ICANN; and (6) avoidance of unnecessary requirements.

Interviews were conducted with many people, including ICANN's past and present General Counsels, ICANN's outside Counsel and ICANN Staff, both current and former members. The General Counsels of each Registry/Sponsoring Organization or their staffs were interviewed. Questions were asked of representatives from key ICANN constituencies, representing registrars, business, intellectual property and non-commercial interests. Views were sought from Board Members who were involved in the launch of the new gTLDs. The methodology included a review of the negotiating history and dynamics that led to the seven agreements.

## **Analysis**

### **Contextual Framework**

ICANN Staff optimistically believed they could negotiate the seven registry agreements within weeks of selection of the new gTLDs in mid-November 2000, and conclude them by the end of that year. That proved to be an overly ambitious schedule. As Chart 1 shows, the .biz and the .info Registry Agreements were concluded in May 2001. The .pro agreement was not completed until a year afterwards, although that delay was caused in part by RegistryPro reconsidering certain aspects of its business model.<sup>105</sup>

Although there were precedents for the new agreements in terms of the legacy regime that governed the .com, .net and .org TLDs, ICANN preferred to craft new agreements. Not only was it the first time that ICANN would be supervising the launch of new registries, but the organization wanted to see the existing .com, .net and .org agreements migrate over time to the same framework. Moreover, the legacy agreements were also inadequate to meet some of the six goals, such as “adherence to the material provisions of the proposals that were selected by the Board.” ICANN also had to determine how to implement the concept of “sponsorship” that had been developed during the selection process.

**Table 15 - Date of Agreements**

TLD	Date
.biz	May 11, 2001
.info	May 11, 2001
.name	Aug. 1, 2001
.museum	Oct. 17, 2001
.coop	Nov. 21, 2001
.aero	Dec. 17, 2001
.pro	May 3, 2002

<sup>105</sup> RegistryPro wanted to add a requirement that registrants purchase digital certificates. There were also changes in its funding posture. These changes are discussed in the section below on “Adherence to Selected Proposals.”

ICANN decided to conduct negotiations with the unsponsored registries first, and with the sponsored registries afterwards. The latter were unhappy to learn they had to wait, which was an understandable reaction after the thrill of being selected and the start of preparations for launch. But it was equally understandable that ICANN would prefer to proceed with the four unsponsored registries first, for it allowed the organization to draw more easily from existing TLD agreements. It was also natural to try to bring the larger registries online as soon as possible in order to begin to address competition concerns.

The ICANN team was led by its General Counsel, Louis Touton. Mr. Touton had a draft text ready for consideration by late December 2000. Theoretically, he could have adopted one of two approaches to the drafting process. One option was to develop a simple model, based solely on ensuring that the new gTLD built and operated the registry competently, in accordance with accepted technical standards, and was willing and able to abide by ICANN policies. Another option was a more detailed “hands-on” model, which would delineate all the various aspects of operating a registry and the precise relationship between ICANN and the new registry. After all, this was the first time that the DNS had been expanded in many years, and the new registry operators and sponsors had certain duties to the global Internet community. The Governmental Advisory Committee had advised ICANN earlier that “the Internet naming system is a public resource and that the management of a TLD registry must be in the public interest.” RFC 1591 (March 1994), which had been incorporated into the first Internet Coordination Policy document as “ICP-1: Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation),” stated that all TLD operators “are trustees for the delegated domain, and have a duty to serve the community. The designated manager is the trustee of the top-level domain for . . . the global Internet community.”

Other considerations on the General Counsel’s mind included concern that the new gTLDs not be able to take advantage of their monopoly status at the expense of registrars or registrants. Mr. Touton had already decided that it was important for the new operators to hew closely to the provisions of their proposals, out of fairness concerns and presumably to limit ICANN’s exposure to liability over the selection process. In light of these considerations, and motivated by an abundance of caution given the experimental nature of the proof-of-concept process that ICANN had launched, he adopted a “hands-on” model.

Negotiations commenced with each registry on an individual basis. Shortly thereafter, separate talks began between ICANN and VeriSign about amendments to the combined Registry Agreement for .com, .net and .org. The impetus for those changes was two-fold. VeriSign wanted to (i) maintain ownership of its registrar, Network Solutions, without – as it had agreed previously – reducing the term of its Registry Agreement to four years; and (ii) secure a presumption of renewal for .com. ICANN wanted to open up the .org

and .net registries to competitive bidding. The prospect of negotiating a new agreement between ICANN and VeriSign meant that the text of the new gTLD agreements could become an important baseline. Although different (but overlapping) sets of lawyers handled the gTLD and the VeriSign negotiations for ICANN, there was close coordination between them. The agreement reached for .com contains a presumption of renewal that the new gTLD agreements do not have, but the .com agreement does provide that any renewal shall be in “substantial conformity” with the provisions of the other registry agreements (other than the presumption of renewal, which would roll over).<sup>106</sup>

The registries did not strategize much with each other during the negotiations.<sup>107</sup> Some registries maintain that ICANN made it clear that they should not coordinate. It also appears that the registries chose not to share information out of competitive and proprietary concerns. In any event, both tactically and strategically, it made sense for ICANN to prefer to work with the registries individually on most elements of the negotiations. While there was joint work on certain topics, there were also significant separate contacts, regarding both the appendices and comments back to ICANN on the initial drafts. The General Counsel anticipated – rightly – that there would be resistance to certain provisions he sought. It would have been harder for ICANN to prevail in a setting where it was outnumbered by the registries.

Both sides characterized the negotiations as difficult. Nearly every word of certain provisions was the subject of fierce negotiation. Not surprisingly, tempers flared, particularly during one teleconference held jointly among ICANN and the four unsponsored registries on the subject of “registry services.” This call may have cemented the belief that ICANN did not want to negotiate text with all of the registries at once. For the most part, however, relations remained cordial. There was generally a great deal of mutual respect among the individuals representing ICANN and the registries. At the same time, the issues were new and complex, and progress was not as fast as hoped. Although the base agreement for the four unsponsored registries was approved at the ICANN Meeting in Melbourne in March 2001, the numerous appendices took longer to complete.

### **Reasonableness Test**

The critical question is whether the agreements as negotiated present a reasonable basis for going forward, when viewed against the goals that they sought to achieve. To the extent the goals that guided the 2000-2001 process may change in a future round of gTLD expansion, the degree of reasonableness of the current framework may change as well.

---

<sup>106</sup> Section 25 of the .com Registry Agreement provides that the “terms of the registry agreement for the renewal term shall be in substantial conformity with the terms of registry agreements between ICANN and operators of other open TLDs then in effect, provided that this Section 25 shall be included in any renewed Registry Agreement unless Registry Operator and ICANN mutually agree to alternative language” (<http://www.icann.org/tlds/agreements/verisign/registry-agmt-com-25may01.htm>).

<sup>107</sup> Unless, of course, they were represented by the same Counsel, which did happen.



### Implementing Existing ICANN Policies

A chief objective of the agreements was to ensure that they implemented then current ICANN policies. To the extent that such policies were not yet clear, Mr. Touton drafted what he believed they were, and let the public comment process and Board review determine whether he was correct. In developing the new policies, he looked to the .com/.net/.org Registry Agreement, registrar accreditation policies and IANA policies. Dr. Cerf, Chairman of the ICANN Board, believed that the policies underlying the agreements should – and did – reflect the most important goals of “fair treatment to registrants and reliable operation of the gTLD.” Significant parts of the agreements are devoted to ensuring that the new TLDs would operate reliably, treat registrars equally and, to the extent possible, protect registrants. Virtually no complaints have come to light that the agreements failed to adequately incorporate existing ICANN policies.

### Flexibility re: Future ICANN Policies

The ICANN Staff and Board believed it was critical that the agreements be flexible enough to adapt to new ICANN policies, without the need for constant amendment of each agreement. Three years later, success in achieving this goal has been somewhat mixed. One mechanism ICANN has for imposing new policies on registry operators without their explicit concurrence is through development of “Consensus Policies.” The agreements define the term as those policies “established based on a consensus among Internet stakeholders represented in the ICANN process,”<sup>108</sup> such as demonstrated by a Board decision, a policy recommendation passed by 2/3 of the GNSO Council, and a report documenting support and opposition. Section 4 of the unsponsored Agreement requires operators to comply with new or revised specifications and policies that are established as “Consensus Policies.” Section 4.3 of the sponsored Agreement contains a similar provision but limits the topics of consensus policies to those not delegated to the Sponsoring Organization. This overall approach signifies a compromise between ICANN’s need for flexibility to adapt to changing circumstances and the registries’ need for some protection against unilateral policy changes. Most registries understand the reason for the “Consensus Policies” provision, although they view it as an “unknown liability.”

There was some confusion about how “Consensus Policies” are to be developed, and the extent, if any, to which they are supposed to bind the ICANN Board. As in 2001, there is just one formal Consensus Policy that is binding on registries, which is the Uniform Dispute Resolution Policy (UDRP). (A Consensus Policy was formed recently regarding the Whois Data Reminder Policy, which is binding on registrars. It is likely that the policies on transfer and delete issues will soon be designated as “Consensus Policies.”) The bylaws that emerged from the ICANN reform effort no longer refer expressly to the notion of building consensus

---

<sup>108</sup> See, e.g., Section 4.3.1 of the ICANN-GNR Registry Agreement.

in the context of developing GNSO policy decisions, although the intent does not appear to have changed.<sup>109</sup> Instead, the bylaws adopted in December 2002 create a new process for recommending action to the Board, called the “Policy Development Process” (PDP). It contains similar procedural protections for any stakeholders in disagreement with the proposed policy, and specifies when the Board is bound by the process. Registries have expressed a preference for the PDP as “less vague.”

ICANN has several other methods at its disposal to reflect changing policies. First, it can revise specifications or policies when specifically allowed by the agreements, such as changing the format for requests to change nameservers. Second, with the consent of the registry, it can impose new requirements on registrars through the vehicle of the Registry-Registrar Agreement.<sup>110</sup> Registrars have fifteen days to accept such a change, or terminate their agreement with the registry. Finally, with of course the consent of the registry, ICANN can formally amend the agreements, as it has done a few times since 2001.

While ICANN has been able to amend the agreements to incorporate certain policy changes, it has so far not used consensus-type policy mechanisms as an effective alternative. Indeed, the shift in the ICANN Bylaws from explicit emphasis on use of a “consensus building process” has led some registries to suggest that the registry agreements themselves should to be amended. This does not appear necessary, as they do not refer specifically to the Bylaws. At the same time, it does appear that ICANN would benefit from an additional way to effect non-substantive amendments to the agreements. One such option is to specify that, on certain issues (e.g., format of notifications) either party may propose a change that would become effective absent objection by the other party by a certain date. If it is a provision that would affect all registries, then all – or at least a supermajority – should agree to it.

### Adherence to Selected Proposals

In the eyes of ICANN Staff, fairness concerns dictated that the legal framework mirror the proposals made by applicants during the selection process. Unlike the current round of sponsored gTLDs, the November 2000 process was competitive because only a handful could be selected under the “proof-of-concept” formula. It was believed that had applicants been allowed to change their proposals dramatically, it would have been unfair to those not selected, who did not have that same opportunity. It may also have led to litigation by those applicants that were not successful. The Board thought that this was a reasonable requirement,

---

<sup>109</sup> The amended bylaws do emphasize the ideal of consensus in decision-making relating to the newly formed ccNSO (Country Code Names Supporting Organization).

<sup>110</sup> See, e.g., Section 8 of Appendix F (Registry-Registrar Agreement) of the .biz Registry Agreement.

for the new TLD applicants would not have (or, perhaps more accurately, should not have) proposed a policy that they did not intend to implement.<sup>111</sup>

The Staff was therefore reluctant to approve any changes that they thought deviated from the proposals, which were instead sent to the Board for advice and approval. One change that understandably required Board approval was the amendment of the .name Agreement in August 2003 to permit registrations at the second level. Global Name Registry's plans for the TLD had earlier been the subject of some discussion at ICANN's Stockholm meeting. The Registry had sought to implement a second-level e-mail forwarding service as part of its Registry Agreement. One Board member, Amadeu Abril I Abril, was worried about the competitive impact of the service on registrars. He objected – ultimately unsuccessfully – that the idea had not been part of the selected proposal, but only mentioned as a possible service for the future, see <http://www.icann.org/minutes/minutes-31jul01.htm>. Another deviation that was referred to the Board for approval was RegistryPro's decision to require all .pro registrations to have associated digital certificates, as well as to reduce its funding commitment from \$17 million to \$8.5 million. (The reduction in budget was explained in terms of a decision to use outsourcing and more targeted marketing.) The Board approved both changes at its March 2002 Meeting in Ghana.

To the extent these discussions reflected genuine concerns for fairness, they were responsible for much of the specificity found in the agreements and appendices. The pressure Staff felt to ensure that new registries stuck to the main points of their proposals was reinforced by a desire to avoid litigation from unsuccessful applicants. At the same time, this pressure had a chilling effect on the adoption of possibly better ideas that emerged after selection. It also made it harder for registries to adapt their business plans to what was becoming a tougher economic environment. While the goal of consistency was reasonable, it led to a legal regime that was so detailed as to appear unreasonable when viewed in light of its other objectives. Specific examples of areas that perhaps did not need to be addressed in such detail, and that inadvertently made the agreements more difficult to enforce, are discussed under “Unnecessary requirements,” below. While adherence to proposals can be an important principle, it should not take precedence over other fundamental considerations, such as sound business practices and the need for a workable legal regime. Indeed, the threat of lawsuits may have inadvertently been exaggerated, as each applicant for a new gTLD executed detailed waivers as part of its original application to ICANN.<sup>112</sup>

---

<sup>111</sup> See, e.g., discussion at the Board's May 7, 2001 meeting on the draft agreements, at <http://www.icann.org/minutes/minutes-07may01.htm>.

<sup>112</sup> The waiver included, inter alia, that “the applicant hereby releases and forever discharges ICANN and each of its officers, directors, employees, consultants, attorneys, and agents from any and all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD.”

One sponsored registry commented that the notion of adherence was applied subjectively. It had wanted to stick to its proposal to use community registrars under certain circumstances, but ICANN staff rejected that idea. Instead, the base agreement requires that the “Sponsor shall ensure that all Registry Services are provided through one or more ICANN-Accredited Registrars,”<sup>113</sup> which is consistent with ICANN’s existing policies on registrar accreditation. The General Counsel rightly believed that ICANN’s policies should take precedence over applicants’ adherence to their proposals. At the same time, those policies could not have taken account of new concepts that ICANN was simultaneously trying to develop, such as the notion of “sponsorship.”

### Relative Uniformity

Among the four unsponsored gTLDs, the registry agreements are nearly identical, with a few exceptions. The main areas where they differ are on start-up plans and schedules, the extent of registration restrictions, and the presence of naming conventions. The .biz, .name and .pro agreements, for example, all include restrictions on which parties may register. The .name and .pro agreements have detailed provisions on their unique naming conventions. Borrowing a page from the sponsored registries, the .pro agreement includes establishment of an Advisory Board to review the categories of qualified registrants in the areas of law, medicine and accountancy.

There are differences between the unsponsored and the sponsored arrangements, although the basic elements are the same in many respects. The .aero, .coop and .museum agreements delegate some of ICANN’s authority, such as selection of the Registry Operator, to the Sponsoring Organization. They also have more flexibility with respect to naming conventions, registry pricing and services. They contain Charters describing their respective mandates and communities. They are obliged to maintain the “representativeness of their policy development processes (section 4.2.3) and to ensure that any revenues received by the Sponsor are used “solely for the benefit of the Sponsored TLD Community” (section 4.2.5).

Despite the differences, sponsored registries generally believe that there was not enough consideration of their unique roles. While the legal framework may have succeeded in providing relative uniformity among the new gTLDs, this was not necessarily seen as an advantage. As one European Commission official noted, diversity was supposed to be a consideration in choosing the seven new gTLDs. Whether this diversity sought to manifest itself in terms of registry innovation or particular community needs, the sponsored TLDs expected more independence from ICANN. The sponsored registries also questioned why constraints that were intended to address the .com TLD’s size and “first-mover” advantage should apply also to them. In retrospect, the legal framework could have been

---

<sup>113</sup> See, e.g., Section 3.6 of the .coop Registry Agreement.

more responsive to the particular needs of the sponsored TLDs, which are quite different than unsponsored TLDs. As one sponsor commented in the context of assessing the agreements, “ICANN should not be slavish to the idea of uniformity at the expense of the individual registry.”

### Enforceability by & Protection for ICANN

There have been few issues involving the scope of ICANN's ability to enforce the new gTLD agreements. The focus has instead been on whether ICANN has the resources and focus necessary to enforce registry (and registrar) contractual obligations, which is a different question. The Business and Intellectual Property constituencies have been requesting ICANN to be more vigilant about enforcement for some time. Several members have suggested that ICANN needs “incremental penalties for enforcement” that are automatic, at least in cases where an infraction is relatively easy to prove. ICANN has historically been too understaffed to devote sufficient resources to enforcement, but that is changing. There have been no suggestions that ICANN lacked sufficient enforcement authority under the agreements, just adequate resources and tools to exercise it.

The protections in the agreements for ICANN also appear adequate. The organization has not faced any lawsuits by the new gTLDs, or other suits on the basis of the registry agreements. There were lawsuits filed just before the 2000 selection process,<sup>114</sup> but they were unconnected to the legal framework being evaluated here.

### Unnecessary Requirements

Current and former registry representatives indicated in interviews that there were numerous requirements they view as unnecessary, or at least of questionable necessity. There are of course a range of views on what a registry agreement should cover, and in how much depth. In developing a model agreement – whether it be a contract between two commercial entities, a treaty between two sovereigns or another type of legally binding regime – there can be tension between making the most important obligations clear and including every detail that has been agreed. Perhaps most important, then, is a common understanding of the required conduct and the way in which unforeseen issues will be addressed, without the need for constant amendment or the inclusion of every detail.

While there were different views on what elements should be, and should not be, included in a new gTLD agreement, no one interviewed believed the agreements

---

<sup>114</sup> In *Economic Solutions, Inc. v. ICANN*, No. 4:00CV1785-DJS (E.D. Mo. 2000), the court denied a temporary restraining order to stop award of a .biz TLD on grounds that it would be confusingly similar to the ccTLD .bz operated by plaintiff. In another case, ICANN defended its warning to the Regland company not to market “pre-registration” in TLDs that were yet to be awarded.

needed more detail. On the contrary, most thought that the agreements could be streamlined to cover only the most fundamental aspects of operating a registry. It indeed seems that a number of other elements could have been left to the discretion of the registry, subject to meeting certain baseline requirements. A safeguard to avoid the exercise of undue discretion by the registry operator or sponsor would be to give ICANN an opportunity to object to a proposed course of action within a limited amount of time. Another way to help streamline and focus the agreements would be to bind all common elements (e.g., Whois obligations) in one place and incorporate them by reference, rather than by repetition.

As we now examine these issues in more detail, it is important to emphasize that the purpose of this part of the Evaluation is to assess the reasonableness of the legal framework for moving forward. Considering only whether the framework was reasonable at the time it was developed will not help judge whether its elements also provide a sound basis for moving ahead. By the same token, assessing whether provisions were necessary or not solely in light of the other objectives at the time (e.g., implementing ICANN present and future policies, adherence to the proposals, uniformity, and enforceability) is not as useful as determining whether the agreements have satisfied these objectives over time.

One Registry official commented that the agreements “should make business sense,” “be enforceable,” and “be easy to live with.” Yet they contain extraordinary detail on many issues, ranging from not only technical registry operations, but also notification formats and marketing budgets. There are also many instances of redundant provisions that appear in both the base agreement and one or more appendices. Even among the appendices, there is unnecessary repetition. For example, the Rebate Program under which Afiliás – which began as a consortium of registrars – offered to rebate to accredited registrars the greater of either a quarter of its cash on hand each year, or a third of the amount of dividends payable to its shareholders, is established by both Appendix W (“Additional Covenants”) and Appendix G (“Price Schedule”). The Whois specifications are divided into three separate Appendices (for public access, for provider access and for ICANN), in addition to Whois provisions in the base agreement. It must be emphasized that it was not only ICANN that was interested in specificity. On several occasions, it was the registries themselves that wanted the level of detail they received. But this does not mean that the current agreements provide the best model going forward.

Most questions focused on the appendices, rather than the base agreements. In the latter, the renewal provision and the prohibition on registries acting as registrars were the main areas of concern. As mentioned in Chapter 4 in the context of competitiveness, nearly all registries expressed the view that they should have been given the same renewal presumption as .com, or at least an

initial registry term longer than five years.<sup>115</sup> To compensate for the possibility that a new gTLD would not be selected as the successor registry upon expiration of its agreement, any successor registry is obliged to pay a transfer fee based on a calculation involving the prevailing LIBOR rate (plus 3%) and the revenue stream of renewals. One of the registries had proposed this formula as better than no compensation at all, in the absence of a presumption. Also as mentioned in the previous Chapter, the sponsored registries felt strongly that they should not have been limited to using ICANN-accredited registrars, particularly when their registration numbers were relatively low and it was proving difficult to interest registrars in their TLDs.

The numerous appendices came in for the harshest criticism. For unsponsored gTLDs, the base agreement includes 23 or 25 appendices covering a multitude of issues. The issues range from technical specifications to registration procedures to sanctions for violations. Some of these annexes were drafted by the registries at the request of ICANN, with direction from ICANN that they draw heavily on the gTLD proposals that they had submitted. Others were drafted by ICANN and intended, in part, to be consistent with the Registry Agreement for .com, .net and (at the time) .org. The new TLDs reported that some of the annexes were included in spite of their misgivings or, in some cases, over their objections. For the unsponsored registries, most comments concerned Appendices C, R, S, T, U, W and Y. Where these Appendices correspond to the Attachments to the unsponsored agreements, both are noted below.

Appendix C (Attachment 6) addresses Functional Specifications. The version in the .info Registry Agreement was cited frequently by people interviewed – other than Afilias officials – as an example of extraordinary and unnecessary detail. This Appendix represents about one half of the bulk of the entire Registry Agreement. It contains an Executive Summary, 12 sections describing every subject from the SRS Protocol to customer support to the actual functional specifications, and several attachments. The Appendix even specifies the type of hardware that Afilias and its subcontractors are to use. This approach to drafting makes it harder to determine which provisions are the critical ones. It means that minor changes, for example in the brand of hardware being used, require ICANN's involvement, possibly at the expense of more substantive work. The same Appendices for .biz and .name are also extremely detailed.

When asked about the need for such detail, Mr. Touton noted that the Appendix had been drafted by the Registry Operator. Afilias did prepare the first draft of the appendix, but ICANN instructed it to incorporate all elements of its technical proposal. This was obviously a critical annex in the context of getting the new TLD off the ground smoothly, and part of its length no doubt stemmed from the fact that .info was one of the first agreements to be negotiated. By the time that

---

<sup>115</sup> Section 5.1.2 of Afilias' Agreement extends the term by one year if the Registry has more than 19,827,980 registrations, a figure that the Registry thought was realistic at the time. The same provision was included in the other registry agreements too.

ICANN concluded the Registry Agreement with .museum five months later, the Appendix on Functional Specifications had been reduced to a mere page (see Attachment 6 to the .museum Registry Agreement, at <http://www.icann.org/tlds/agreements/sponsored/sponsorship-agmt-att6-08sep01.htm>). Wisely, the .museum agreement incorporates important IETF standards by reference, stating that “the Sponsored TLD MUST be operated in compliance with the following Requests for Comments (RFCs): [1034](#), [1035](#), [1101](#), [2181](#), [2182](#).” The .museum agreement also incorporates other appendices by reference, rather than restating all of the obligations. For example, instead of repeating the Whois provisions in other appendices of the .museum agreement, the Functional Specifications state simply that “Whois service MUST meet at least the functional specifications set forth in Attachments 15, 16, and 17.”

Appendix R (Attachment 18) deals with Data Escrow specifications, and Appendix S (Attachment 19) contains the model Data Escrow Agreement. These provisions should be supplemented with more comprehensive provisions on disaster recovery in the base agreement. There was concern expressed that these provisions do not yet function as they were intended. Afilias has executed the model escrow agreement with an agent and ICANN, while NeuLevel has concluded an agreement with a third party only. Other registries are waiting for clearer guidance from ICANN on what is required. Since ICANN does not yet have a system in place to spool data from escrow, they have not been insisting on compliance. This is not a workable solution, and attention to this subject should be made a high priority.

Appendix T (Attachment 20) details monthly Reporting Requirements. These reports must describe the number of registrars providing service in the TLD, Registry SLA performance levels,<sup>116</sup> monthly growth trends, and other information related to registry operations. Appendix U (Attachment 21) requires initial and annual “Proof-of-Concept” Reports (officially called “Concepts Reports”). These reports are to include descriptions of the start-up periods in terms of Sunrise and other registrations, dispute resolution, marketing efforts, registrar complaints and capital expenditures. A number of registries complained that these reports were burdensome to prepare. Several wanted to know precisely what they were used for. Others wanted to know if all of the information was necessary. They noted that some information, such as which region a registrant is from, is not registry information but belongs to registrars. Other information, such as that necessary to determine the coincidence between a new gTLD and domains in .de and .uk, was deemed not readily available.

The requirements are lengthy, and it would be reasonable to re-examine precisely what information is necessary. For the monthly reports, it is possible that some of the information, such as geographic distribution, might be provided on a quarterly or less frequent basis, if it turns out it is truly a burden to provide. There is clearly widespread interest in and use of the monthly numbers indicative

---

<sup>116</sup> The Service Level Agreement is described in Appendix E of the Registry Agreement.



of growth trends, so that information should not be changed. With respect to the Concepts Reports, these too provide helpful information, although they need to be streamlined, both in terms of the disparate reporting deadlines and the extent of information required. It would be a fair bargain for ICANN to undertake to review both reporting requirements in exchange for the registries actually filing the required reports, and doing so on time. At present, registries file the monthly reports regularly. The Concepts Reports, however, tend to be filed late, if at all. NeuLevel, for example, did not file the Concepts Report that was due 120 days after the end of its Sunrise period until recently. Afilias filed its first Concepts Report on time in August 2002, but has failed to file follow-up annual reports, including one on whether "Registry Services Can Effectively Be Provided by a Registry Operator Cooperatively Owned by the Registrars" that was due in October 2002.<sup>117</sup>

Appendix W (Attachment 23) contains Additional Covenants for all registries, several of which are uniform. This appendix contains funding and marketing commitments, which have led some to ask why those should not be left to business decisions. Appendix W also prohibits all registries from merging with a TLD operator that has more than 10 million registered names under management, or any of its affiliates. While an understandable provision given the emphasis on promoting competition, the sponsored registries felt that such statements did not take their unique characteristics into account. For Afilias, Appendix W also requires that it offer a "Subscription Program" to enable all registrars the opportunity to purchase Class B shares of Afilias.

Appendix Y specifies a Sanctions Program of financial penalties for unsponsored registries as one way to enforce compliance with Appendices H (Equivalent Access Certification) and I (Registry Code of Conduct). A finding of a violation by ICANN, after provisions for notice and comment by the Registry Operator, can result in penalties of \$10,000 for minor violations and \$100,000 for more serious ones. ICANN has not found violations, although it considered whether to do so in one situation before declining to take action. Nonetheless, the new gTLDs resent the way the provisions were imposed on them, and characterize the text "as rammed down our throats" because it had to be included in the .com Registry Agreement.<sup>118</sup> For this reason, ICANN agreed in "the event that the gTLD Constituency of the [DNSO] proposes a substitute Appendix Y at any time prior

---

<sup>117</sup> Interestingly, the Reports were mandated in part to assist with this Evaluation. Those that have been filed have been helpful, but they are not a substitute for an independent assessment based on discussions with the registries and other members of the community.

<sup>118</sup> Appendix Y was added to the .com, .net, and .org agreements negotiated in early 2001 with VeriSign after they were completed but before final approval by the ICANN Board, based on concerns expressed in the community that VeriSign might not respect the required separation between its registrar and registry business units. In accepting the addition of specific sanctions to its Registry Agreements, VeriSign insisted that the sanctions practice "should apply to all registries." See <http://www.icann.org/correspondence/sclavos-letter-to-lynn-01apr01.htm>.

to 1 May 2002, and ICANN determines (following an appropriate process of public notice and comment) that substitution by that Appendix Y would serve the interests of the Internet community, the substitution shall be made." No such alternative, however, was ever proposed by the gTLD Constituency.

### Other Issues

It was important to ask registries not only what provisions in the agreements seemed unnecessary, but also whether there were any issues not included in the original framework that should have been. Two omissions came to light.

First, a major issue is the need for stronger recovery mechanisms to help a failing registry and manage the migration to a new system. Both registry and ICANN officials stressed the critical importance of including recovery mechanisms. Dr. Cerf suggested that the agreements pay closer attention to the importance of business continuity, and specify an alternative for the TLD if there is registry failure or malfeasance. Indeed, the RFP for the new round of sponsored TLDs includes "assurance of continuity of registry operations in the event of business failure of the proposed registry" as one of the four technical criteria a successful applicant must meet. Section 4.2 of the base registry agreement recognizes the need for such provisions when it specifies that "procedures to avoid disruptions of registration due to suspension or termination of operations by a registry operator" as one of the areas where a Consensus Policy could emerge. In light of the large electrical outages that occurred in some power grids in 2003 in the United States and Europe, greater attention should also be paid to spreading out the location of data centers. In addition, registries should – either as an ICANN requirement or on their own initiative -- practice fail-over from one data center to another at least once every two years.

The second issue involves important process questions and affects the registries' ability to function as both a business and in the public interest. Several registries supported a more streamlined process for seeking approvals from ICANN Staff and the Board. The process ought to specify which changes can be made by ICANN Staff alone, and which must be approved by the Board, and the timeline for both kinds of decisions. ICANN is being responsive to these concerns, with initiation of a PDP on the "Need for a Predictable Procedure for Change in the Operation of TLD Registries," see <http://www.icann.org/gnso/issue-reports/registry-svcs-report-19nov03.htm>. These changes are important to provide the registries with greater business certainty, and it remains to be seen if the PDP will meet these expectations.

### **Conclusion**

The new gTLD agreements reflect an approach of intensive drafting and detail, which may not be appropriate to future TLDs. While it is understandable for ICANN to have wished to err on the side of caution as it undertook gTLD

expansion -- its most significant task at the time -- the resulting legal framework is cumbersome. This recommendation should not, of course, be interpreted to imply there is anything wrong with detailed agreements when they are necessary for smooth implementation.

The agreements did a satisfactory job of reflecting then current ICANN policies, particularly when those policies were not collected in any one place at the time. The ability of the agreements to adapt flexibly to new policies is less clear. ICANN has had to amend them in several instances since 2001, such as to reflect new policies on redemption grace periods, when other processes (e.g., adoption of a Consensus Policy) would have avoided that. The legal framework has served well the goal of protecting ICANN from exposure to litigation over the new gTLDs. It has also given ICANN broad enforcement authority that it can use to secure compliance. There have been complaints, however, that a more effective method of enforcement for implementing its broad authority is needed, such as a tool box of less severe sanctions that can be applied with automaticity. There was relatively strict, if sometimes inconsistent, insistence that the agreements adhere to key provisions of the original proposals, although it is debatable whether this was always the wisest course. To some extent, this adherence was responsible for the extraordinarily detailed level of commitments found in the appendices. While the agreements are relatively uniform, there are some cases -- such as with respect to the use of accredited registrars for sTLDs -- where divergence would have made more sense.

The detail of the agreements may unintentionally make it harder to pinpoint and enforce the most critical elements. It seems clear that the number and length of appendices could be reduced in a future round. A streamlined base agreement with perhaps a few appendices could provide a more workable format that also preserves the critical elements of registry performance and mandates compliance with ICANN policies. Using the one-page functional specifications in the sponsored agreements that reference IETF standards, for example, would be a promising start. There should also be enough flexibility inherent in the agreements to deal with routine issues, rather than try to address every conceivable one directly in the text. Registries could, for example, be given wider latitude on certain non-substantive issues, with an opportunity for ICANN to object within a certain period of time. And ICANN could be given authority to implement new policies in limited areas if a supermajority of registries (e.g.,  $\frac{3}{4}$ ) agree. It will also be helpful to define a clear process for seeking ICANN approvals pursuant to the agreements, determining when amendments are necessary, who has to approve them, and in what timeframe, before additional TLDs are launched.

## CHAPTER 6: LEGAL & REGULATORY ISSUES

The Task Force posed the question:

- *“Have the new gTLDs encountered any legal or regulatory problems that were not considered at the outset, and, if so, how could they have been avoided?”*

### **Objective**

The Task Force Report stated that the “key indicator here is whether lawsuits have been launched or threats of lawsuits have been made that caused major changes in behavior on the part of either the gTLD registry operator or of ICANN.” It suggested an analysis of “major changes that each registry was obliged to make, if any, as a result of lawsuits or other legal threats, complaints received, or to comply with regulatory or other unforeseen requirements.” It recommended that a “survey of the registries would be useful in this regard to the extent they are willing to share information not obligated by their Agreement with ICANN.”

### **Methodology**

This component of the Evaluation analyzes whether the new gTLDs have encountered any legal or regulatory problems, or other “unforeseen requirements” of major significance. This analysis does not duplicate the examination of issues that arose during the start-up phases. It instead focuses on whether there were lawsuits filed, or threatened, or other circumstances, that caused major changes in the behavior of the new registries and sponsors. If so, which changes were required to be made? Were they the result of lawsuits, threats of suit, complaints, other problems, or done on the registries or sponsors’ own initiative? Few legal issues were found in the course of investigation, but there were a number of other issues that came to light.

The Methodology included:

- Interviews with ICANN General Counsel, outside Counsel and Staff, including current and former members;
- Interviews with the General Counsels of each Registry or their staffs and, where applicable, the sponsoring organizations;
- Interviews with lawyers and other representatives from key ICANN constituencies; and
- Docket search of U.S. courts to confirm the number of disputes that resulted in litigation.

## **Analysis**

This section of the Evaluation examines the extent to which regulatory or legal issues arose, other than those relating to the start-up period. Each of the six new gTLDs that are fully operational was interviewed about whether it had faced lawsuits, or the threat of lawsuits, since launch. Each of the six gTLDs indicated that there were no other lawsuits filed, or threatened, or other legal issues that caused major changes in their behavior. No evidence to the contrary emerged during the course of the Evaluation.

A number of regulatory issues that affected their operations did arise, and are discussed below. Several of them mentioned an issue that is not “regulatory” in origin, but which nonetheless created a serious hurdle that has not yet been completely overcome: forging the right technical and policy approach to software compatibility and acceptance problems. All new gTLDs with roots longer than three letters – which includes all but .biz and .pro – faced this problem. They initially found little support for resolving the problem. The problem is discussed below from a policy, rather than a technical, perspective.

### **.info**

#### Country Names

Afilias encountered two regulatory problems that were not foreseen. While both might have been foreseen, they are quite different in nature. The first issue involved the registration of “country names.” While this problem was related to the .info start-up, it has broader implications, beyond the new TLDs. The GAC grew concerned at indications that a large number of names of countries and distinct economies had been abusively registered during the Sunrise period by non-governmental authorities. As noted in a report of the .info Country Names Discussion Group (ICNG), “[t]he appropriate use of such names is of concern to governments and other public authorities in the light of the risk of their speculative and abusive registration and use, particularly by registrants and resellers without any relationship with the country or place concerned” (<http://www.icann.org/accra/icng-topic.htm>). The GAC Communiqué of September 9, 2001 called for interim measures by ICANN and the Registry to prevent conflicts due to the “very special nature” of .info. A day later, the ICANN Board authorized Afilias, as a temporary measure pending further discussion, to reserve country names that were not already registered, so that they could be transferred to the relevant governmental entity upon request. This decision was made only shortly before Afilias was scheduled to “go live” in September 2001.

Pursuant to the ICANN Board’s instructions, Afilias temporarily registered 129 names that had not been registered during Sunrise while the .info Country Names Discussion Group (ICNG) began its work. The remaining 198 names

were the subject of challenges under Sunrise, with 17 registrations challenged by third parties and a large number challenged by the Registry.<sup>119</sup>

There was some concern by the DNSO Names Council that reserving .info names would set a troublesome precedent.<sup>120</sup> The GAC responded that the DNSO "appears not to recognize the major effort made by GAC members to circumscribe and limit their requirement for reservation of names of countries in .INFO according to ISO 3166-1, as well as actively seeking cooperation with Afilias regarding the approach" (<http://www.icann.org/committees/gac/names-council-resolution-commentary-26oct01.htm>). After the ICNG report was considered at ICANN's Ghana Meeting, the Board accepted the recommendation that the 329 country names on hold be made available for registration by relevant governments and public authorities see <http://www.icann.org/minutes/prelim-report-14mar02.htm>. At present, only about 10 names are reportedly still registered to third parties. Approximately 30 names have been registered by governments through a GAC/Afilias procedure that has been established. Another 20 names are in the process of being transferred to the relevant government. A number of names are in active use (see, e.g., <http://spain.info/TourSpain/Home?Language=en>).

### TLD Acceptance

A second issue Afilias faced concerned TLD acceptance, which was shared by all new gTLDs with four or more characters. Most existing gTLDs have three characters (e.g., .com, .net, .org, .gov, .mil, .edu), and ccTLDs have two characters. Only one gTLD, which is not widely used outside of limited circles -- .arpa -- has four letters. As a result, the new gTLDs had compatibility problems with the software used by Internet infrastructure operators (including ISPs and corporate network operators) and application providers (including web hosting companies and email services). The problem was flagged in Summit's March 2003 sTLD Compliance Report, which focused on .aero, .coop and .museum.

Afilias' Chief Technology Officer, Ram Mohan, worked with Bruce Tonkin of Melbourne IT to alert the ICANN Security and Stability Committee (SSAC). In a paper published in August 2003, SSAC highlighted the problem as lying with the DNS resolvers, provisioning software (for the creation of web sites and email services), and end-user application software (such as email programs and web forms). The SSAC paper stated that:

"Sometimes, as in the case of many DNS resolvers, a configuration change is all that is needed to support the new TLDs. Other times, as in the case of checking user input against expected behavior, there are

---

<sup>119</sup> ICANN Accra Meeting Topic: Draft Report of the .info Country Names Discussion Group, Feb, 21, 2002, at <http://www.icann.org/accra/icng-topic.htm>.

<sup>120</sup> The .aero TLD also does not accept registrations for country names.

problems because a fixed list of TLDs is used or TLDs are presumed to be at most three characters in length.

Some web applications use algorithms that guess or attempt to automatically complete domain name entries (e.g., search engines, directories, browsers) when a fully qualified domain name is not supplied. Problems arise when these applications use an outdated list of TLDs, or attempt to redirect users to a different TLD when the user's intent was to lookup one of the new TLDs."<sup>121</sup>

SSAC suggested several remedies, including calling upon:

- ICANN to develop an Advisory on support for new TLDs that would be publicized through its website and constituencies;
- ICANN to recommend the IAB consider issuing an informational RFC on this issue;
- Internet infrastructure providers that have customized software for Internet service provision to test whether it supports the new gTLDs and promptly correct any problems; and
- Internet software application developers to review their software for support of new TLDs and address any problems quickly.

The situation has improved since last year, but it is not yet resolved. It is helpful to have SSAC involved. As will be seen below in the discussion under .aero, the IETF is also playing a constructive role. Both efforts would be helped considerably by the designation of a member of ICANN Staff to develop an action plan for next steps. These steps might include (i) assessing the current dimensions of the problem; (ii) monitoring its improvement; and (iii) publicizing any shortcomings.

## **.biz**

### Alternate Roots

NeuLevel's right to operate .biz was challenged by the AtlanticRoot Network, Inc. (ARNI), which operates the "BIZ TLD Registry." The "BIZ TLD Registry" is run outside of the authoritative DNS root operated by ICANN under its Memorandum of Understanding with the U.S. Department of Commerce (DOC), and is often referred to as an alternate root. Leah Gallegos, the President of ARNI, raised her concerns about fairness in a petition to DOC and in testimony before the U.S. Congress. She argued, among other issues, that approval of the new .biz TLD

---

<sup>121</sup> "Support of New Top-Level Domains by Internet Infrastructure Operators and Application Providers," by the ICANN Security and Stability Committee (August 25, 2003).

would undermine ARNI's rights, including property rights in the .biz alternate route.

On May 8, 2001, NeuLevel issued a strong rebuttal, pointing out that the .biz launch would not interfere with the continued ability of alternate roots to operate outside the DNS. It also pointed out that ARNI cannot have a property interest in a TLD extension, as gTLDs are not considered property under U.S. law. The ICANN-NeuLevel Registry Agreement was signed three days later, and inclusion of ".biz" into the authoritative root was subsequently approved by DOC. Although NeuLevel did not question the basis for the surge in ARNI registrations after ICANN selected .biz in November 2000, others did look at the data. Ben Edelman, a Fellow at the Berkman Center for Internet and Society at Harvard Law School, conducted an "Analysis of Registrations in the ARNI .BIZ Top-Level Domain," posted at <http://cyber.law.harvard.edu/people/edelman/dotbiz>, which compared the size of the ARNI registry on November 15, 2000, and on June 15, 2001. He found tremendous growth, from 297 to 3,788 names. He also noticed "substantial 'clumping,'" with 5% of the registrants responsible for 31% of the registrations. It appears that ICANN's selection of NeuLevel to operate the authoritative .biz root actually boosted ARNI's numbers, whether in protest, as a misperceived opportunity to pre-register preferred names, or for other reasons.

Former ICANN President Lynn considered the longer-term implications of the question of alternate roots important enough to warrant its own Internet Coordination Policy (ICP) document. On July 9, 2001, Dr. Lynn published "ICP-3: A Unique, Authoritative Root for the DNS."<sup>122</sup> His paper commented in particular on objections by alternate root operators to launch of the new gTLDs:

"In fact, some of the operators of these alternate roots state that stability is not an important attribute for the DNS. This thesis, for reasons already stated, is at fundamental variance with ICANN policy as embodied in its founding documents. Some of these operators and their supporters assert that their very presence in the marketplace gives them preferential right to TLDs to be authorized in the future by ICANN. They work under the philosophy that if they get there first with something that looks like a TLD and invite many registrants to participate, then ICANN will be required by their very presence and force of numbers to recognize in perpetuity these pseudo TLDs, inhibiting new TLDs with the same top-level name from being launched through the community's processes.

No current policy would allow ICANN to grant such preferential rights. To do so would effectively yield ICANN's mandate to introduce new TLDs in an orderly manner in the public interest to those who would simply grab all the TLD names that seem to have any marketplace value, thus

---

<sup>122</sup> President Lynn also published a companion piece, "Keeping the Internet a Reliable Global Public Resource: Response to New.net 'Policy Paper' " at <http://www.icann.org/icp/icp-3-background/response-to-new.net-09jul01.htm>.



circumventing the community-based processes that ICANN is required to follow. For ICANN to yield its mandate would be a violation of the public trust under which ICANN was created and under which it must operate . . .  
.”

The ARNI challenge did not result in litigation against NeuLevel, and did not interfere with its launch.

## **.name**

As a company headquartered in the United Kingdom selling a product geared to individuals, Global Name Registry had to balance potentially conflicting obligations under its Registry Agreement and the EU Data Protection Act of 1998 (the Act). The Act limits the ability of a company to process personal data and transfer it to the majority of countries outside of the EU. A standard registry agreement requires a gTLD operator to provide “free public query-based access to up-to-date data concerning domain-name and nameserver registrations maintained by Registry Operator in connection with the Registry TLD,” including telephone, fax and email information about the registrant. The Global Name Registry wanted to operate consistently with both requirements, as well as respond to increasing concern in different countries about consumer privacy issues. In December 2002, it secured ICANN Board approval to modify its Registry Agreement with respect to the extent of publicly available Whois information.

Appendix O of the .name Registry Agreement now authorizes the use of four different methods to return Whois information. A “Summary Whois Query” provides very limited information, such as whether a domain name exists and its registration status. A “Standard Whois Query” provides more information, including: registrar ID, admin ID, technical ID, billing ID, Nameserver ID, creation date, and expiration date, but not personally identifiable data. A “Detailed Whois Query” and an “Extensive Whois Query” require passwords. A password for a “Detailed Whois Query” is available to the general public. Such queries return more contact information about registrants, although not e-mail addresses or phone or fax numbers for administrative, technical or billing contacts if they are the same as those of the registrant. A password for an “Extensive Whois Query” is obtained by executing a contract with the Registry and agreeing to use it for only certain purposes (e.g., enforcement of legal rights; consumer protection). This type of query returns all traditionally required contact information, as well as information about e-mail forwarding registrations.

The Registry petitioned for this change after consulting broadly, including with the intellectual property, business, law enforcement and registrar communities. While the Registry already had authority to suppress a registrant’s telephone

number and email address, it was not able to do so with respect to a registrant's technical, administrative and billing contacts. In a large corporation, different company officials usually fulfill these roles. In the case of personal name registrations, however, the registrant is likely also to be the technical, administrative and billing contact. Hence, the registrant's telephone number and email address were listed under these other fields and as a result publicly available. The communities consulted found the Registry's concern about the privacy of its registrants and need for full compliance with the Act to be compelling. They supported the change as long as it did not set a precedent for other TLDs, which were not specifically geared to individual registrants. The UK Data Protection Commissioner also reviewed and contributed to the change.

The Registry is awaiting the outcome of the Whois discussions under way in the ICANN community before implementing the revised procedure, in case it will be affected by those results. At present the Registry uses the four categories – Summary, Standard, Detailed and Extensive -- to differentiate the information it provides in response to Whois queries. It does not, however, require a password to conduct a "Detailed" search. The information returned can include the telephone numbers and email addresses of administrative, billing and technical contacts, even if it is synonymous with that of the registrant. It does require a password for "Extensive" information, which can be obtained online.

No complaints emerged during the Evaluation about the mechanisms Global Name Registry has developed to avoid a direct conflict between its obligations under the Act and its commitments to the ICANN community. The Registry worked hard to find a balance that shows respect for privacy concerns but also enables communities that require complete Whois data the ability to access it.

### **.museum**

MuseDoma did not face any significant regulatory issues. Like the other new gTLDs with more than 3 letters, it faced technical acceptance problems. The situation became so frustrating that MuseDoma indicated it wished it had instead launched a three-character TLD.

### **.coop**

MuseDoma also did not face any significant regulatory issues. Like the other new gTLDs with more than 3 letters, it faced technical acceptance problems. DotCoop noted that a number of ISPs would not support a .coop name. Sometimes the ISP was simply unfamiliar with the new TLD, and was able to support it after discussion with dotCoop staff. Other times, the ISP refused and

even informed the registrant that it would have to go elsewhere for support. In a few cases, the ISP agreed to support the name, but only at a higher price for service.

## **.aero**

SITA faced three issues it classified as regulatory: (i) technical acceptance; (ii) data protection issues; and (iii) the migration of “.int.”

### TLD Acceptance

SITA was concerned that parties actively using their new .aero web and email addresses continued to experience acceptance difficulties. It found that some ISPs and websites, even within the aviation community, still did not recognize names from the new TLDs. SITA had raised the problem with ICANN Staff during 2002-2003, believing that resolution of the issue was critical for the success of other new TLDs too, and should therefore be coordinated by ICANN. After little happened, SITA decided to take direct action by seeking the assistance of John Klensin, former Chair of the IAB. Dr. Klensin posted the first Internet-Draft to the Network Working Group of the IETF on the subject in February 2003. The document was submitted to the RFC Editor in June, returned for revisions in August, and resubmitted in September. By February 2004, RFC 3696 on “Application Techniques for Checking and Transformation of Names” was published (see <ftp://ftp.rfc-editor.org/in-notes/rfc3696.txt>). It has recently been endorsed by the IAB.

The RFC summarized the relevant rules, references and standards in an effort to encourage providers to remedy the problem as quickly as possible. As the document notes:

“If criteria are applied that do not match the protocols, users will be inconvenienced, addresses and sites will effectively become inaccessible to some groups, and business and communications opportunities will be lost. Experience in recent years indicates that syntax tests are often performed incorrectly and that tests for top-level domain names are applied using obsolete lists and conventions. We assume that most of these incorrect tests are the result of the inability to conveniently locate exact definitions for the criteria to be applied.”

At the ICANN Public Forum meeting in Rome in March 2004, Dr. Cerf, Chairman of the ICANN Board, highlighted the need for a “concerted effort to uncover the problem and try to aim people who can solve it to deal with it . . . .” The attention focused on the problem by SITA, Dr. Klensin, and Dr. Cerf, combined with Afiliat’s efforts in SSAC, are all steps in the right direction. But, as noted, above, they would be helped considerably by designating a member of the ICANN Staff to (i)

assess the current dimensions of the problem; (ii) monitor its improvement; and (iii) publicize any shortcomings.

### Data protection

SITA has some concerns in common with Global Name Registry on data protection issues. Both registries are mindful of the need to be compliant with their ICANN and EU obligations. SITA's situation is different, in that its registrants are predominantly businesses and organizations, not natural persons. Nonetheless, its Registry Operator -- SITA INC -- is a Belgian company and its back-end provider -- CORE -- maintains .aero support operations and data in Germany. SITA views the agreement that registrants conclude as part of the registration process, under which they consent to the Whois use of their data,<sup>123</sup> as a compromise until its concerns are factored into ongoing ICANN discussions on Whois policy.

### “.int”

The ICANN-SITA Registry Agreement required SITA to relinquish its use of “sita.int” because it “is not an international organization established by a treaty between or among national governments, and therefore does not meet the current qualifications for new registrations within .int” (see Section 5 of Attachment 23). The deadline for compliance was extended until June 17, 2004, and SITA vacated .int before then. SITA found the migration to be a more difficult endeavor than first anticipated. Thousands of its customers depended daily on programs that use the “.int” root, and they did not understand why it was necessary to move.

### **Conclusion**

No evidence of litigation – lawsuits or threatened lawsuits – emerged during the course of the Evaluation, other than with respect to the start-up issues discussed in Chapter 2. One challenge – not normally considered “regulatory” but classified so by the affected new gTLDs because of the serious hurdle it created – involved acceptance of the roots. Both .aero and .info helped mobilize the IETF and ICANN's SSAC, respectively. These efforts could be helped considerably by designating a member of the ICANN Staff to develop an action plan for next steps. Such steps might include (i) assessing the current dimensions of the problem; (ii) monitoring its improvement; and (iii) publicizing any shortcomings.

---

<sup>123</sup> A registration agreement for a .aero registration provides: “You further agree that we may make publicly available, or directly available to third party vendors, some, or all, of the domain name registration information you provide, for purposes of inspection (such as through our WHOIS service) . . . .”

Another issue, faced by two of the new gTLDs, concerns data protection. Global Name Registry is expecting to make changes to its Whois operations to reconcile potentially conflicting obligations under its Registry Agreement with the requirements of the EU Data Protection Act of 1998. SITA's situation is somewhat different, in that its registrants are predominantly businesses and organizations, rather than individuals. But with its registry operations performed by CORE within the EU territory, it too is watching carefully the Whois policy discussions under way in ICANN.

Other regulatory issues faced by the new gTLDs included the challenges posed by the registration of "country names" for .info, and by the existence of an alternate root for .biz. Having to address country names only days before start-up did change slightly the way in which Afilias had planned to operate, in that country names were suddenly reserved and only available for registration by the appropriate governmental entity. There was no litigation over the .biz alternate root, but NeuLevel faced questioning by members of the U.S. Congress.

## CONCLUSION

This Evaluation of the policy and legal questions surrounding launch of the new gTLDs has assessed their performance in five areas: effectiveness of trademark protection during start-up, extent of compliance with registration restrictions; impact on competition; adequacy of the legal framework; and regulatory issues. Consistent with the “proof-of-concept” that led to their selection in November 2000, the goal has been to determine what worked well and what did not, and why.

The new gTLD start-up periods proved generally effective at protecting the interests of trademark holders, but suffered from other problems. Afiliias’ use of a Sunrise registration period without screening or verification led to serious abuses and problems, including an unusually high number (43%) of disputed registrations. NeuLevel’s development of an IP Claim process, which gave prospective registrants and claimants a chance to reconsider their actions before disputes would be settled by WIPO or NAF, operated more smoothly but was quite complex. It also enabled non-trademark parties to successfully defend registrations if they could demonstrate legitimate interests or rights. The Global Name Registry offered trademark holders the option of defensive registration for names that would not resolve, but the concept was complicated by its initial naming conventions and a consent procedure that enabled individuals with names similar to trademarks to still register them. Also, defensive registrations may make sense in the context of a TLD meant for individuals (or, in the case of dotCoop, for cooperatives), but they may not be consistent with broader expansion of the DNS to accommodate new users and uses.

With respect to Land Rush, there was concern about the round robin process used by Afiliias and NeuLevel (for “Group 2B”), which randomly selected a name from the top of each registrar’s list. This method was criticized as unfair because it favored shorter lists and, as such, opened the door to manipulation of the process. Some registrars either limited the length of their own lists, offering the coveted spots to premium customers, or limited the lists of other registrars that they controlled. Global Name Registry instead chose to randomly eliminate duplicates on each registrar’s list, combine the lists, and then select registrations randomly. This eliminated the advantage of submitting artificially small lists, but it did not guard against registrants submitting the same request to multiple registrars. These various methods suggest that the combination of uniqueness plus randomization, or reverting to a “first-come, first-served” process might be fairer in the next round. But they also highlight the need for a broader discussion of the advantages and disadvantages of the various allocation options, including what the goals and priorities of the process should be.

Both the .biz and .name gTLDs are subject to restrictions that limit registrations to commercial purposes and to personal names, respectively. Random sampling indicated fewer problems than expected in .biz, with only 1.8% of the

registrations appearing to fail to satisfy the criteria and another 9.6% being unclear. In .name, 10.6% of the registrations raised questions and another .8% were classified as unclear. While the registries are not obligated to enforce the restrictions through verification, there are simpler methods, such as random screening, or scrutiny when a registrant reaches a certain number of registrations, which could help. Another solution is to recognize the difficulty of enforcing restrictions on global registries and adopt the model of .com, .net and .org, which were once restricted but are no longer.

The new gTLDs have introduced some competition, but how much is debatable. Examining market share, the extent of actual choice and price elasticity suggest that impact has been minimal. Other evidence, however, indicates that TLD expansion has attracted about 20% new registrants and led to new uses among 40 – 60% of registrants. The most significant contribution has clearly been development of facilities-based competition. As a result, new providers of registry services have been able to compete effectively with the incumbent registry, VeriSign, on this basis. Innovation has played a supporting role, and may become increasingly important as the three largest registries work to distinguish themselves from one another.

The agreements that underpin the new gTLDs reflect a level of detail that may not be necessary for future TLDs. While it was understandable for ICANN to have erred on the side of caution as it undertook initial expansion, the resulting legal framework is cumbersome. There was relatively strict insistence that the agreements adhere to key provisions of the original proposals, although in retrospect it appears that such rigidity was not always the wisest course. While the agreements are relatively uniform, there are some cases -- such as the requirement that smaller, unsponsored TLDs use only ICANN-accredited registrars – where divergence would have made sense. In a future round, it should be possible to use a streamlined base agreement and limit appendices to those necessary to ensure critical elements of registry performance and compliance with ICANN policies. There should also be more flexibility in the agreements to enable both ICANN and the registries to address routine issues.

None of the registries faced major legal problems, other than those relating to start-up. There were, however, others kinds of hurdles. One challenge involved technical acceptance of new gTLDs with more than three characters. The IETF and ICANN's Security and Stability Advisory Committee have helped focus attention on the problem, which would now benefit from ICANN Staff starting to monitor progress and publicize any problems. Another challenge – for .name and .aero – involved reconciling their ICANN obligations on access to Whois data with the data privacy requirements of the EU Data Protection Act.

Launching a new gTLD is not for the faint of heart. The experiences of the six that have done it already, and the wisdom the community as a whole as gained, should provide valuable assistance to those TLDs that follow.

## ACKNOWLEDGEMENTS

The over eighty people who were interviewed for this Evaluation deserve special acknowledgement. Their names are included in Appendix A. The new gTLDs in particular should be singled out for commendation. All were cooperative, and several went out of their way to provide helpful information. Others, including past and present members of the ICANN Board and representatives of ICANN constituencies, were also extremely generous with their time.

Former ICANN officials were especially selfless and patient during hours of interviews. Their role in organizing the first expansion of generic top-level domains in years was historic and courageous. Current ICANN staff were extremely helpful in terms of providing data and other information for analysis. They also generously made time for interviews and follow-up questions.

The new gTLDs that are the focus of this Evaluation – .aero, .biz, .coop, .info, .museum and .name and, to some extent, .pro – deserve recognition for the formidable tasks they have undertaken. With ICANN's help, they built gTLDs from the ground up, and in economic conditions more challenging than they forecast when formulating their proposals. In an Evaluation that by definition tends to focus more on problems than accomplishments, that achievement should not be overlooked. The ICANN Board and Staff developed the broad vision: these registry operators and sponsoring organizations created the ideas and infrastructure to fill it. Their hard work and dedication are clear, and any criticisms and recommendations in this Evaluation should not overshadow their achievements.

Miriam Sapiro  
President, Summit Strategies International



## APPENDIX A

### List of People Interviewed

(Alphabetical)

1. Amadeu Abril i Abril – Member, Names Council; past Member, ICANN Board
2. Jonathan Armstrong - Eversheds
3. Bruce Beckwith – Public Interest Registry
4. Joke Braeken - Tuonome.it
5. William Black - Nominet.uk
6. Elana Broitman - Register.com; Chair, ICANN Registrars' Constituency
7. Jordyn Buchanan – past CTO, RegistryPro
8. Katrina Burchell, Unilver PLC
9. J. Beckwith Burr - Wilmer, Cutler & Pickering; past Associate Administrator of the National Telecommunications and Information Administration (NTIA) for International Affairs, U.S. Department of Commerce
10. Marilyn Cade - AT&T; ICANN Commercial & Business Users Constituency and Member, Names Council
11. Vinton G. Cerf - Chairman of the Board of Directors, ICANN
12. Andrew Charlton - SITA
13. Jonathan Cohen - Shapiro, Cohen; past Board Member, ICANN
14. Philip Colebrook - Global Name Registry
15. Robert Connelly - PSI-Japan, Inc.
16. Susan Crawford - Cardozo Law School
17. Tina Dam - Registry Liaison, ICANN
18. Alan Davidson - Center for Democracy & Technology
19. Rosa DelGado – Board Member, ISOC; past Director of Internet Affairs & New Business Incubation, SITA
20. Sarah Deutsch - Verizon
21. Sabine Dolderer - DENIC
22. Karen Elizaga - past Vice President for Policy, Global Name Registry
23. J Scott Evans – Adams Evans; International Trademark Association
24. Patrik Fältström – Cisco Systems; Internet Architecture Board
25. Harold Feld - Media Access Project
26. Robert Flaim - U.S. Federal Bureau of Investigation (FBI)
27. Mary Frank - Kimberly-Clark Worldwide, Inc
28. Alec French - Minority Counsel, Judiciary Committee, U.S. House of Representatives
29. Roberto Gaetano – ICANN At-Large Advisory Committee; Liaison to ICANN Board

30. Michael Geist - University of Ottawa Law School
31. Philipp Grabensee – SHSG Rechtsanwälte
32. Dan Halloran – Deputy General Counsel, ICANN; former Registrar Liaison, ICANN
33. Ken Hamma – J. Paul Getty Museum
34. Hakon Haugnes - Global Name Registry
35. Paul Hazen - National Cooperative Business Association (NCBA)
36. Steve Heflin - Domain Bank, Inc.
37. Michael Heltzer - International Trademark Association (INTA)
38. M. Scott Hemphill – Afiliis
39. Richard Henderson – Teacher
40. Jordi Hinojosa – Nominalia
41. Carolyn Hoover - DotCooperation LLC
42. John Jeffrey – General Counsel, ICANN
43. David Johnson - New York Law School
44. Paul Kane - CENTR
45. Cary Karp - Museum Domain Management Association
46. Roland LaPlante – Afiliis
47. Karen Lentz – Registry Liaison, ICANN
48. Hal Lubsen – Afiliis
49. M. Stuart Lynn - past President, ICANN
50. David Maher - Public Interest Registry
51. Andrew McLaughlin - Google; past Vice President & Chief Policy Officer, ICANN
52. Steve Metalitz - Counsel to Copyright Coalition on Domain Names (CCDN); past President, ICANN Intellectual Property Constituency
53. Ram Mohan – Afiliis
54. Milton Mueller - Syracuse University; ICANN Non-Commercial Domain Name Holders Constituency
55. Jane Mutimear - ICANN Intellectual Property Constituency
56. Jeffrey Neuman – NeuLevel Inc.
57. Elliot Noss - Tucows, Inc.
58. Steven Pack, Afiliis
59. Michael Palage - Afiliis; ICANN Board Member
60. Samuel Paltridge - Organization for Economic Co-operation and Development
61. George Papadavalou - European Commission
62. Y.J. Park - ICANN Non-Commercial Domain Name Holders Constituency
63. Gianluca Pellegrini - Tuonome.it
64. Michael Roberts – Darwin Group; past President of ICANN
65. Rita Rodin - Skadden Arps
66. Thomas Roessler – ICANN At-Large Advisory Committee
67. Karen Rose, Community Networks – FulfilNET; formerly NTIA, U.S. Department of Commerce
68. Cassidy Seghal - Independent Consultant; former General Counsel, RegistryPro

69. Wendy Seltzer – ICANN At-Large Advisory Committee
70. Ivor Sequeira – NeuStar, Inc.
71. Philip Sheppard – AIM; past Chairman of the Names Council
72. Joe Sims – Jones, Day
73. Theresa Swinehart – ICANN; former member of the Names Council
74. Richard Tindal - NeuLevel Inc.
75. Louis Touton - past General Counsel & Secretary, ICANN
76. Paul Twomey - former Chair of the Government Advisory Committee, ICANN
77. J.J.E. Vandekerckhove – Royal Philips Electronics (Netherlands)
78. Susan Wiens, National Arbitration Forum (NAF)
79. Christian Wichard - World Intellectual Property Organization (WIPO)
80. Christopher Wilkinson - European Commission
81. Marie Zitkova - Société Internationale de Télécommunications Aéronautiques (SITA)

## APPENDIX B

### gTLD Survey

#### SURVEY on DOMAIN NAME USAGE

1. Was “abc.newgTLD” the first domain that was registered by the current owner (e.g., you, or your company or organization)?

1. Yes (SKIP TO QUESTION 5)
2. No

2. How many domains has the owner of “abc.newgTLD” registered before?

1. 1
2. 2-20
3. 21-100
4. More than 100

3. Are any of the existing additional registrations for the same exact character string as in this registration (“abc.newgTLD”) with the only change being the domain? In other words, is everything to the "left of the dot" the same? (For example, "icann.info" and "icann.org" have the same exact character string to the left of the domain.)

1. Yes
2. No (SKIP TO QUESTION 5)
3. N/A (SKIP TO QUESTION 5) (e.g., in the case of 3rd level domains in .museum)

4. Are the previous registrations in: (PLEASE CHECK ALL THAT APPLY)

1. .com
2. .net
3. .org
4. a ccTLD
5. Other

5. At the time you initially registered example.com, what was its intended use? (PLEASE CHECK ALL THAT APPLY)

1. Active use (e.g., website, email)
2. Defensive registration (prevent others from using the name)
3. First choice domain name not available
4. Business use

5. Personal use
6. Expression of opinions
7. Resale
8. Other
9. Not sure

6. Is the domain “abc.newgTLD” currently in use?

1. Yes
2. No or Not Sure (SKIP TO QUESTION 8)

7. What is the domain “abc.newgTLD” currently being used for: (PLEASE CHECK ALL THAT APPLY)

1. An active website
2. To redirect to another website
3. Email
4. Defensive registration
5. Resale
6. Other purpose

8. Is there any plan to use the domain “abc.newgTLD” in the future for:

1. A website
2. Email
3. Other purpose (or none)

9. Does the owner of “abc.newgTLD” plan to renew it when the current registration expires?

1. Yes
2. No
3. Don't know yet

10. Was the domain name registered on behalf of (please specify):

1. Yourself
2. Small company (less than 10 employees)
3. Medium company (between 10 and 500 employees)
4. Large company (more than 500 employees)
5. Non-profit organization
6. Governmental entity
7. Other

11. In which of the 5 ICANN regions do you reside?

1. Africa
2. Asia-Pacific, including Australia
3. Europe
4. Latin America and Caribbean
5. North America

(The ICANN Regions are fully specified here ([link](#)), as adopted by a resolution of the ICANN Board on 26 June 2003.)

12. Prior to being asked to fill out this survey, how much did you know about ICANN?

1. A lot
2. A little
3. No knowledge of ICANN