Comments of Coalition for Online Accountability (COA)

November 22, 2009

The Coalition for Online Accountability (COA) appreciates this opportunity to comment on version 3 of the Draft Applicant Guidebook for the new gTLD process (DAG v.3).

COA consists of nine leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); the Business Software Alliance (BSA); Broadcast Music, Inc. (BMI); the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); the Recording Industry Association of America (RIAA); the Software and Information Industry Association (SIIA); Time Warner Inc.; and the Walt Disney Company. COA is a member of the Intellectual Property Constituency (IPC) of ICANN's Generic Names Supporting Organization (GNSO), and supports IPC's comments on DAG v.3. However, in its own right, COA and its participants have engaged actively in many aspects of ICANN's work since the inception of the organization, and have commented extensively on the new gTLD process, most recently on July 20 when COA submitted detailed comments on the published "excerpts" to version 3 of the DAG (DAG v.3x). See http://forum.icann.org/lists/e-gtld-evaluation/msg00011.html.

I. What These Comments Do Not Address

While COA considers the issue of rights protection mechanisms for intellectual property rights in the new gTLDs to be among the most important in this entire proceeding, we defer comment on these issues at this time. In COA's July 6 comments on the final report of the Implementation Recommendation Team on trademark issues, we "urge[d] ICANN to adopt the principal recommendations of the IRT report and to incorporate these in the final Applicant Guidebook for any new gTLD rollout." See http://forum.icann.org/lists/irt-final-report/msg00188.html. We are disappointed that ICANN has not chosen to do this, at least so far. However, we are hopeful that the further consideration of these issues within the GNSO, as directed by the ICANN Board, will lead to an outcome that implements the IRT recommendations more fully than was proposed by the ICANN staff. Since the GNSO process is not scheduled to be completed until the middle of December, we look forward to commenting on that outcome at that time, and thus omit comments in this document on the issues covered by the IRT report.

Nor do we address, in this submission, the three – or, since the Seoul ICANN meeting, the four -- other "overarching issues" identified by the staff as requiring resolution before a gTLD application window may be opened, except to the limited extent to which the steps that ICANN proposes to take to prevent the spread of malicious online behaviors into the new gTLD space are reflected in DAG v.3.[1] We look forward to learning more about how ICANN plans to

[1] COA has submitted a separate comment regarding the background paper on "Mitigating Malicious Conduct," see http://www.icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-04oct09-en.pdf.

modify its approach to the "overarching issue" regarding economic analysis. With regard to "root scaling," we find the Interisle report that ICANN commissioned to be persuasive on the question of how the new gTLD rollout should be paced to minimize the risks to the security and stability of the root zone, and look forward to responding to the conclusions of the two ICANN advisory committees that are currently reviewing that report. Finally, on the newly added "overarching issue" regarding vertical integration of registry and registrar functions, we are not in a position at this time to offer detailed comments on the four general options listed in the annex to Module 5 of DAG v.3.

II. Issues regarding Community Applications

In the three previous rounds of comments on the Draft Applicant Guidebook, COA has focused a significant amount of attention on how the new gTLD rollout will impact communities. As explained in our initial comments filed almost a year ago, many COA participants view themselves as institutions representative of cognizable economic and creative communities for purposes of the new gTLD process, and believe they should have standing to speak for those communities. For this reason, and because the concept of a "community application" is virtually the only form of categorization of new gTLD applications that ICANN has seen fit to recognize, we have raised extensive questions about the criteria for designation of a community application; about how community representatives can raise and prevail upon objections to applications that purport to represent a community or that target a community; about the "comparative evaluation" process that all community applications involved in string contention must undergo; and about post-delegation enforcement of obligations of successful community applications. Most recently, in its July 20 submission commenting on v.3x of the DAG as released May 30, COA devoted nearly all of its comments to these issues.

It is disappointing to see that, in the "final" text of version 3 of the DAG, ICANN has made virtually no changes to the guidebook on most of these issues. Where it has made substantive changes (notably with regard to what it now labels the "community priority" procedure, formerly known as "comparative evaluation"), it has decided to roll back the progress exhibited in v.3x.

A. Community-based applications: The thrust of COA's comments on v.3x on this point was to reiterate its call (echoed by many other commenters) for ICANN to recognize as a separate category of new gTLD application those "that would be open for registration only by persons or entities standing in a specified relationship with a particular company (such as its employees, suppliers, and/or distributors)." Whether labeled as "corporate TLDs," "single registrant TLDs," or ".brand," all such proposed new gTLDs present particular issues which may not be present, or which may need to be approached quite differently, in applications that envision a broader range of registrants. In its most recent staff analysis rejecting this approach, the staff concluded that "the ICANN community should continue to discuss TLD categories." That discussion has continued, including at the most recent ICANN meeting in Seoul, and has, in COA's view, begun to coalesce around a consensus that ICANN's dogged adherence to a "one-size-fits-all" approach to the new gTLD rollout is untenable. Whether with respect to security and protection against malicious conduct; or with respect to vertical integration of registry and registrar functions; or with respect to the economic study issues of calibrating the scope and pace

of the rollout in a way that optimizes competition and consumer choice, the evidence of need for differential standards for differentiated applications is becoming irrefutable. We hope this need will be fully addressed in DAG v.4.

B. Community objection standards and procedures : COA raised seven main concerns in this area on pages 2-3 of its v.3x comments, none of which has resulted in any change to the "final" version of DAG v.3.[2] We list these briefly below, but refer the reader to our July 20 and earlier comments for details:

- An applicant can invoke the "complete defense" to an objection, even if there is no other community-based application for the same string, and even if the challenger represents a community defined differently from the community defined by the applicant
- No presumption of detriment in favor of a challenger meeting all other criteria, and no explicit recognition of representative nature of community institutions
- No examples (including those using strings that will not be in contention in the next round) of challengers who may possess or lack standing
- No explicit recognition of trade associations or membership/affiliate organizations for a particular creative or economic sector as having standing
- No cumulation of qualifications to encourage organizations to join together in filing challenges
- No operationalization of "encouragement" to DRSPs to allow consolidation of challenges whenever possible
- Publication of running list of objections as they are filed is still simply a matter of "discussion" between DRSPs and ICANN

COA appreciates that ICANN staff has responded to some of these points, particularly the first two, on pages 20-21 of its October 2 "Summary Report and Analysis of Public Comment" (see http://www.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en.pdf). That response reveals a profound disconnect between the staff's admitted bias toward approval of new gTLD applications, even those deemed objectionable by communities to which they are targeted, and ICANN's newly reaffirmed commitments to act "in the public

[2] The only change in the community objection provisions between v.3x and v.3 appears on page 3-19 of the redline version of the latter, in section 3.4.4, where it is stated that evidence of "detriment" to a community could include "evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests." COA fully agrees with this statement, although we note that exactly the same objection could be made, on behalf of any objector, to any application, without regard to any relationship to a community. Unfortunately, it does not appear that DAG v.3 provides any forum for consideration of such an objection, except perhaps in the community context. This shortcoming must be rectified.

interest," including with regard to the new gTLD launch. http://www.icann.org/en/announcements/announcement-30sep09-en.htm.

In the staff's world view, if a community institution reasonably perceives a threat that new gTLD applications will be made for strings that are clearly targeted to that community, its only rational option is for it to pre-emptively apply for all TLDs bearing those strings itself, whether or not it believes that such new gTLDs will be in the best interest of community members. In effect, the staff recognizes no harm flowing from granting another party exclusivity in a proposed gTLD string that targets a community, so long as the community representative itself is free to apply for that string. This "all-into-the-pool" mentality is a sure-fire recipe for increasing the volume of new gTLD applications, with the accompanying increased revenue flow to ICANN, its contractors and agents. But it would no more indicate that a community supports a new gTLD targeted to it than a high volume of defensive domain name registrations at the second level of a gTLD would indicate high demand.

This insistence on restricting the community objection process as much as possible in order to channel potential objectors into filing their own new gTLD applications bleeds over into the objection standards as well. For instance, on the targeting criterion (page 3-18, redline version), v.3 ups the ante on v.2 by requiring that there be a "strong association" between the community represented by the objector and the applied-for gTLD string. A focus on the strength of the association would be more relevant if the objector were competing with the original applicant for this string, but could unfairly disadvantage a community representative who is not asserting its greater entitlement to the string, but simply objecting to its award to the applicant.

While a sentence-by-sentence critique of the staff's analysis is beyond the scope of this document, one passage deserves to be singled out for its fundamental misunderstanding, both of the position espoused by COA (and by other commenters, including IPC), and of the entire objection process itself. On page 21, the staff states: "Eliminating the 'detriment' requirement by way of presuming it simply by the filing of an objection, appears aimed at giving certain objectors with standing a veto power over applications. Such a power is not the envisioned result of the objection process." First, anyone who reads the COA submissions could confirm that we have never called for "eliminating the 'detriment' requirement," only for shifting the burden of persuasion on detriment; and we have never advocated that every challenger should benefit from this burden shift "simply by the filing of an objection," but only a challenger who "has shown that it meets the criteria of community delineation, substantial opposition, and targeting." July 20 submission at 3. Second, "giving certain objectors with standing a veto power over applications" is precisely what all the objection procedures spelled out in the DAG are about. A trademark owner who meets the criteria of the legal rights objection procedure obtains a "veto power over applications" for new gTLD strings that are confusingly similar to its mark; it is not told that if it wishes to prevent the applicant from succeeding, it must itself apply for the new gTLD string. An objector can prevail in the morality and public order objection procedure even if it would otherwise be entitled to obtain the objected-to string in its own right. Apparently only in the field of community objections is a valid representative of a community targeted by a proposed string to be told that its objection fails for lack of sufficient proof of "detriment," and that its only remedy – now no longer available to it – would have been to apply for the string itself.

C. Community Priority Evaluation: The v.3 "excerpts" released in May recommended that a community applicant could prevail in this evaluation (and thus avoid having the string contention resolved by an auction) if it achieved a score of 13 of 16 possible points. COA supported this change, while noting that there were still many scenarios in which a legitimate community applicant could fall beneath this threshold. Consequently, we were extremely disappointed to find ICANN reversing course in finalizing version 3, reverting to the 14-point threshold that had appeared in version 2. This change virtually ensures that whenever there is a non-community competitor to one or more community-based applications for a particular string (or set of strings within a contention set), the contention is extremely likely to be resolved, not on the basis of community preference, but simply on the basis of whose pockets are deeper. This outcome is very hard to square with ICANN's public interest obligations.

The summary of comments (on page 29) suggests two explanations for the ICANN staff's about-face. First, in public comments, some opposition was expressed to lowering the threshold from 14 points to 13. However, the summary lists only one clear opponent: eNom. (Another commenter, according to the summary, expressed "some concerns about lowering the threshold score," but its suggestion that ICANN "publish the ICANN staff's scenarios to test this scoring method" was rejected.) Second, the staff asserts that "the new definitions and empirical testing of the standards indicate that the score of 14 should be restored." But there are no new definitions – the criteria are virtually unchanged from those proposed in v.3x – and the additional "explanatory notes" now sprinkled throughout section 4.2.3, while to some extent useful[3], ought not to provide an excuse for making the process less survivable for community applicants. As to the "empirical testing," which the staff states that it has been undertaking throughout the entire process of development of the DAG, there is no way to evaluate whether this provides a justification for reversing course, since the staff refuses to disclose its test results, or to explain why 13 seemed an acceptable threshold under earlier tests, but not any longer.

A third possible justification may be gleaned from new language that has been inserted in section 4.2.3 of DAG v. 3: "It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well-qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application…". The fear seems to be that a "qualified" application will trump one that is "well qualified." But such a distinction is completely alien to the entire approach of the DAG, in which the relative "qualifications" of applications are never judged against each other, but only against objective evaluation criteria. The justification stated in section 4.2.3 would make sense if all applications were granted in the order of the scores achieved in the evaluation phase of the process, but with the exception that community status enabled an application to "jump the queue" and take priority over one that scored higher in terms of its "qualifications." But the DAG has never adopted the system of preferring the "well qualified" over the merely "qualified." (If it had, then it could be much easier to resolve cases of string contention, simply by preferring the application with the higher score.) All applications that survive the evaluation phase, regardless of their evaluation score, are on an equal footing. With

[3] COA notes, however, that none of the explanatory notes addresses the specific questions about criteria that were included in its comments on v.3x.

an auction as the default method for resolving string contention, there will certainly be cases in which a "highly qualified" applicant will lose out to a "merely qualified" but better-funded contender. Accordingly, this scenario provides no justification for further narrowing the eye of the needle through which a community application must pass at the "community priority" phase.

In our v.3x comments, COA pointed out once again that "any community application which has been the subject of a community objection, by an objector with standing, automatically loses 2 points, under criterion 4B ("strong and relevant opposition"), even though by definition it has vanquished the objection." ICANN staff responded that this will not automatically be the case, and that "it is less likely [sic] that the objection alone (especially when defeated) would be seen as proof of 'strong and relevant' opposition." Summary of Comments at 29.[4] However, in order to claim standing to make an objection, the objector must prove that it is an established institution with an ongoing relationship with a clearly delineated community that is strongly associated with the applied-for gTLD string. DAG v.3 section 3.1.2.4. Furthermore, even if it can prove that it represents a clearly defined community, that community opposition is substantial, that this community is strongly associated with the applied-for string, and that there is a likelihood of detriment to that community if the application were granted, the objector will still lose if the applicant successfully asserts the "complete defense" discussed above. Id. at section 3.4.4. If such an objector, having incurred the time and expense to prosecute the objection, does not constitute "strong and relevant opposition," then ICANN needs to better explain what it means by that term.

Of course, even if the staff were correct that what it calls the "plausible alternative outcome" were to occur, and the applicant lost only one, not two, points on this criterion, the staff's decision to raise the required threshold from 13 to 14 points means that any loss of two additional points will doom the claim to community priority. Thus, even under this assumption, a community application would be funneled into an auction if any two of the following were true[5]:

- The community represented is long-standing, but not of "considerable size" (criterion 1B);
- The community represented is of "considerable size," but lacks sufficient longevity (same);
- The string has some "other significant meaning beyond identifying the community" (for example, "Polish" identifies a community of persons with connections to Poland, but the same character string has numerous other meanings as both a noun and a verb) (criterion 2B);

[4] The parenthetical in the quoted passage makes no sense. Had the objection not been defeated, the application would never enter the community priority evaluation phase at all.

[5] If COA is correct that the unsuccessful objection by a party with standing would likely cost the application two points in the community priority evaluation phase, then the application would lose any claim to community priority status even if only one of the listed conditions applied.

- The application, while tightly regulating who may register in the TLD and how they may use that registration, does not regulate (on grounds of the "articulated community-based purpose") what names a second-level registrant may use for its registration (criterion 3B);

- The community represented by the application is "clearly delineated and pre-existing," but is deemed insufficiently "organized" to justify a top score on the delineation factor (criterion 1A).

In sum, the changes reflected in DAG v.3 reinforce the likelihood that the community priority evaluation procedure will turn out to be an intricately designed rococo-style anteroom to an auction. This outcome is not in the public interest.

D. Post-delegation Obligations (Registry Restrictions Dispute Resolution Procedure): Since this issue does not appear to have advanced beyond the Explanatory Memorandum published on May 30 (i.e., there is no new proposal on it in DAG v.3), COA defers further comment at this time.

III. Other Issues

A. Role of Public Comment. In a new paragraph inserted in section 1.1.3 of DAG v.3, the staff seems to be trying to draw a bright line between public comments regarding "whether applications meet the established criteria" and the "formal objection process." The implication seems to be that a comment not falling in the first category will be channeled into the second process. In practice, this line may be difficult to draw. Furthermore, since the evaluation and objection phases occur sequentially, the public may well have relevant information that will fall between the cracks: if received during the evaluation phase, if ICANN deems it to fall into the second category, it apparently will not be forward to the evaluators, yet a formal objection to the application in question may never be filed and therefore the comment will never be considered in the process at all. Greater clarity on this issue would be welcomed. In addition, public comments deemed to fall into the second category should automatically be forwarded to the Independent Objector if they deal with subjects on which he or she is empowered to file an objection. (Section 3.1.5 contemplates ICANN forwarding public comments to the IO but does not specify which public comments will receive this treatment.)

COA also notes that DAG v.3 eliminates the requirement that evaluators "perform due diligence on the comments received," and urges ICANN to explain this deletion. We also note that while the evaluators (in the initial, extended, and, where applicable, community priority phases) are directed to "take the relevant information into consideration," the decisionmakers in the objection processes merely have "discretion to consider" public comments. Since at least most of the objection processes are designed to answer the same question as the initial and extended evaluation phases – does this application meet the relevant criteria to continue toward possible delegation – this disparity needs to be justified.[6]

[6] ICANN should also clarify to whom a concern that a new gTLD application lacks effective security protection for user interests, or for the public, should be directed, and at what phase of the process. See note 2, supra.

B. Base Registry Agreement. For the third time, COA calls upon ICANN to revise the base registry agreement to give ICANN the authority to audit new gTLD registries regarding material misrepresentations made in the application and contract negotiation process, as well as material statements that are no longer true. The language now found in section 2.11 of the draft agreement remains deficient because it only authorizes audits for compliance with "covenants contained in Section 2 [sic: should be Article 2] of this Agreement," while the warranty of truthfulness of these statement appears in Article 1.

COA also supports the concerns of IPC regarding other deficiencies in the draft base registry agreement, particularly its failure to require registries to take proactive steps to ensure that registrars comply with obligations regarding complete and accurate Whois data which they collect in the new gTLDs. We see that in the summary of comments (pages 33-34), ICANN has finally responded to this repeated request made by many commenters over the past year. However, its response – that it wishes to "maintain the status quo so as to not pre-empt or side-step the bottom-up policy development work" within the GNSO – is unpersuasive. First, registry imposition of Whois-related obligations on registrars is the status quo for at least some of the new gTLDs that ICANN recognized in its most recent round. See, e.g., http://www.icann.org/en/tlds/agreements/asia/appendix-s-06dec06.htm#6 (.asia) http://www.icann.org/en/tlds/agreements/mobi/mobi-appendixS-23nov05.htm (.mobi, see part 6 of appendix S). Second, there is no "bottom-up policy development work" within the GNSO that would require registries to take a proactive role on this issue with the registrars they use, and thus nothing to "pre-empt or side-step." Finally, while COA is pleased that ICANN has decided to maintain the status quo with respect to requiring new gTLD registries to maintain and publish a full range of Whois data ("thick Whois"), there is no reason why the status quo should be viewed as a ceiling, rather than a floor. At a time when law enforcement, private sector security experts, consumer protection agencies, and many other groups all agree that more accurate Whois data is an essential tool in combating a growing tide of malicious, criminal, and otherwise illegal behavior online – including but by no means limited to copyright and trademark infringement – ICANN should take a more proactive role in setting the ground rules for the new gTLD space.

COA thanks ICANN for considering these comments. Please contact the undersigned for further information.

Respectfully submitted,

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