



## New gTLD Program Explanatory Memorandum

### Standards for Morality and Public Order Research

Date of Publication:

30 May 2009

### 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

- Legal research was conducted in selected jurisdictions in every region of the world in order to develop standards for the implementation of a dispute process for the GNSO recommendation on morality and public order.
- Sitting and former judges on international tribunals, as well as attorneys and law professors who regularly appear before them, were consulted on appropriate limitations found in the legal research that could be incorporated into workable standards.
- As a result of the legal research and consultations, the four identified standards are: (i) Incitement to or promotion of violent lawless action; (ii) incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin; (iii) Incitement to or promotion of child pornography or other sexual abuse of children; or (iv) a determination that an applied-for gTLD string would be contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law

### I. Introduction and background

ICANN's New gTLD Program has been developed to implement the GNSO's policy recommendations relating to New gTLDs. This memorandum summarizes the research relating to the development of standards for the implementation – by means of the "Morality and Public Order" objection in the dispute resolution process<sup>1</sup> – of the GNSO recommendation that gTLD strings should not be contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.<sup>2</sup> The guiding principle remains that which was formulated by the GNSO in its final report on the introduction of new gTLDs:

*The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.<sup>3</sup>*

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<sup>1</sup> See Module 3 of the Draft Applicant Guidebook (v.2), dated 18 February 2009.

<sup>2</sup> This rule is based upon GNSO Recommendation No. 6, which states:

Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.

Examples of such principles of law include, but are not limited to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organization (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

<sup>3</sup> ICANN Generic Names Supporting Organization, Board Report: Introduction of New Generic Top-Level Domains, dated 11 September 2007, Principle G.

On 29 October 2008, ICANN published an explanatory memorandum, entitled "Morality and Public Order Objection Consideration in New gTLDs". Citing the International Covenant on Civil and Political Rights, the explanatory memorandum set out two general principles that would be followed in implementing the GNSO's Principle G and its Recommendation No. 6:

- Everyone has the right to freedom of expression; but
- Such freedom of expression may be subject to certain exceptions that are necessary to protect other important rights.

These general principles are widely accepted.<sup>4</sup> However, it is difficult to identify specific legal norms relating to morality and public order, applicable to potential gTLD strings, that are generally accepted under principles of international law. An alternative is to identify legal norms that are widely accepted on the national level. As described by the explanatory memorandum, ICANN carried out legal research in selected jurisdictions in every region of the world in order to develop standards for the implementation of the GNSO recommendation on morality and public order.<sup>5</sup> In order to provide some additional insight into ICANN's reflections upon this topic, this memorandum concludes with a brief description of certain other categories that were not included among the standards for upholding objections to applied-for gTLDs.

In addition to the research, ICANN consulted sitting and former judges on international tribunals, as well as attorneys and law professors who regularly appear before international tribunals. Nearly all of those whom ICANN consulted expressed the view that panelists considering morality and public order objections should not be limited to certain pre-defined categories of expression. Panelists should have the discretion to decide that some other category of expression could rise to the level of being contrary to generally accepted norms of morality and public order under international law.

On the basis of these consultations and research, panelists should be accorded broad (but not unlimited) discretion when hearing morality and public order objections. In light of the great variety of potential gTLD strings that might be at issue in dispute proceedings, panels should have discretion to apply general principles to individual cases. At the same time, panelists should have guidance for the exercise of their discretion. For this reason, certain categories of public policy rules relating to morality and public order were identified as being very widely, if not universally, accepted.<sup>6</sup>

These principles were incorporated in the second version of the draft Applicant Guidebook, dated 18 February 2009 (paragraph 3.4.3), as follows:

*An expert panel hearing a morality and public order objection will consider whether the applied-for gTLD string is contrary to general principles of*

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<sup>4</sup> In addition to the International Covenant on Civil and Political Rights, see also the Universal Declaration of Human Rights and regional treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights.

<sup>5</sup> Research was carried out in the following jurisdictions: (i) Brazil, (ii) Egypt, (iii) France, (iv) Hong Kong SAR, China, (v) Japan, (vi) Malaysia, (vii) South Africa, (viii) Switzerland and (ix) the United States.

<sup>6</sup> These widely-accepted categories of public policy rules were described on pp. 4-5 of the 29 October 2008 explanatory memorandum.

*international law for morality and public order, as reflected in relevant international agreements. Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply. The grounds upon which an applied-for gTLD string may be considered contrary to morality and public order according to internationally recognized standards are:*

- *Incitement to or promotion of violent lawless action;*
- *Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin;*
- *Incitement to or promotion of child pornography or other sexual abuse of children; or*
- *A determination that an applied-for gTLD string would be contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law.*

Various international conventions incorporate one or more of these standards, as the following examples show:

*Article 20 of the International Covenant on Civil and Political Rights provides:*

1. *Any propaganda for war shall be prohibited by law.*
2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*"

Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination stipulates that the States Parties

*"Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof".*

Article 13(5) of the American Convention on Human Rights provides:

*"Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."*

Article 34 of the Convention on the Rights of the Child stipulates:

*"States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

- (a) *The inducement or coercion of a child to engage in any unlawful sexual activity;*
- (b) *The exploitative use of children in prostitution or other unlawful sexual*

*practices;*

*(c) The exploitative use of children in pornographic performances and materials."*

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography also provides, in Article 3:

*"1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:*

*[...]*

*(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2."*

## **II. Broad discretion is appropriate**

As described above, ICANN carried out research in international law in an effort to identify generally accepted legal norms relating to morality and public order. There are, indeed, at the highest level peremptory norms of public international law from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character (*jus cogens*), such as the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting piracy and trade in slaves.<sup>7</sup> However, it is a different matter to identify generally accepted international legal norms relating to morality and public order that could serve as the basis for an DRSP panel to make a determination regarding an objection to a proposed gTLD, a string of up to 63 characters.

Panelists should be given broad discretion to consider and apply general principles to specific cases. However, that discretion, while broad, should not be unlimited. If certain specific categories of public policy rules could be identified as being widely accepted under national laws, these categories would provide helpful guidance to panelists in the exercise of their discretion. The identification of such categories would also be helpful for applicants and potential objectors, making the dispute resolution procedure more transparent and predictable in its outcomes.

ICANN therefore expanded its research to examine the rules of public policy, as they apply to free expression, in a representative sample of countries in each region of the world. The fruits of that research are summarized in the following sections of this memorandum.

## **III. Incitement to or promotion of violent lawless action**

The incitement to violent lawless action is punishable under the laws of most countries, including the United States where the protection of free speech is particularly strong. (In some countries, the prohibition against incitement to violent lawless action is subsumed within broader restrictions upon free expression.) For example:

- **Brazil:** Incitement to and the lauding of crime and criminals are crimes defined in

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<sup>7</sup> See Brownlie, *Principles of International Law*, pp. 488-490 (6<sup>th</sup> ed. 2003).

Sections 286 and 287 of the Criminal Code.

- **Egypt:** The Fourteenth Chapter of the Penal Code provides that a person who incites one or more persons to commit a felony or a misdemeanor shall be considered an accomplice in the unlawful act and punished accordingly. If the instigation results only in an attempt of the crime, the court shall impose the penalty for the attempted commission of the crime.
- **France:** Article 23 of the Law of 29 July 1881 on Freedom of the Press, as amended, makes it an offense to incite another person, with written or spoken words, actions, etc., to commit a crime or misdemeanor. The law expressly includes communications to the public by electronic media within its scope. Article 24 of this law stipulates specific sanctions in relation to incitement of certain serious crimes.
- **Hong Kong:** Under the Public Order Ordinance, it is an offense to incite or induce any person to kill or do physical injury to any person or to any class or community of persons, to destroy or cause any damage to any property or to deprive any person by force or fear of the possession or use of any property. The Crimes Ordinance prohibits, *inter alia*, inciting another person to commit criminal acts such as treason or mutiny.
- **Malaysia:** Section 505 of the Penal Code provides, *inter alia*, that it is an offense for any person to make, publish or circulate any statement with intent to incite or which is likely to incite any class or community of persons to commit any offense against any other class or community of persons. In addition, the Internal Security Act 1960 empowers the Minister of Internal Security to prohibit the publication of a document that contains any incitement to violence, etc.
- **South Africa:** Freedom of expression is protected under the Bill of Rights that is included in the 1996 Constitution. This protection does not extend to the incitement of imminent violence or the advocacy of hatred based on race, ethnicity, gender or religion and which also constitutes incitement to cause harm.
- **Switzerland:** Article 259 of the Penal Code prohibits any form of expression that incites a person to commit a crime.
- **United States:** Section 2101 of Title 18 of the United States Code makes it an offense to use any facility of interstate or foreign commerce to incite or encourage a riot.

#### **IV. Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin**

- **Brazil:** The Federal Constitution protects the freedom of religious belief and practice (see especially Section 5, items VI, VIII and XLI). Section 208 of the Criminal Code establishes protection against public offenses to the religious beliefs of third parties (such crime pre-supposes specific intent). Giving effect to constitutional protection against racism (Section 3, IV; Section 5, XLII), Federal law nr. 7,716/89 establishes penalties for discrimination or for prejudice based on race, color, ethnic, religious or national origin (again, the crime pre-supposes specific intent).

- **Egypt:** Section 2 of the Second Chapter of the Penal Code imposes penalties upon any person who propagates by any method extremist thoughts with the purpose of instigating disdain or contempt of religions.
- **France:** Article 24 of the Law of 29 July 1881 on Freedom of the Press, as amended, makes it an offense to incite discrimination, hatred or violence toward another person or group of persons on the basis of their ethnic, national, racial or religious origin or identity, or on the basis of their gender, sexual orientation or handicap.
- **Hong Kong:** Sections 46 and 46 of the Disability Discrimination Ordinance make it unlawful for a person, by any activity in public, to incite hatred towards, serious contempt for, or severe ridicule of, another person with a disability or members of a class of persons with a disability. The Race Discrimination Ordinance, which has been passed by the Legislative Council but not yet entered into effect, contains analogous provisions regarding incitement of hatred on the ground of race.
- **Malaysia:** The Internal Security Act 1960 empowers the Minister of Internal Security to prohibit the publication of a document that promotes feelings of hostility between different races or classes of the population. Section 298A of the Penal Code provides, *inter alia*, that it is an offense for any person who by written words:
  - (a) causes, or attempts to cause, or is likely to cause disharmony, disunity, or feelings of enmity, hatred or ill-will; or
  - (b) prejudices, or attempts to prejudice, or is likely to prejudice, the maintenance of harmony or unity,
 on grounds of religion, between persons or groups of persons professing the same or different religions.
- **South Africa:** The Films and Publications Act, 1996 prohibits, with limited exceptions, the distribution of any publication which (a) amounts to propaganda for war, (b) incites to imminent violence, or (c) advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm. Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 provides that, with limited exceptions, "no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
  - (a) be hurtful;
  - (b) be harmful or to incite harm;
  - (c) promote or propagate hatred."
- **Switzerland:** Article 261 of the Penal Code makes it an offense to insult the religious convictions of another person. In addition, Article 261 bis prohibits the incitement to hatred or discrimination against a person or group on the basis of race, ethnicity or religion.
- **United States:** The Federal Constitution protects the freedom of religious belief and practice from interference by the federal or state governments (see

Amendments I, XIV). Giving effect to constitutional provisions protecting against discrimination (see especially Amendments XIII and XIV), Section 1983 of Title 42 of the United States Code and analogous federal case law prohibit discrimination based on race, color, gender, religion, or national origin by the federal or state governments.

## V. Incitement to or promotion of child pornography or other sexual abuse of children

As the recital of legal provisions below shows, the regulation of sexually explicit materials – *a fortiori*, those directed toward and/or involving children – is common. It must be recalled that the issue in the context of the new gTLD program is the application of these rules to gTLD strings, *not* to the eventual content of the gTLDs. ICANN explained this point in its analysis of public comments in relation to the first version of the draft Applicant Guidebook, and it bears repeating here for the avoidance of confusion:

*It is important to stress that the requirement that new gTLD strings not be contrary to generally accepted legal norms relating to morality and public order concerns the string – i.e., the letters to the right of the dot. This is not a regulation of the content of websites. It would be optimal if a mere gTLD string could not constitute incitement or promotion of child pornography or other sexual abuse of children. However, taking into account the fact that new gTLD strings may comprise up to 63 characters, one must anticipate that a string could well incite or promote child pornography.<sup>8</sup>*

The laws relevant to this category of restrictions upon freedom of expression include the following:

- **Brazil:** Federal Law nr. 10,764 prohibits the production, disclosure or exploitation of pornographic images of children.
- **France:** It is an offense, pursuant to Article 227-22 of the Penal Code, to assist or attempt to assist in the corruption of a minor. The penalties for this offense are increased, *inter alia*, “where the minor was put in contact with the offender by the use, for the dissemination of messages to an unrestricted public, of a telecommunications network.” Article 227-22-1 makes it an offense for an adult to make sexual propositions to a minor under the age of 16 by using an electronic means of communication.
- **Japan:** Article 175 of the Criminal Code prohibits the distribution, sale or display in public of an obscene document, drawing, etc. In order to fall within the scope of this provision, a written text (such as a gTLD string) would have to contain sufficiently explicit terms that would or might unnecessarily stimulate or promote sexual desire.
- **Hong Kong:** It is an offense under the Control of Obscene and Indecent Article Ordinance to publish certain obscene and/or indecent materials.
- **Malaysia:** Section 292 of the Penal Code concerns obscenity and stipulates, *inter alia*, that it is an offense for any person to advertise or make known by any means

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<sup>8</sup> New gTLD Draft Applicant Guidebook: Analysis of Public Comment, dated 18 February 2009, p. 93.

whatsoever that any person is engaged or is ready to engage in any act that is an offense under this section.

- **South Africa:** The Films and Publications Act, 1996 regulates the publication of explicit sexual materials. Both the distribution and the possession of publications that contain child pornography are prohibited. A gTLD string such as ".childporn" alone (*i.e.*, without considering the content of the gTLD) could fall within the scope of this prohibition.
- **Switzerland:** Pursuant to Article 197 of the Penal Code, a person who gives access to pornography to persons under the age of 16 or publicly displays pornography is subject to imprisonment. In addition, "hard" pornography (involving children, violence, etc.) is prohibited.
- **United States:** Section 2252B of Title 18 of the United States Code prohibits the use of a misleading domain name on the Internet to deceive a minor into viewing material that is considered harmful to minors, such as material that appeals to a prurient interest of minors. Section 1466A of Title 18 prohibits the production, distribution, or receipt of a visual depiction of a minor engaging in sexually explicit conduct.

## VI. Other restrictions

As discussed above, certain restrictions are widely accepted in diverse countries around the world, including those where free speech in general is well protected. There are other categories of restrictions that are only accepted in a limited number of countries or are applied in substantially different ways. Such categories would *not* be likely to qualify as generally accepted legal norms relating to morality and public order that are recognized under principles of international law and therefore have *not* been proposed as standards for morality and public order objections in the new gTLD program.

Examples of these excluded categories include the following:

- Incitement to lawless action might cover *any* lawless action, not just *violent* lawless action. However, that would broaden the scope of this category enormously: The criminal/penal laws of various countries differ in their definitions of lawless activities. Would any and all lawless action be covered? If not, where would the line be drawn?
- Certain countries have laws protecting religion and/or punishing blasphemy. However, different religions are protected in different countries, while certain countries refuse to recognize religions that are recognized by others. And, of course, some countries do not limit freedom of expression in this area at all. A standard that bars *any* gTLD string that insults or denigrates *any* religion would be unduly restrictive, yet drawing lines to protect certain religions and not others cannot be justified for the global internet and would, at any rate, be difficult to implement. It seems sufficient to bar the incitement to or promotion of discrimination based on religion.
- Sedition and subversive propaganda are prohibited in many countries, but what constitutes such forbidden speech varies substantially, depending upon the many factors. An attempt to give effect to such laws in the new gTLD program would

risk importing repressive practices. It should be sufficient to bar gTLD strings that incite or provoke violent lawless action.

- Libel laws set certain limits upon the freedom of expression. It is very difficult, if not impossible, to identify legal rights regarding libel that are recognized or enforceable under generally accepted and internationally recognized principles of law. This is an area where there exists substantial diversity among the laws of different countries. At any rate, victims of defamatory speech have remedies under national laws.
- The competition (antitrust) laws of certain countries operate to limit freedom of expression (*e.g.*, the denigration of a third party's product or service). In light of the lack of uniformity in this area and taking into consideration the protection of third party rights available through legal rights objections, it does not appear necessary or desirable to include such a category in the standards applied to morality and public order objections.
- Advertising is subject to regulation in most countries. However, regulations vary from country to country and over time. It does not appear necessary or appropriate for ICANN to regulate advertising in gTLD strings.