New gTLD Program
Explanatory Memorandum

Proposed ICANN Registry Restrictions Dispute Resolution Procedure (RRDRP)

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Background - New gTLD Program

Since ICANN was founded ten years ago as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, one of its foundational principles, recognized by the United States and other governments, has been to promote competition in the domain-name marketplace while ensuring Internet security and stability. The expansion will allow for more innovation, choice and change to the Internet's addressing system, now constrained by only 21 generic top-level domain names. In a world with 1.5 billion Internet users—and growing—diversity, choice and competition are key to the continued success and reach of the global network.

The decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community. Representatives from a wide variety of stakeholders—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—completed its policy development work on new gTLDs and approved a set of recommendations. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008 at the ICANN meeting in Paris. A thorough brief to the policy process and outcomes can be found at http://gnso.icann.org/issues/new-gtlds/.

This paper is part of a series of papers that will serve as explanatory memoranda published by ICANN to assist the Internet community to better understand the Request for Proposal (RFP), also known as *Applicant Guidebook*. A public comment period for the Applicant Guidebook will allow for detailed review and input to be made by the Internet community. Those comments will then be used to revise the documents in preparation of a final Applicant Guidebook. ICANN will release the final Applicant Guidebook and open the application process in the first half of 2010. For current information, timelines and activities related to the New gTLD Program, please go to http://www.icann.org/en/topics/new-gtld-program.htm.

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

Summary of Key Points in this Paper

- ICANN seeks comment on a proposal to create a dispute resolution procedure to resolve allegations that a new gTLD registry operator is not appropriately enforcing the registration restrictions it proposed in its application.

- It would not be fair to allow registries to obtain a benefit fin the allocation process from promising to police the registration and use of sub-domains, and then not hold the registry accountable for implementing the restrictions.

- An independent dispute resolution service provider would allow ICANN to avoid having to make particularized decisions on Internet content and the use of domains.

Introduction:

The following summarizes the planning that ICANN should implement a dispute resolution procedure for handling complaints that a community-based restricted TLD registry operator was not meeting its obligations to police the registration and use of domains within the TLD registry. The need for such a Registry Restrictions Dispute Resolution Procedure (RRDRP) is based on the idea that it would not be fair to give a preference in the New gTLD allocation process to an applicant based on a promising to restrict use of a TLD to a particular community, and then not require the applicant to "keep its promise."

The Implementation Recommendation Team (IRT) is recommending a related post-delegation dispute resolution procedure for resolving claims that certain registry operator's (Operator) operations contribute to cybersquatting. ICANN and other community members have also considered and discussed various options relating to such post-delegation dispute resolution procedures relating to existing rights. The RRDRP, in contrast, would handle complaints that an Operator was not appropriately enforcing the community-based restrictions it agreed to implement in its registry agreement.

Rationale for a RRDRP

ICANN has generally avoided becoming directly involved in policing the use of domain names at the registrant level, which is appropriate in light of ICANN's mission (to coordinate the DNS "at the overall level") and in keeping with ICANN's core values (e.g., "[r]especting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.").

Instituting a UDRP-like independent process for deciding questions of compliance with community-based domain eligibility and use restrictions would have the benefit of removing ICANN from particularized decisions on Internet content and the use of domains. In the absence of an RRDRP, ICANN would be called upon to expend resources on gray areas of eligibility and use restrictions compliance. A robust RRDRP will also have the advantage of protecting the interests of legitimate and eligible registrants

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within community-based restricted TLDs who otherwise could see their interests in their registrations tarnished by registrations made in violation of the promised restrictions associated with the TLD. An objection/complaint-based RRDRP will also be advantageous since decisions on use and eligibility will be made only when there is a real party in interest.

Some possible objections to the establishment of an RRDRP would be that it will require ICANN to implement a procedure with the purpose and effect of suppressing legally-protected speech and, that as a result of the RRDRP, Operators might be over-zealous in restricting content since they could be subject to substantial penalties (financial or otherwise) for allowing registrants to freely register and use domains in the restricted TLD.

ICANN's New gTLD allocation process envisions that some TLD applications will be "community-based", from established organizations that represent defined and limited communities. Such applications might be awarded some level of preference in the event of contention for strings against commercial applicants. In order to be awarded such a preference in the case of string contention, the community-based applicant would be required to prove the legitimacy of its claim to represent a particular community and a strong nexus to the particular string under contention. It would be up to the applicant to propose meaningful restrictions on who could register in the community-based TLD, how domains in the TLD could be used, and what string selection restrictions would be enforced.

RRDRP Implementation Details

Under the RRDRP, a harmed organization or individual could lodge a complaint about an Operator's failure to respect agreed restrictions in a community-based restricted TLD. Initial complaints might be processed through an online form similar to the Whois Data Problem Report System at InterNIC.net. A nominal processing fee could serve to decrease frivolous complaints. The Operator would receive a copy of the complaint and would be required to take reasonable steps to investigate (and remedy if warranted) the reported non-compliance. The Complainant would have the option to escalate the complaint if the alleged non-compliance continues. If escalated, a UDRP-like panel would make the decision as to whether the registration complained about was inappropriate given the registration restrictions under which the Operator agreed to operate.

Unlike a third party pursuing a post-delegation legal rights claim, however, the Complainant in a community-based action cannot base its complaint against the Operator upon its own legal rights. There will be no contractual relationship between the Complainant and the Operator that could give rise to a breach of contract claim related to the registry agreement. Nor can the Complainant claim to be the third-party beneficiary of certain obligations in the registry agreement, as ICANN will ensure that its registry agreements with Operators do not expressly or tacitly make any person a third-party beneficiary of the Operators' obligations under those agreements. In addition, the Operator will owe no duty of care to the Complainant in relation to its obligations under the registry agreement that could give rise to a claim sounding in tort.

The basis for the complaint procedure will be analogous to that which exists under the UDRP and for that which will be established for objections to applications for new gTLDs: the Operator will be obliged, pursuant to the registry agreement, to accept the

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complaint procedure. ICANN would not be a party to any complaint proceedings. The registry agreement would stipulate that ICANN and the Operator would be bound by the decision of the dispute resolution panel, absent extraordinary circumstances such as bias or fraud on the basis of the panel.

Complaints under the RRDRP would be resolved on the basis of loser pays in order to allocate costs to the non-prevailing party: Operators would not want to tolerate non-compliant registrations since they would be subject to paying for multiple dispute processes, and Complainants would not file frivolous complaints if they were required to bear the costs of the proceedings in cases where the complaint was not meritorious.

Beyond bearing the costs of any proceedings in which it was found to have not discharged its responsibility to enforce the TLD restrictions, the community-based TLD Operator might also be subject to other remedies such as graduated sanctions, or orders to perform according to the restrictions or lose the right to add new registrations. The ultimate remedy for severe cases of failure to enforce registration restrictions could be the forced re-delegation of the registry TLD to a new operator deemed able to carry out the responsibilities attached to operating a restricted TLD intended for the uses of a defined and limited community. Escrowed registry data could be used to maintain operations during any such transition of a TLD to a new operator. All such remedies would be designed to protect legitimate and eligible registrants.

The RRDRP would be administered by an independent Dispute Resolution Service Provider (DRSP), as is done under the UDRP and will be done under the New gTLD Dispute Resolution Procedure. The rules of procedure would be developed drawing upon the UDRP, and also the other dispute resolution procedures developed for the New gTLD program (including the objection process for top-level domain applications and the post-delegation legal rights dispute resolution procedure being discussed by the IRT and others). Possibly, one set of rules could govern both types of post-delegation complaints, with a few provisions applying only to one or the other type of complaint (such as the number of panelists). The RRDRP rules would be supplemented by the rules of the DRSP, in the same manner as the various DRSPs' rules supplement the New gTLD Dispute Resolution Procedure.

Conclusion

This memorandum is intended to be a general summary of the proposed concept for a Registry Restrictions Dispute Resolution Procedure (RRDRP). This is a preliminary draft for discussion only, which ICANN welcomes and encourages.

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