



Leading the Marketing Community

Submitted Electronically to gtld-guide@icann.org

December 15, 2008

Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601

Attn: Paul Twomey, President and CEO

Re: Comments of the Association of National Advertisers on the New gTLD Program and Process

Dear Mr. Twomey:

The Association of National Advertisers (ANA) would like to express its strong reservations and concern about the proposal of the International Corporation for Assigned Names and Numbers (ICANN) to increase dramatically the number of generic top level domains (New gTLD Program). We believe that implementing this proposal is certainly premature and highly likely to be counterproductive.

ANA leads the marketing community by providing its members insights, collaboration and advocacy. ANA's membership includes 400 companies with 9,000 brands that collectively spend over \$100 billion in marketing, communications and advertising. ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs and advance, promote and protect all advertisers and marketers.

ANA believes that ICANN's proposal to open the generic top level domain (gTLD) space to virtually any character string and its outline of a program for an initial application round for applicants who wish to operate a registry for a new gTLD (the New gTLD Program) deserves extremely careful further scrutiny and analysis. ANA opposes the proposed New gTLD Program for a number of important reasons. The generic top level domain space is currently limited to 21 TLDs (including, .com, .net and .org). The potentially unlimited expansion of the top level domain space will greatly increase the costs of brand management and will create new opportunities for others to infringe, phish and engage in other deceptive practices. As a result, brand owners and consumers will be net losers.

At a minimum, ANA respectfully urges ICANN to extend the comment period for an additional sixty to ninety days to allow further comments from consumer groups, trade associations, businesses and other Internet stakeholders. Notwithstanding ICANN's notification efforts (including a one week extension of the comment period from December 8 to December 15), ANA believes that the Internet community has yet to accord the New gTLD Program the attention and focus it merits. The impact of making a wrong decision could have substantial adverse economic consequences for consumers and the business community. On the other hand, there is little harm in delay. ANA strongly advocates giving all stakeholders a further opportunity to consider the New gTLD Program and to submit comments.

Brand Owners *and* Consumers May Be Net Losers under the New gTLD Program

The financial health of ANA's member companies depends on maintenance of structures (legal, economic, technological and cultural) that support creation and maintenance of strong brand identities. Brand owners, however, are not the only beneficiaries of branding--or necessarily even the principal beneficiaries. A coherent system for naming, identifying and advertising the availability of products and services is an absolute necessity for a strong economy. The current system provides major benefits for consumers who must make choices in an increasingly complex global marketplace. The New gTLD Program threatens the health of this existing well-developed system for identifying products and services in the marketplace.

Brands provide consumers with an important signal about the source and quality of goods and services. The process is good for business and good for consumers. The process is good for consumers because it involves the transmission of important information about products in the marketplace; it helps them make quick and rational sense of the available complex set of choices. It is also good for business because it helps companies around the world to communicate effectively and efficiently, in an easily understandable manner, about their products and services.

Therefore, the law generally and appropriately rewards strength in marks. It encourages policing of marks and encourages enforcement against infringement. It penalizes persons who infringe or who dilute the brands of others. The law creates these incentives not simply to protect the owner's interest in the brand (the "property" interest), but to protect the consumer from *confusion* and abuse by those who seek to trade on brands that consumers have come to trust and rely upon. The laws that protect brand-owners—trademark, false advertising, deceptive practices, consumer fraud—are key components of consumer protection regimes.

This system of information transfer -- the mutually rewarding feedback between brand owner and consumer-- depends for its success on a well calibrated balance between brand-protection laws and other important interdependent factors such as: the cost of creating and maintaining a solid brand and the physical/architectural opportunity for

others to infringe and elude detection and enforcement within a well-ordered business marketplace.

The New gTLD Program of unlimited top level domains will, if implemented, create massive changes in the TLD architecture and threatens to create a correspondingly large disturbance of the current balance of factors described above. A multitude of new domain operators are likely to sell huge numbers of second level domains to the public worldwide. These second level domains, due to their proliferation, will be even more vulnerable to the same kinds of phishers, squatters and other fraudulent operators who currently abuse the existing smaller gTLD system.

Presently, ANA's members expend substantial sums of money monitoring domain name abuse, defensively registering domains (sometimes in the hundreds or even thousands) and prosecuting squatters and other violators. These new costs are likely to escalate substantially when these same policing activities are required over potentially hundreds of new gTLD channels. Brand owners will thus find themselves forced to pay dramatically more to maintain their existing brand equity or simply abandon their current levels of brand hygiene and enforcement activities—and assume more risk. ANA believes the potential costs of the new gTLD program seem to far outweigh any perceived benefits to business or the general public.

No doubt, businesses would make some creative uses of the new gTLDs if they become available. ANA is not blind to some of the virtues of openness as an end in itself, as it allows for experimentation and creativity. Openness can, however, also increase the opportunity for harmful activity. Importantly, we do not believe that ICANN has demonstrated an existing or probable demand that comes close to justifying the potential for the proliferation of tortious conduct targeted at existing brands. The question, then, is to what extent any benefit offsets the massive burdens imposed by the New gTLD Program on brand owners and consumers. ICANN should perform this analysis and the resulting calculus of relative risk, benefit and burden needs to inform the reevaluation of the obligations and processes described in the Draft RFP.

The New gTLD Program also might have the unintended consequence of causing individual countries to seek enhancement of the liability and damages provisions of their existing trademark, unfair competition, deceptive practices and cybersquatting laws. Again, however, ANA hopes ICANN itself will review the allocation of risk and relative burdens imposed by the New gTLD Program so as to avoid the need for individual countries to remedy public policy initiatives that from the outset may prove to be hasty and ill-conceived.

Although ANA would have preferred ICANN to have decided against introducing the new gTLD proposal, we urge, at a minimum, that ICANN move cautiously and consider all points carefully before embarking on this potentially seismic shift in domain availability. Specifically, ANA strongly urges ICANN, as it reviews the Draft RFP in the coming

weeks, to examine each of the modules with an appreciation of the relative costs and burdens that will be placed on all parties concerned.

We note the following as examples of issues/proposals that ICANN should consider:

1. **Protections for Trademarks.** ICANN should explore additional application restrictions, processes and technologies to insulate brand owners from the costs and burdens of chasing and prosecuting squatters and others for violation of their trademark rights.

2. **Transparency of Applications and Registration Information.** Some comments suggest transparency in the application process (e.g., elimination of proxy registrations, heightened emphasis on the provision of complete “whois” information, and posting all gTLD applications) will lead to less abuse. ICANN should examine these proposals as well.

3. **Fees.** ICANN should study the various issues raised concerning fees, including those questions relating to how the new proposed fee structure might impact fee structures with existing gTLDs.

4. **General Process Issues.** ANA notes several application and adjudication process issues that should be analyzed, including ICANN’s right to “overrule” the determination of a Dispute Resolution Provider, the apparent absence of judicial remedy and how allowing public comments on the application process impacts it as a whole and, particularly, the objection process.

5. **“Generic” gTLDs.** “Generic” gTLDs (e.g., .bank, .insurance, .securities, .medicine, etc.) have a unique social and commercial value as they are broadly descriptive of industries and other unifying activities. Under the terms of the Draft RFP, anyone can apply for these “generic” gTLDs, including a single member of the applicable industry. ANA suggests that ICANN thoroughly review the uses and standing requirements for these gTLDs.

Each of the above areas raise significant questions that deserve further careful scrutiny and the time to receive input from businesses and other affected groups. Overall, the Internet has been a powerful source of change, innovation and opportunity. ANA respects ICANN's desire to exploit the vast innovative potential of this technology. ICANN, however, should do so only in a manner that recognizes its interdependence with other technologies, legal structures, market forces and cultural norms.

At this point, ANA believes that before launching this program, ICANN must make a strong case that the benefits of the New gTLD Program outweigh the downside risks. To date, a large segment of stakeholders are highly skeptical that this burden can be met. This proposal should not be launched until a careful reevaluation can be completed. At

a minimum, the Draft RFP must be carefully reconsidered and retooled so as to minimize adverse consequences to brand owners and consumers.

We appreciate the opportunity to comment and look forward to further discussion with ICANN in regard to this important matter in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel L. Jaffe". The signature is fluid and cursive, with the first name "Daniel" being the most prominent part.

Daniel L. Jaffe
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