

Fiona M. Alexander
Associate Administrator, Office of International Affairs
National Telecommunications and Information Administration
United States Department of Commerce
1401 Constitution Avenue
N.W. Room 4701
Washington DC 20230

June 8th , 2009

Dear Miss Alexander,

Please find enclosed our comments for The U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) Notice of Inquiry seeking comment regarding the upcoming expiration of the Joint Project Agreement (JPA) with the Internet Corporation for Assigned Names and Numbers (ICANN).

Yours sincerely,

Paul Tattersfield
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Introducing competition to registry services

There seems to have been a quiet policy shift in ICANN's approach to registry competition and this shift seems to have occurred around 2003. We believe it was this change of approach which has led to many of the very real concerns that arise today.

From the 1998 MOU part of ICANN mission was to introduce competition

II.C.2. Competition - This Agreement promotes the management of the DNS in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the DNS. This competition will lower costs, promote innovation, and enhance user choice and satisfaction¹

More specifically

V.C.9.c. Potential consumer benefits/costs associated with establishing a competitive environment for gTLD registries.¹

One way of establishing competition is to allocate the rights to run a registry for a fixed term and on expiry of that term hold an invitation to tender for a subsequent term.

The alternative approach to registry competition which ICANN seems to be trying to adopt is to award a gTLD to a registry in perpetuity and then try and generate the competition, sort under the various MOUs, by awarding new additional gTLDs to competing registry companies.

Given the first mover advantage of .com with 25 years of usage and 80,000,000 domains there has to be serious questions as to the likely success of this approach especially when compared with a much less complex approach involving fixed term competitive tendering of any new and existing registries.

Further not subjecting the incumbent registries to periodic tendering of services especially ones which may dominate the market as a whole runs the risk of leaving both ICANN and the companies operating these registries open to accusations of combination or conspiracy to monopolize.

¹ <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>

For example the recent United States Courts of appeals ruling filed June 5, 2009 Coalition for ICANN Transparency Inc. v. VeriSign Inc.² raises some of these concerns. How long will it be before ICANN is embroiled in these actions especially an independent ICANN without the protection of the Department of Commerce?

Many of these problems stem from the failure to clearly and publicly articulate the fundamental principles of domain ownership and registry function.

What is the function of a registry?

Is a registry like a librarian whose function is to maintain a list of books, provide access to those books at a fixed rental price and in the most reliable and efficient manner?

Or is a registry like a book business where it aims to obtain and then supply books at the highest prices the market will support? Perhaps by charging people more to rent the most popular books, perhaps running auctions and incentives in order to transact as many books as possible?

The market will recognize the "librarian model" even if ICANN does not, quickly and effectively ensuring that in a very short space of time the actual heavy lifting and mechanics of registrations will in the main be contracted out to a handful of specialist registry companies like VeriSign, Afilias & NeuStar.

This is already happening with a handful of specialist companies providing the actual registry services.

.com .name and .net (VeriSign)
.biz .travel and .tel (NeuStar)
.aero .asia, .info mobi and .org (Afilias)

Part of this process will almost certainly lead to further consolidation, with larger players acquiring not only the technical services of the newer smaller registries but also the whole businesses as demonstrated most recently with VeriSign's acquisition of .name³

² <http://www.ca9.uscourts.gov/datastore/opinions/2009/06/05/07-16151.pdf>

³ <http://www.icann.org/correspondence/spencer-to-jeffrey-02mar09-en.pdf>

Who owns the strings in the root?

A further simple question that needs to be addressed is if further new gTLDs are to be added to the root who actually owns the various rights to these strings?

The answer most people would give may vary depending on how these new gTLD strings are allocated. If these new gTLDs are going to be sold in perpetuity to the highest bidder starting bid \$185,000 + \$25,000 a year ⁴ the answer may be considerably different to a model where ICANN manages a small number of open gTLDs at the most competitive price for the benefit of internet users as a whole.

Whilst seemingly abstract questions the relationship of the entities involved and the rights each hold will likely determine how well competition develops at registry level.

ICANN's preferred model for Registry competition – new gTLDs

The model ICANN has evolved and to a certain extent presented as a fait accompli to the community over the last few months raises serious concerns on a number of levels

As Paul Twomey was at pains to point out in the hearings last week ⁵ he believes the justification for a rapid and unprecedented expansion of the number of gTLDs in the top-level domain space is to be found in the Whitepaper ⁶ that established ICANN.

The question is often asked why ICANN is expanding the top-level domain space. The answer is: we were asked to by the community and the United States Government. It was a key-stone in the Whitepaper ⁶ that established ICANN, has been an objective of each of the temporary agreements, and the JPA, and was the subject of a two-year, intensive, broad-based community driven policy development discussion that could not have taken place anywhere – except at ICANN. ⁵

The Whitepaper⁴ Paul Twomey refers to also identified "the considerable impact on Internet users changes made to the number of gTLDs."

Further, changes made in the administration or the number of gTLDs contained in the authoritative root system will have considerable impact on Internet users throughout the world. In order to promote continuity and reasonable predictability in functions related to the root zone, the 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 should be coordinated.⁶

⁴ <http://icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>

⁵ http://energycommerce.house.gov/Press_111/20090604/testimony_twomey.pdf

⁶ http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm#N_16_

The ICANN board in 2006 also identified this considerable impact indicating the need for "full market" economic analysis. ICANN's president and CEO referenced these reports during the 2006 annual meeting. Worryingly ICANN has provided very little of this analysis to the community. Instead there has been a continued piecemeal release of economic reports most recently from Professor Carlton.^{7 8 9 10}

The reports which have been issued fail to address many of the fundamental issues and original questions that the Board asked ICANN to provide the community. For example the latest reports on the surface at least they don't seem to recognize -

In anti trust considerations it is the mix of competitive forms which is important rather than the intensity of the competition.

Whether opening entry to the root primarily using a market driven approach is in fact effective Internet governance?

Or whether ICANN's preferred approach will simply result in a series of separate and on the whole non competing monopoly positions, which will in effect be granted in perpetuity.

Worryingly Professor Carlton author of the latest reports also dismisses the need for economic impact studies preferring instead to concentrate on the role of entry in promoting consumer welfare.¹⁰ This is not helpful, without these wider economic studies there has been no attempt to predict how the new gTLD process will change the very fabric of the Internet.

⁷ <http://www.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>

⁸ <http://www.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>

⁹ <http://www.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>

¹⁰ <http://www.icann.org/en/topics/new-gtlds/carlton-re-kende-assessment-05jun09-en.pdf>

What will be the likely distribution of new gTLDs?

In the absence of these reports we have turned to various technical forums, blog posts and new commercial websites seeking to offer new gTLDs services should ICANN's new gTLD proposal be implemented. It is clear from these investigations applications for new gTLDs are likely to be clustered around several distinct purposes

IDN – (International Domain names (Languages not based on ASCII characters))

Geographic - (.nyc .berlin)

Community & language - (.scot .cym)

Technical - (.tel conversions between telephone numbers & domains etc.)

Corporate & Brand - (.dell .ebay .ibm .mac .apple)*

Generic - (.news .shop .search)

*The company and brand examples are illustrative and should not be taken as an indication that there is or is not any intention to apply using ICANN's new gTLD process.

The whole of the ICANN new gTLD implementation proposal evolves around trying to develop a single proposal for all types of gTLD. Since the initial draft ICANN has not been prepared to discuss or amend their one size fits all approach which is very

concerning for a bottom up or consensus driven organization. As result of massive community concern once ICANN's proposals were first presented to the wider community it has been willing to discuss four "Band Aid" type proposals which it terms "Overarching Issues" as an attempt to try and make their original framework acceptable. This approach not only runs the risk of skewing the whole process to appease the most powerful and most vocal constituents but more worryingly means ICANN is unwilling to discuss the framework itself.

Further this approach leads to the impression at least that ICANN has been captured by vested interests and the new gTLD process will implemented as a one size fits all regardless of community concerns. The one size fits all approach is convenient as the demand for new gTLDs is unlikely to be uniform, indeed much of demonstrable need for new gTLDs could be satisfied by concentrating on specific needs.

Each of the likely types of TLDs bring individual policy concerns however two of these types have the potential to fundamentally change the Internet and not necessarily in a good way.

Corporate & Brand gTLDs

.com isn't sold or advertised by VeriSign. It is sold and branded implicitly by virtually every major corporation using it day in day out across all their communications. It's that simple.

The success of the internet is because it delivers efficiency to the market place. It enables anyone to reach an unfathomable number of people simply by buying a domain name. Cost - \$10 + hosting per year. Mind blowing!

ICANN's new gTLDs for corporations and brands changes this by taking advantage of the efficiencies afforded by the original design of the Internet over non internet models. And in doing so creates a super league the cost of entry to which is \$185,000 and \$25,000 + hosting per year.

Recent trends in brand evolution have led to many websites both on and off line using a more and more minimalist form

<http://www.brand.com>
www.brand.com
brand.com
.brand if allowed may follow

If this happens and is reinforced worldwide in corporate communications day in day out users will quickly come to recognize that a brand to the right of the dot is a major player and therefore by implication a brand to the left of the dot will be perceived as a lesser brand.

The level playing field of the internet is destroyed and a super league created.

The Creation of a Super league

There has to be serious concerns not least because a single layer model to the right of the dot can never replicate the complexities of businesses around the world. Whilst initially appearing to offer more freedom for new domains it actually offers less freedom.

For example if there is .dell .ibm what about brands like .hp? HP is seriously disadvantaged simply because its brand is 2 letters and 2 letters are reserved for country codes.

Or the fact that it offers a system where there can only be one organization to the right of the dot - ever! This is a step backwards from the existing system which by careful management of competing open generic gTLDs allows multiple totally separate entities to each enjoy a similar level of branding in the second level to the left of the dot.

What about organizations whose names conflict with geographic areas? .amazon? What about organizations or brands that share a name with places that may in the future have a need for an internet presence? .moon or .saturn etc. What about companies whose brands are already taken like .cat?

But most importantly a Super league destroys the ability to compete on a level playing field. At the moment to launch some software designed compete to with Microsoft or Sun its \$10 + hosting a year then it's down to skill and innovation.

A super league changes this and medium sized players will have to consider whether it worth spending \$185,000 + \$25,000 per year with ICANN to enjoy the same level of branding and enter the Super league. For startups and smaller players cost of admission to this implicit branding advantage is likely to prove prohibitive.

The Creation of Private Monopolies

If day to day usage and advertising of corporate bands to the right of the dot means they enjoy competitive advantage then generic names to the right of the dot will become to enjoy a similar branding advantage.

Generic names such as .news .shop .store .music .radio and .movie will become to be perceived as superior. Their simple existence will create a series of worldwide monopolies.

What happens if Microsoft applies for .search? If they are granted rights to .search how is google.search handled? May be Microsoft would be happy to allocate it Google especially if they can use shopping.seach, images.search & video.search.

What happens if Rupert Murdoch purchases a controlling interest in a company which is awarded .news?

Conclusion

The issues highlighted here and those raised by concerned parties in submissions to the draft Applicant Guide Books for new gTLDs over the last few months should have been articulated, discussed and resolved much earlier in the process.

The fact that such fundamental issues are only now just beginning to be articulated and after publicity and promotion of the new gTLD process to the world encouraging them to invest time and resources in a process which was presented as almost complete has to give rise to concerns.

Sadly ICANN's determination to push on with the project essentially "as is" when there are so many fundamental and potentially litigious issues has to cast doubt over their ability to become a responsible independent organization. At worst the thinking behind the current new gTLD process demonstrates how ICANN process has allowed itself to be subject to capture by vested interests and at best shows an organization which is not mature enough to manage the Domain Naming System independently.