

# **Accountability and Transparency at ICANN**

## **An Independent Review**

Appendix C: The Introduction of New gTLDs  
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## ***Abstract***

In June of 2008, the ICANN Board unanimously adopted the GNSO's policy recommendations for the introduction of new generic top-level domain names (gTLDs) and resolved to begin work on the implementation of a new gTLD application process. The new program, initially scheduled to launch in September 2009, is still under development.

The proposed process has been fraught with controversy, including criticisms over its delays, whether ICANN's method of publishing and incorporating public comments is sufficiently transparent and responsive, and whether new gTLDs should even exist. Critics have also raised a number of specific substantive issues, including the Expression of Interest proposal, trademark protection, the role of the Governmental Advisory Committee, the proposed morality and public order standard for objections to new gTLDs, and vertical integration.

## ***Case Study Sources and Methodology***

*For more information on our sources and methodology, please see Appendix A.*

This case study is based on publicly available materials, including public comments, ICANN documents, academic studies, media reports and expert opinions. It provides a summary of the facts regarding the introduction of new gTLDs. As per Exhibit B, section 1 of the Services Agreement between the Berkman Center and ICANN, its goal is to help identify key issues, challenges and areas of disagreement related to the new generic top-level domain name (gTLD) program. The observations below will contribute to the Berkman team's final report.

In addition to publicly available sources, this case study includes statements, opinions and perceptions of those we interviewed in the course of developing this case. These perceptions and opinions play an important role in the interpretation of ICANN decisions and their reception by the community. The statements of interviewees do not reflect the opinions or conclusions of the study team. While we have made every effort to remove factual inaccuracies, we do not attest to the accuracy of the opinions offered by interviewees. The interviews were conducted on the condition of confidentiality.

*Note:* As per the Services Agreement, this case study focuses on events prior to June 17, 2010. However, the new gTLD program is still evolving. As such, this study may not reflect the most recent developments in this case.

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## 1 Introduction

One of ICANN's roles, as articulated in its Articles of Incorporation, is "performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system."<sup>1</sup> Since the 1980s, the DNS has contained seven gTLDs (.com, .edu, .gov, .int, .mil, .net, and .org), three of which—.com, .net, and .org—are open for public registration.<sup>2</sup> In 2000, ICANN issued a call for proposals for new gTLDs. Between late 2000 and 2004, it introduced seven new gTLDs: .aero, .biz, .coop, .info, .museum, .name and .pro. In 2005, ICANN announced five more approved sponsored TLDs—.cat, .jobs, .mobi, .tel, and .travel—bringing the total number to twenty-one.<sup>3</sup>

In October 2007 the Generic Names Supporting Organization (GNSO)<sup>4</sup> finalized a list of policy recommendations on the introduction of new gTLDs,<sup>5</sup> in line with ICANN's stated commitment to "introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."<sup>6</sup> The ICANN Board approved these recommendations in June 2008, and staff began work on a new Draft Applicant Guidebook (DAG) four months later.

The DAG is currently in its fourth iteration, published on May 31, 2010. The timeline on the New gTLD Program section of ICANN's website estimates that the final Applicant Guidebook will be published some time in 2010 and lists the date of program launch as "to be determined."<sup>7</sup>

## 2 Proposed Application Process

According to the current (fourth) version of the DAG, applicants for new gTLDs must complete the following steps:

1. Register for the TLD Application System.
2. Submit a partial deposit of \$5000 for each gTLD desired.

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<sup>1</sup> ICANN, "Articles of Incorporation," revised November 21, 1998, <http://www.icann.org/en/general/articles.htm>; United States Department of Commerce, Statement of Policy on the Management of Internet Names and Addresses, June 5, 1998, <http://www.icann.org/en/general/white-paper-05jun98.htm>.

<sup>2</sup> A specialized TLD, .arpa, is reserved for "technical infrastructure purposes." Over 250 country code TLDs (e.g., .uk or .ru) also exist. ICANN, "Top-Level Domains (gTLDs)," <http://www.icann.org/en/tlds/>.

<sup>3</sup> On December 11, 2009, ICANN entered into a TLD sponsorship agreement with the Universal Postal Union (UPU), under which the UPU sponsors the .post gTLD. The domain has not yet been added to the root. ICANN, ".POST Sponsored TLD Agreement," December 11, 2009, <http://www.icann.org/en/tlds/agreements/post/>.

<sup>4</sup> The GNSO is one of three Supporting Organizations (the others being the Address Supporting Organization and the Country Code Names Supporting Organization) that develop and recommend policies to the ICANN Board. Each Supporting Organization also appoints two voting members to the Board.

<sup>5</sup> GNSO, "Final Report - Introduction of New Generic Top-Level Domains," August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>6</sup> ICANN, "Bylaws for Internet Corporation for Assigned Names and Numbers," amended June 25, 2010, <http://www.icann.org/en/general/bylaws.htm>.

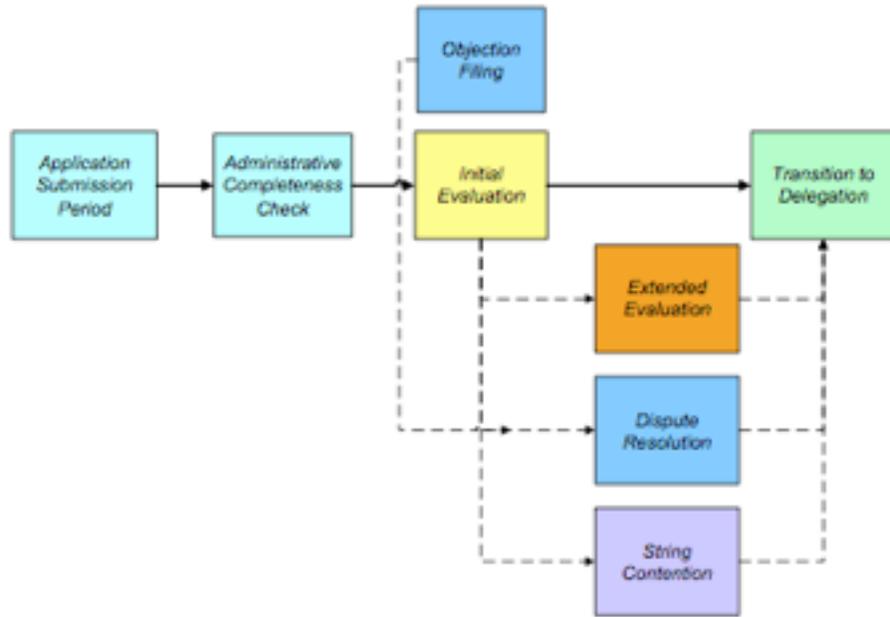
<sup>7</sup> ICANN, "New gTLD Program: New to the Program? Start Here!," <http://www.icann.org/en/topics/new-gtlds/program-en.htm>.

3. Complete the full gTLD application and submit the remainder of the evaluation fee (\$180,000, for a total cost of \$185,000).
4. Pass evaluations including:
  - evaluation of the requested string (to determine that it “is not likely to cause security or stability problems in the DNS”);
  - screening for string similarity, including problems caused by “similarity to existing TLDs or reserved names”;
  - screening of the applicant (to determine “whether the applicant has the requisite technical, operational and financial capabilities to operate a registry”); and
  - a background check for the operator and key members.
5. If applicable, sufficiently address any objections made on the grounds of “string confusion, legal rights, morality and public order and/or community.”
6. Undergo a 45-day public comment period.
7. Pass a secondary Extended Evaluation if the application does not meet the criteria for the initial evaluation.
8. Transition to delegation: Complete a registry agreement with ICANN and pass a series of technical tests.<sup>8</sup>

Not all of these steps are necessary for all applicants, and all of these steps are subject to change before the process is finalized and the gTLD program is formally launched. The fourth version of the DAG illustrates the process as follows:

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<sup>8</sup> ICANN, “Draft Applicant Guidebook, Version 4,” May 31, 2010, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf>.



**Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.**

### 3 Major Issues

ICANN’s decision to begin work on a new gTLD application process met with opposition from some in the global business community, including trademark holders and members of the financial sector, as well as a number of governments.<sup>9</sup> Opponents argued that a gTLD expansion would “create morality, trademark and geographic problems at the top-level,” confusing consumers and placing a great financial burden on business owners who would be forced to defensively register both TLDs and second level domains in new TLDs to protect their brands.<sup>10</sup> Other concerns included fears that increasing the number of gTLDs would threaten the stability of the DNS, that the expected benefit to consumers through greater competition would not outweigh the costs associated with such an expansion, and that the new program may invite an increase in criminal conduct such as phishing, malware and botnets. Others, by contrast, complained of ICANN’s slowness to commence this proposed expansion, arguing that ongoing

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<sup>9</sup> Michael Palage, “ICANN’s gTLD Proposal Hits a Wall: Now What?,” *The Progress & Freedom Foundation PFF Blog*, December 22, 2008, [http://blog.pff.org/archives/2008/12/icanns\\_gtld\\_pro.html](http://blog.pff.org/archives/2008/12/icanns_gtld_pro.html).

<sup>10</sup> Richard J Tindal, “Switching on the Light: Expression of Interest for New TLDs,” *Circle ID*, February 25, 2010, [http://www.circleid.com/posts/switching\\_on\\_the\\_light\\_expression\\_of\\_interest\\_tlds/](http://www.circleid.com/posts/switching_on_the_light_expression_of_interest_tlds/).

restriction of the DNS name space is anti-competitive or that the process is being held up by a few powerful voices that do not represent the wider ICANN community.<sup>11</sup>

### 3.1 Timeline

ICANN's timeline for the launch of the new gTLD program has been pushed back repeatedly. In June 2008, ICANN estimated that the Applicant Guidebook would be finalized by November 2008 and that the program would launch by early 2009.<sup>12</sup> In response to comments on the first draft of the guidebook indicating that the proposed timeline was too aggressive, in February 2009, ICANN extended the launch date to December 2009. Three months later, ICANN revised the timeline again, pledging to begin accepting applications in early 2010.<sup>13</sup>

At the October 2009 ICANN meeting in Seoul, ICANN faced criticism from potential applicants who claimed, "the timetable hasn't slipped, but has been abandoned" and implored ICANN to "just pick a date." "We're losing faith in this process as we see delay after delay after delay," said one.<sup>14</sup> Interviewees suggested that these delays may be due to the influence of powerful stakeholders who are fundamentally opposed to the widespread expansion of the domain name space. Some interviewees pointed to the ongoing discussion of trademark protection in new gTLDs as an example of an issue where a specific interest group, in this case trademark holders represented in the GNSO Intellectual Property Constituency (IPC), delayed the progress of the new gTLD program. This debate began with the GNSO Working Group on Protecting the Rights of Others in May 2007 and moved through the Implementation Recommendation Team and the GNSO Special Trademark Issues Working Group, which submitted its final report in February 2010.<sup>15</sup> Trademark holders have stated their opposition to the widespread expansion of gTLDs; the IPC has urged the limitation of this expansion.<sup>16</sup> In its June 2009 Communiqué to the Board, the GAC also stressed "the need for more effective protection for intellectual property rights" while stating its support for the introduction of new gTLDs.<sup>17</sup>

Other interviewees felt the delays may be due to the over-consideration of public input or to the Board's indecisiveness when faced by a lack of public consensus. These commentators described frustration at seeing issues that had been perceived or even explicitly marked as closed subsequently reopened. Such issues include the morality and public order standard for governmental objections to new gTLDs, which was debated within the GNSO, inserted into the first version of the DAG, and later altered in response to public comments (these alterations and

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<sup>11</sup> Andrew Alleman, "New gTLD Timeline Slips, Frustration Boils Over in Seoul," *Domain Name Wire*, October 26, 2009, <http://domainnamewire.com/2009/10/26/new-gtld-timeline-slips-frustration-boils-over-in-seoul/>.

<sup>12</sup> ICANN, "New gTLD Program: What kind of internet do you want?," June 23, 2008, [http://par.icann.org/files/paris/BAA\\_Intro\\_NewGTLDS\\_Paris\\_23Jun08.pdf](http://par.icann.org/files/paris/BAA_Intro_NewGTLDS_Paris_23Jun08.pdf).

<sup>13</sup> ICANN, "New gTLD Program Update," May 31, 2009, <http://www.icann.org/en/announcements/announcement-07may09-en.htm>.

<sup>14</sup> ICANN, "New gTLD Overview: ICANN Meeting, Seoul, Korea," October 26, 2009, <http://sel.icann.org/meetings/seoul2009/transcript-new-gtlds-program-overview-26oct09-en.txt>.

<sup>15</sup> Interviews, September 2010.

<sup>16</sup> International Trademark Association, "Creation of New gTLDs and Trademark Protection," July 8, 2009, [http://www.inta.org/index.php?option=com\\_content&task=view&id=2005&Itemid=153&getcontent=](http://www.inta.org/index.php?option=com_content&task=view&id=2005&Itemid=153&getcontent=).

<sup>17</sup> GAC, "GAC Communiqué—Sydney," June 24, 2009, <http://gac.icann.org/system/files/Sydney%20Communique.pdf>.

the initial reasoning behind the standard are described in two explanatory memoranda published by ICANN in October 2008 and May 2009<sup>18</sup>).<sup>19</sup> In the introduction to the third version of the DAG, published in October 2009, ICANN President Rod Beckstrom lists “evaluation criteria, dispute resolution standards and procedures, and contention resolution procedures” as being among the areas “where the process of continuous iteration and community feedback is essentially complete.”<sup>20</sup> However, in its March 2010 Communiqué to the Board, the Governmental Advisory Committee (GAC) stated that it “believe[d] this item should not be listed on the ‘closed items’ list with respect to the new gTLD process,” argued that the standard was inappropriate, and requested more detail from ICANN staff on how the standard would be implemented.<sup>21</sup>

Other interviewees expressed concerns that by proceeding with implementation of the GNSO recommendations before thoroughly responding to community concerns over the necessity for a gTLD expansion—which would include a thorough economic analysis and demonstrating the capability of the root to scale successfully—ICANN has created controversies that could have been avoided.<sup>22</sup>

In other interviews, it was suggested that the delays are a necessary part of the bottom-up, multi-stakeholder approach to which ICANN is committed.<sup>23</sup>

## **3.2 “Overarching Issues”**

Based on public comments on the first version of the Draft Applicant Guidebook, ICANN identified four “Overarching Issues” related to the introduction of new gTLDs: 1) Trademark Protection; 2) Potential for Malicious Conduct; 3) Security and Stability/Root Zone Scaling; and 4) TLD Demand and Economic Analysis.<sup>24</sup>

### **3.2.1 Trademark Protection**

In response to trademark-related concerns raised in public comments on the first draft of the DAG, ICANN pledged to discuss trademark issues stemming from the introduction of new gTLDs “with all relevant parties” and with Intellectual Property organizations around the world. On March 6, 2009, the ICANN Board resolved to direct the GNSO’s Intellectual Property Constituency, in conjunction with ICANN staff, to form an Implementation Recommendation

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<sup>18</sup> ICANN, “New gTLD Program Explanatory Memorandum: Morality and Public Order Objection Considerations in New gTLDs,” October 29, 2008, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>; ICANN, “New gTLD Program Explanatory Memorandum: Standards for Morality and Public Order Research,” May 30, 2009, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>.

<sup>19</sup> Interviews, September 2010.

<sup>20</sup> ICANN, “Draft Applicant Guidebook, Version 3,” October 4, 2009, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf>.

<sup>21</sup> “GAC Communiqué—Nairobi,” March 10, 2010, [http://gac.icann.org/system/files/Nairobi\\_Communique.pdf](http://gac.icann.org/system/files/Nairobi_Communique.pdf).

<sup>22</sup> Interviews, September 2010.

<sup>23</sup> Interviews, September 2010.

<sup>24</sup> ICANN, “New gTLD Draft Applicant Guidebook: Analysis of Public Comment,” February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>.

Team (IRT) to address trademark concerns.<sup>25</sup> For additional information on the IRT, please see section 3.3 of this report.

### **3.2.2 Potential for Malicious Conduct**

In February 2009, ICANN promised to “actively solicit[] feedback” on the potential for malicious conduct (specifically criminal conduct: phishing, pharming, malware, botnets) in the new DNS namespace.<sup>26</sup> ICANN set up a wiki to address all four “overarching issues” in April 2009; as of mid-August 2010 only two comments had been posted directly to the wiki.<sup>27</sup> In December 2009, ICANN staff announced that it would establish two temporary groups of experts to address these issues.<sup>28</sup> These two groups, the Zone File Access (ZFA) Advisory Group and the High Security op-Level Domain Advisory Group (HSTLD), published a set of documents on malicious conduct within new gTLDs and held two workshops at the March 2010 ICANN meeting in Nairobi.<sup>29</sup>

### **3.2.3 Security and Stability/Root Zone Scaling**

The ICANN Board delegated work on the security and stability issue to the Security and Stability Advisory Committee and the Root Server System Advisory Committee, which jointly conducted a study analyzing the impact of the proposed gTLD expansion on security and stability within the DNS root server system. A report on root scaling was published on August 31, 2009; a study on root zone augmentation and impact analysis followed on September 17, 2009.<sup>30</sup>

### **3.2.4 TLD Demand and Economic Analysis**

In October 2006, the ICANN Board resolved to direct the President of ICANN to:

*commission an independent study by a reputable economic consulting firm or organization to deliver findings on economic questions relating to the domain registration market, such as:*

- *whether the domain registration market is one market or whether each TLD functions as a separate market,*
- *whether registrations in different TLDs are substitutable,*
- *what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,*

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<sup>25</sup> ICANN, “Adopted Board Resolutions — Mexico,” March 6, 2009, <http://www.icann.org/en/minutes/resolutions-06mar09.htm>.

<sup>26</sup> ICANN, “New gTLD Draft Applicant Guidebook: Analysis of Public Comment,” February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>.

<sup>27</sup> ICANN, “New gTLD Overarching Issues,” [http://st.icann.org/new-gtld-overarching-issues/index.cgi?new\\_gtld\\_overarching\\_issues](http://st.icann.org/new-gtld-overarching-issues/index.cgi?new_gtld_overarching_issues).

<sup>28</sup> ICANN, “Temporary Expert Advisory Groups Formed on New gTLD Malicious Conduct Initiatives,” December 3, 2009, <http://www.icann.org/en/announcements/announcement-03dec09-en.htm>.

<sup>29</sup> ICANN, “Mitigating Malicious Conduct in New gTLD—Zone File Access and High Security Zone TLD,” February 22, 2010, <http://www.icann.org/en/announcements/announcement-22feb10-en.htm>.

<sup>30</sup> ICANN, “Security and Stability: Root Zone Scaling,” [https://st.icann.org/new-gtld-overarching-issues/index.cgi?security\\_and\\_stability\\_root\\_zone\\_scaling](https://st.icann.org/new-gtld-overarching-issues/index.cgi?security_and_stability_root_zone_scaling).

- *what is the effect of the market structure and pricing on new TLD entrants, and*
- *whether there are other markets with similar issues, and if so how are these issues addressed and by who?*<sup>31</sup>

In its resolution, the Board stated that its decision to call for an independent study was motivated by public comments “concerning competition-related issues such as differential pricing” with respect to proposed new registry agreements between ICANN and the operators of the .biz, .info and .org registries, which had been posted for comment in July 2006.<sup>32</sup>

In a December 18, 2008 letter to ICANN’s CEO and Board Chairman, the United States Department of Commerce, on behalf of the US government, expressed concerns that the publication of the first draft of the DAG had preceded the completion of this study.<sup>33</sup> Several other groups, including the National Association of Manufacturers,<sup>34</sup> AT&T,<sup>35</sup> and the Internet Commerce Coalition<sup>36</sup> also expressed concerns that ICANN had not yet filled its obligation to conduct a thorough economic study prior to releasing the DAG.<sup>37</sup>

Some interviewees also expressed concerns that this analysis still remains to be satisfactorily conducted, while others believed the economic studies ICANN has commissioned have been helpful in informing the debate over vertical integration between registries and registrars (for more information on this debate, see “Vertical Integration” below).<sup>38</sup>

In March 2009, ICANN released two studies by University of Chicago economist Dennis Carlton, one on the impact of gTLDs on consumer welfare and one on the possibility of price caps on the prices charged by new gTLD registries for second level domains. In these studies, Carlton concluded that the introduction of new gTLDs would “improve consumer welfare by facilitating entry and creating new competition.... The likely effect of ICANN’s proposal is to increase output, lower price and increase innovation.” He also stated that price caps on new TLDs were “unnecessary” and that imposing price caps may harm the marketplace by placing limits on the pricing flexibility of new registries without providing many benefits to registrants.<sup>39</sup>

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<sup>31</sup> ICANN, “Adopted Resolutions from ICANN Board Meeting,” October 18, 2006, <http://www.icann.org/en/minutes/resolutions-18oct06.htm>.

<sup>32</sup> ICANN, “Proposed .BIZ, .INFO and .ORG gTLD Registry Agreements,” July 28, 2006, <http://www.icann.org/en/announcements/announcement-2-28jul06.htm>.

<sup>33</sup> Meredith A. Baker, United States Department of Commerce, “Letter to Chairman Dengate-Thrush,” December 18, 2008, <http://www.icann.org/correspondence/baker-to-dengate-thrush-18dec08-en.pdf>.

<sup>34</sup> National Association of Manufacturers, “Industry Comments to the New gTLD Program and Process,” December 15, 2009, <http://forum.icann.org/lists/gtld-guide/pdf7xgwqYBTl6.pdf>.

<sup>35</sup> AT&T, “AT&T Comments on New gTLD Guidebook,” December 15, 2008, <http://forum.icann.org/lists/gtld-guide/docvN9GJ3ZMCd.doc>.

<sup>36</sup> Internet Commerce Coalition, “Comments on the New gTLD Program and Process,” December 15, 2008, <http://forum.icann.org/lists/gtld-guide/pdfwiBzRRbU1A.pdf>.

<sup>37</sup> Michael Palage, “ICANN’s Economic Reports: Finding the Missing Pieces to the Puzzle,” *Progress Snapshot* 5.4, April 2009, [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1494671\\_code759757.pdf?abstractid=1494671&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1494671_code759757.pdf?abstractid=1494671&mirid=1).

<sup>38</sup> Interviews, September 2010.

<sup>39</sup> ICANN, “New gTLDs—Preliminary Reports on Competition and Pricing,” March 4, 2009, <http://www.icann.org/en/announcements/announcement-04mar09-en.htm>.

After publishing the reports, ICANN opened a 45-day public comment forum, in which they were widely criticized.<sup>40</sup> Andrew Allemann of the Domain Name Wire blog accused ICANN of “whitewash[ing]” its own positions on new gTLDs and pointed out that Carlton contradicted himself in the reports by saying new gTLDs would benefit consumers by creating competition but that they would not be successful enough to pose a threat to trademark holders.<sup>41</sup> University of Miami law professor and long-time ICANN watcher Michael Fromkin called the studies “naïve” and challenged Carlton’s credibility, pointing out that the studies included very little quantitative data to back up their conclusions.<sup>42</sup>

In June 2009, ICANN commissioned Carlton to write two new papers responding to these criticisms. Reactions were mixed, with those who criticized the original papers unmoved and others—including several potential gTLD applicants—supporting the papers.<sup>43</sup> Between June 2009 and March 2010, the GAC emphasized the “lack of comprehensive analysis of economic and competition impacts” of the new gTLD program in three Communiqués to the Board and a separate letter to Peter Dengate-Thrush. In July 2009, the International Trademark Association Board of Directors passed a resolution stating that “ICANN has yet to commission the independent, comprehensive economic study of the domain name registration market called for by its Board of Directors in 2006” and that, “accordingly, ICANN has demonstrated no adequate economic or public policy justification for the introduction of new gTLDs.”<sup>44</sup>

In September 2009, Larry Smith and Howard Coble, both members of the United States House of Representatives’ Judiciary Committee, sent a letter to Rod Beckstrom stating that “the only economic justification put forth thus far has been an ICANN-commissioned report that has been widely criticized for failing to include empirical data or analysis” and asking whether ICANN intended to follow through on its commitment to carry out an economic study.<sup>45</sup> Beckstrom responded by pointing to the two reports by Carlton and an October 2008 study on vertical integration by CRA International. He stated that “Even with what appears to be the compelling benefits of competition, ICANN’s commitment to open and transparent processes requires further action on ICANN’s part” and declared that ICANN would “retain economists to review and summarize work to date regarding the costs and benefits of new gTLDs...and then evaluate whether additional study is required.”<sup>46</sup>

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<sup>40</sup> ICANN, “[competition-pricing-prelim] Chronological Index,” <http://forum.icann.org/lists/competition-pricing-prelim/>.

<sup>41</sup> Andrew Allemann, “ICANN Releases Two ‘Whitewash’ Reports to Defend its Positions on new gTLDs,” *Domain Name Wire*, March 5, 2009, <http://domainnamewire.com/2009/03/05/icann-releases-two-whitewash-reports-to-defend-its-positions-on-new-gtlds/>.

<sup>42</sup> Michael Fromkin, “Deeply, deeply flawed economic report and analysis,” *ICANN Watch*, March 4, 2009, <http://www.icannwatch.org/article.pl?sid=09/03/05/0248231>.

<sup>43</sup> ICANN, “[competition-pricing-prelim] Chronological Index,” <http://forum.icann.org/lists/competition-pricing-prelim/>.

<sup>44</sup> International Trademark Association, “Creation of New gTLDs and Trademark Protection,” July 8, 2009, [http://www.inta.org/index.php?option=com\\_content&task=view&id=2005&Itemid=153&getcontent=](http://www.inta.org/index.php?option=com_content&task=view&id=2005&Itemid=153&getcontent=).

<sup>45</sup> Lamar Smith and Howard Coble, Letter to Rod Beckstrom, September 15, 2009, <http://www.icann.org/correspondence/smith-coble-to-beckstrom-15sep09-en.pdf>.

<sup>46</sup> Rod Beckstrom, Letter to Lamar Smith and Howard Coble, September 22, 2009, <http://www.domainnamenews.com/wp-content/uploads/2009/09/2009-09-22-letter-from-rod-beckstrom.pdf>.

### 3.3 Expression of Interest Proposal

The concept of an Expression of Interest (EOI) model, in which prospective applicants could express “interest” in top-level domain strings before filing complete formal applications, was advanced at the October 2009 ICANN meeting in Seoul by various participants, primarily prospective applicants frustrated at the delays and uncertainty surrounding the gTLD program and concerned that the process, which was becoming increasingly expensive, may be put off indefinitely.<sup>47</sup> An EOI model would serve as a sign of progress, helping to move the process forward. At the meeting, the ICANN Board resolved to direct ICANN staff to “study the potential impact of a call for formal ‘expressions of interest,’” and to submit a draft proposal for Board consideration at the December 2009 Board meeting.<sup>48</sup> The Board noted that the model “could assist the resolution of the remaining issues and assist ICANN in planning for the coming new gTLD round” and “will likely contribute to a better understanding of: 1) the economic demand for new gTLDs; 2) the number of gTLDs that are likely to be applied for; and, 3) relevant industry data.”<sup>49</sup>

On November 11, 2009, ICANN announced it was considering soliciting expressions of interest in new gTLDs.<sup>50</sup> ICANN opened a month-long public comment period between November 11 and December 11, 2009 and asked for input on the form an EOI model might take. (Note: in this announcement, ICANN stated that those who wanted to have their comments considered by the ICANN Board during its December meeting should submit comments no later than November 27.)<sup>51</sup>

In this round of public comments, supporters of an EOI model included a number of Internet marketing companies, TLD consulting firms, self-identified potential gTLD applicants (including business and civil society organizations), and GoDaddy. They argued it would kick-start the application process and ensure that only serious applicants were involved. Potential gTLD applicant Stephen Ruskowski’s comment is typical of the sentiments expressed by EOI proponents:

*I welcome the transparency and approve of any screen that helps ensure all applicants are serious, viable, and well-intentioned. Restricting the round to those who have participated in the formal EOI (with attendant fees, toward the full*

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<sup>47</sup> ICANN, “New gTLD Overview: ICANN Meeting, Seoul, Korea,” October 26, 2009, <http://sel.icann.org/meetings/seoul2009/transcript-new-gtlds-program-overview-26oct09-en.txt>. A sample comment from potential applicant Bret Fausett is indicative of this concern: “There are people who are burning money trying to build businesses on this ICANN platform, and it’s very difficult when you don’t know what the target is.”

<sup>48</sup> ICANN, “Adopted Board Resolutions — Seoul,” October 30, 2009, <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>.

<sup>49</sup> ICANN, “Adopted Board Resolutions — Seoul,” October 30, 2009, <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>.

<sup>50</sup> ICANN, “Expressions of Interest in new gTLDs: ICANN seeks input and advice,” November 11, 2009, <http://www.icann.org/en/announcements/announcement-11nov09-en.htm>.

<sup>51</sup> ICANN, “Expressions of Interest in New gTLDs,” <http://www.icann.org/en/public-comment/public-comment-200912.htm#eoi-new-gtlds>; ICANN, “[eoi-new-gtlds] Chronological Index,” <http://forum.icann.org/lists/eoi-new-gtlds/>; ICANN, “Expressions of Interest in New gTLDs: Summary of Comments (11 November to 11 December 2009),” January 4, 2010, <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-04jan10-en.pdf>.

*application fee) would establish a minimum level of commitment and go a long way toward ensuring the integrity, order, and manageability of the application process. Also, making these EOIs public would promote early conflict resolution and perhaps help some groups and individuals avoid more serious risk as they become aware of better-positioned, more experienced competition.<sup>52</sup>*

On December 18, 2009, ICANN published a draft EOI model, which would require prospective applicants to submit information about themselves and the requested TLD, as well as a \$55,000 deposit, in order to participate in the first round of gTLD applications. Those who did not participate in the EOI would not be eligible to submit a gTLD application until later rounds.<sup>53</sup> ICANN opened a second public comment period on this model through January 27, 2010. Arguments against the proposed model clustered around four main points: effectiveness, cost, possible favoritism toward ICANN insiders, and its potential to create a secondary market for TLD slots.<sup>54</sup>

- 1. Effectiveness:** In its announcement of the EOI draft proposal, ICANN stated that the goal of the EOI was to gather information about the potential number of applications it would eventually receive. Opponents argued that many serious applicants would stay out of the EOI process to avoid revealing their ideas for a string, preventing unwanted competition (the proposed EOI applied only to the first round of applicants; later rounds were open to anyone). Others believed the EOI model was premature given that draft status of the Applicant Guidebook and that would further delay the application process while pulling attention away from the other, more serious “overarching issues.”

Supporters argued the EOI model would “illuminate” the gTLD landscape, providing a better picture of the prospective applicants, helping avoid conflicting applications and better informing potential applicants of any serious threats to their applications.

- 2. Cost:** For many, the \$55,000 EOI fee stood out in sharp contrast to the lack of a similar fee during the EOI phase of first round of gTLD proposals in 2000.<sup>55</sup> Opponents of the fee worried that non-profits, applicants from the developing world, or those who had been affected by the economic crisis would be effectively priced out of applying. One comment stated that the program “should not be used as a revenue raising tool for ICANN.”

Supporters of the fee, which included many self-identified potential applicants, believed it would effectively prevent non-serious proposals. They also noted that the \$55,000 EOI fee would be applied to the \$185,000 evaluation fee required for any TLD application and that the total cost of entering a new TLD into the root is around \$500,000, making

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<sup>52</sup> Stephen Ruskowski, “EOI,” November 17, 2009, <http://forum.icann.org/lists/eoi-new-gtlds/msg00009.html>.

<sup>53</sup> ICANN, “New gTLD Program: Aspects of an Expressions of Interest and Pre-Registration Model,” December 18, 2009, <http://www.icann.org/en/topics/new-gtlds/eoi-model-18dec09-en.pdf>.

<sup>54</sup> ICANN, “Expressions of Interest (EOI) in New gTLDs: Public Comments Summary and Analysis (11 Nov. to 11 Dec. 2009 and 18 Dec. 2009 to 27 Jan. 2010),” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-15feb10-en.pdf>.

<sup>55</sup> In 2000, interested parties were instructed to submit a brief (no more than ten pages) description of their proposal indicating how likely they were to formally apply. No fee was assessed until an applicant officially applied. ICANN, “ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains,” June 13, 2000, <http://www.icann.org/en/meetings/yokohama/new-tld-topic.htm#V>.

the EOI fee a relatively small part of the process. Those who cannot afford the EOI fee likely cannot afford to apply for or manage a TLD, they argued.

- 3. Possible favoritism toward ICANN insiders:** Opponents to the EOI proposal feared that it would give those who tend to be more involved in ICANN an unfair advantage over general Internet users in applying for new gTLDs. Eric Brunner-Williams, the Chief Technology Officer of Core Internet Council of Registrars, specifically voiced this concern, claiming the EOI idea “raises profound anti-competitive and institutional confidence issues from ICANN itself gaming the rules to benefit a group of participants that engage in ICANN’s processes to a greater extent than Internet users generally.”<sup>56</sup>

Proponents, including Richard Tindal (Senior Vice President of domain name registrar eNOM), pointed out that the rules for obtaining a new gTLD were the same no matter who was applying and that a well-executed communications campaign would ensure that all who might want to submit an EOI would be able to do so.<sup>57</sup>

In its analysis of the public comments, ICANN noted that if the Board were to approve the EOI proposal, it would need to organize a widespread information campaign to ensure that all potential applicants were aware of the program.<sup>58</sup>

- 4. Potential to create a secondary TLD market:** Some opponents, including Microsoft and Time Warner, expressed concern that applicants would try to “game the system” by first submitting multiple EOIs and then turning around and selling the resulting TLDs to those with real interest in maintaining them and the ability to pay more than the original cost. Those in favor of the EOI system, including Richard Tindal, noted that each EOI costs \$55,000 and provides no guarantee that the desired TLD will actually be obtained, so the likelihood that someone will decide the possible advantages outweigh the financial risks is quite small.<sup>59</sup>

ICANN received nearly 400 public comments during its two open forums on the EOI proposal. In its analysis of these comments, ICANN staff noted that while “many responses expressing opposition actually state the EOI is acceptable if conducted in a certain way,” there was a “general consensus that certain other overarching issues should be addressed prior to the launch of the EOI or gTLD program.”<sup>60</sup>

ICANN held a public discussion on the EOI proposal during the March 2010 meeting in Nairobi,

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<sup>56</sup> ICANN, “Expressions of Interest in New gTLDs: Summary of Comments (11 November to 11 December 2009),” January 4, 2010, <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-04jan10-en.pdf>.

<sup>57</sup> Richard J Tindal, “Switching on the Light: Expression of Interest for New TLDs,” *Circle ID*, February 25, 2010, [http://www.circleid.com/posts/switching\\_on\\_the\\_light\\_expression\\_of\\_interest\\_tlds/](http://www.circleid.com/posts/switching_on_the_light_expression_of_interest_tlds/).

<sup>58</sup> ICANN, “Expressions of Interest (EOI) in New gTLDs: Public Comments Summary and Analysis (11 Nov. to 11 Dec. 2009 and 18 Dec. 2009 to 27 Jan. 2010),” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-15feb10-en.pdf>.

<sup>59</sup> Richard J Tindal, “Switching on the Light: Expression of Interest for New TLDs,” *Circle ID*, February 25, 2010, [http://www.circleid.com/posts/switching\\_on\\_the\\_light\\_expression\\_of\\_interest\\_tlds/](http://www.circleid.com/posts/switching_on_the_light_expression_of_interest_tlds/).

<sup>60</sup> ICANN, “Expressions of Interest (EOI) in New gTLDs: Public Comments Summary and Analysis (11 Nov. to 11 Dec. 2009 and 18 Dec. 2009 to 27 Jan. 2010),” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-15feb10-en.pdf>.

during which there was very little consensus.<sup>61</sup> The GAC also held a discussion of the EOI and submitted a Communiqué to the Board in which it “question[ed] the benefits of pursuing further a separate EOI process, which could distract attention and resources from finalizing the new gTLD program.”<sup>62</sup> At that meeting, the ICANN Board voted against implementing an EOI model, claiming it would cause unnecessary confusion and delay and that it would take resources away from other critical issues.<sup>63</sup> ICANN CEO and president Rod Beckstrom said that the EOI proposal, if enacted, would have “added another step, another process, another set of community discussions and debate” to the gTLD process.<sup>64</sup> Some interviewees who had submitted public comments expressed concerns that this explanation for the Board’s decision was not adequate, given the fact that many of the submissions did in fact express support for the EOI.<sup>65</sup>

### **3.4 Trademark Issues and the Implementation Recommendation Team**

Of the four “overarching issues” identified by ICANN staff via the comments on the first version of the DAG, issues related to trademark protection have elicited the most public attention.

For many trademark holders, the introduction of new gTLDs raises concerns about trademark protection. ICANN is taking these concerns seriously; of the twenty principles laid out in the GNSO recommendations, the need to protect existing trademarks is listed third, above the need to prevent technical instability within the DNS and the need to comply with international human rights norms.<sup>66</sup>

The GNSO recommendations also include the need to prevent TLDs that are “confusingly similar” to existing top-level domains or Reserved Names; this recommendation is listed second. While this recommendation does not specifically reference trademarks, the accompanying notes largely concern trademark law. In a comment on the recommendation, Avri Doria, then Chair of the GNSO Council, expressed her concern with the language, noting:

*By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I.e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation.<sup>67</sup>*

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<sup>61</sup> ICANN, “New gTLD Update and EOI Panel Discussion,” March 8, 2010, <http://nbo.icann.org/node/8877>.

<sup>62</sup> GAC, “GAC Communiqué—Nairobi,” March 11, 2010, [http://gac.icann.org/system/files/Nairobi\\_Communique.pdf](http://gac.icann.org/system/files/Nairobi_Communique.pdf).

<sup>63</sup> ICANN, “Adopted Board Resolutions — Nairobi,” March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>; Elisa Cooper, “EI, EI — NO!,” *Circle ID*, March 12, 2010, [http://www.circleid.com/posts/20100312\\_icann\\_expression\\_of\\_interest\\_ei\\_ei\\_no/](http://www.circleid.com/posts/20100312_icann_expression_of_interest_ei_ei_no/).

<sup>64</sup> Ascio, “Highlights from the ICANN Meeting 7-12 March—Nairobi, Kenya,” March 25, 2010, <http://www.ascio.com/NewsContent.aspx?id=296>.

<sup>65</sup> Interviews, September 2010.

<sup>66</sup> GNSO, “Final Report - Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>67</sup> GNSO, “Final Report - Introduction of New Generic Top-Level Domains,” footnote 39, August 8, 2007, [http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#\\_ftn39](http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_ftn39).

Within trademark law, the concept of “confusingly similar” holds a different legal standard than the concept of “likelihood of confusion.” Two names—Acme Hardware and Acme Realty—may be “confusingly similar,” but, as they are used for dissimilar goods and services, are unlikely to cause confusion and therefore do not infringe on one another’s trademark. American University law professor Christine Farley explains that in domain name policy, where only the requested string is being considered, “confusingly similar” is the only standard that can be applied because domain names lack the real-world context necessary to determine “likelihood of confusion.” The GNSO recommendation “equates domain names with trademarks as legally protectable properties,” she writes, pointing out that under the proposed standards American University, which currently owns american.edu, would theoretically be able to prevent anyone else from registering .american. Furthermore, she notes, trademarks are largely regionally and market-based, whereas domain names are global; a “one-size-fits-all approach would leave consumers confused in one place, while unjustifiably denying speech rights in another.”<sup>68</sup>

On the other side of the debate are trademark holders, who fear that the introduction of new gTLDs will worsen existing problems with trademark infringement and cybersquatting. They fear they will be required to “defensively register” their trademarks as gTLDs—a costly process at \$185,000 per gTLD—as well as purchase second level domains in each new TLD to protect their brands. Monitoring and enforcing their trademarks across a broad new swath of domain registries will be overwhelming, they argue.<sup>69</sup> (Not all agree with these assertions. Using ten years of data from cases decided according to the Uniform Dispute Resolution Policy, Fred Kreuger and Antony Van Couvering of Minds + Machines estimate that the total annual cost to trademark holders resulting from new gTLDs may be as little as \$0.10 per trademark worldwide.<sup>70</sup>)

At the March 2009 ICANN meeting in Mexico City, the Board resolved to request that the GNSO’s Intellectual Property Constituency form an Implementation Recommendation Team (IRT) to “develop and propose solutions to the overarching issue of trademark protection in connection with the introduction of new gTLDs.”<sup>71</sup> This resolution was in response to a proposal by “members of the community with knowledge and expertise in this area.”<sup>72</sup> These community members were identified in interviews as members of the GNSO’s Intellectual Property Constituency (IPC).<sup>73</sup> The IRT was organized by the IPC in consultation with the ICANN staff. According to the Board resolution, the team should be “comprised of an internationally diverse group of persons with knowledge, expertise, and experience in the fields of trademark, consumer

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<sup>68</sup> Christine Haight Farley, “Convergence and Incongruence: Trademark Law and ICANN’s Introduction of New Generic Top-Level Domains,” Washington College of Law Research Paper No. 2009-22, <http://ssrn.com/abstract=1400304>.

<sup>69</sup> Joshua S. Jarvis, “New gTLDs Still On Track Despite Trademark Concerns,” *Trademark and Copyright Law Blog*, April 2, 2010, <http://www.trademarkandcopyrightlawblog.com/2010/04/articles/domain-names/new-gtlds-still-on-track-despite-trademark-concerns/>.

<sup>70</sup> Fred Kreuger and Antony Van Couvering, “A Quantitative Analysis of Trademark Infringement and Cost to Trademark Holders in New gTLDs,” *Minds + Machines Working Paper 2010-1*, February 10, 2010, <http://www.mindsandmachines.com/wp-content/uploads/M+M-Quantitative-Analysis-of-Cost-of-New-TLDs-to-Trademarks.pdf>.

<sup>71</sup> ICANN, “Adopted Board Resolutions — Mexico,” March 6, 2009, <http://www.icann.org/en/minutes/resolutions-06mar09.htm>.

<sup>72</sup> *Ibid.*

<sup>73</sup> Interviews, September 2010.

protection, or competition law, and the interplay of trademarks and the domain name system.” The resolution also directed the IRT to “solicit input from the interested constituencies prior to its first session to ensure broad community input at the outset of its work.”<sup>74</sup>

The IRT was criticized by the domain name industry and the ALAC for containing only trademark industry representatives and excluding consumers, Internet users and domain name registrants. In a statement regarding the IRT’s final report, ALAC said, “We are aware of a number of qualified individuals who expressed interest in participating in the IRT but were summarily refused without reason.”<sup>75</sup> These sentiments were echoed in several interviews. Interviewees also raised questions about the process behind the creation of the IRT, particularly focusing on whether the creation of a team of experts selected from a subset of the GNSO constituency was consistent with ICANN’s commitment to a bottom-up, multi-stakeholder approach to policy making.<sup>76</sup>

The IRT met via teleconference and held two in-person sessions (one in Washington, D.C. and one in San Francisco, both supported by ICANN staff) between March 25, 2009 and the submission of its final report to the ICANN Board on May 6, 2009. Its draft report, published on April 24, 2009, was open for public comment from April 24–May 24, 2009. The final report was made available for comment from May 29–June 29, 2009; this period was later extended to July 6, 2009. Some interviewees raised concerns over ICANN’s response to the IRT final report. They noted that though the ICANN Board had commissioned a report from the IRT “for consideration by the ICANN community at the [June 2009] Sydney meeting,”<sup>77</sup> the IRT was not given a chance to meet with the Board directly at this meeting.<sup>78</sup> (The IRT recommendations were, however, discussed at a consultation session on trademark protection and malicious behavior.<sup>79</sup>)

The IRT’s May 2009 final report proposed the following mechanisms for trademark protection:

- IP Clearinghouse, Globally Protected Marks List and associated Rights Protection Mechanisms, and standardized pre-launch rights protection mechanisms;
- Uniform Rapid Suspension System;
- Post delegation dispute resolution mechanisms (PDDRP);
- Whois requirements for new TLDs; and
- Use of algorithm in string confusion review during initial evaluation.<sup>80</sup>

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<sup>74</sup> Ibid.

<sup>75</sup> ALAC, “Statement of the Committee to the Public Consultation on the Implementation Recommendation Team (IRT) Final Report of 29th May 2009,” July 7, 2009, <https://www.atlarge.icann.org/files/atlarge/correspondence-07jul09-en.pdf>.

<sup>76</sup> Interviews, September 2010.

<sup>77</sup> ICANN, “Adopted Board Resolutions — Mexico,” March 6, 2009, <http://www.icann.org/en/minutes/resolutions-06mar09.htm>.

<sup>78</sup> Interviews, September 2010.

<sup>79</sup> ICANN, “New gTLD Program—Consultation Session on Trademark Protection and Malicious Behavior,” June 24, 2009, <http://syd.icann.org/node/3788>.

<sup>80</sup> ICANN, “Final Report on Trademark Protection in New gTLDs,” May 29, 2009, <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>.

These recommendations have raised multiple objections, as described in the ICANN staff analysis of public comments on the IRT final report.<sup>81</sup> Among them:

1. The International Trademark Association generally praised the IRT recommendations but expressed concerns that they “may not be adequate to address the potential problems associated with an unlimited expansion of NTLDs [new gTLDs].”<sup>82</sup>
2. Some have raised the concern that the IP Clearinghouse, which would act as a repository of trademark rights (including family names, trade names, unregistered marks and globally protected marks), may “represent a step towards a wholly new global registered trademark system,” the creation of which “is outside ICANN’s scope and authority.” Comments submitted by the NCUC and ALAC express concerns that the creation of this clearinghouse “could effectively derail ICANN.”
3. A Globally Protected Marks List (GPML) would prevent the registration of gTLDs and second level domain names matching any of the marks it contains. The list would contain only those marks registered in countries in each of the five global regions defined by ICANN. Opponents argue that registering a trademark in each region in order to include it in the GPML would constitute a major burden on trademark holders while providing relatively little protection. The current version of the DAG makes no mention of a GPML.
4. A comment submitted by George Kirikos calls the Uniform Rapid Suspension System (URS) an “extremist view of trademark rights favoring IP interests in comparison with the UDRP” [ICANN’s existing Uniform Domain-Name Dispute-Resolution Policy] that “goes beyond what is protected by law and due process.” Opponents to the URS fear it could become “an easy, cheap tool for Reverse Domain Name Hijacking.”
5. Privacy advocates worry that the Whois requirement may pose a threat to free speech. In a statement delivered at the Sydney ICANN meeting in June 2009, the At-Large Community, the At-Large Advisory Committee and the Non-Commercial Users Constituency noted that the Whois requirement did not take into account international privacy standards or national laws protecting privacy.<sup>83</sup>

The report was criticized as heavily weighted in favor of existing IP interests and overstepping both the bounds of existing copyright and trademark law and ICANN’s own mandate by asking that ICANN take responsibility for policing instances of trademarked terms in second and third level domains. In their joint statement in June 2009, the At-Large Advisory Committee and Non-Commercial Users Constituency claimed that “in the case of the IRT Report, we had neither

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<sup>81</sup> ICANN, “Summary Analysis of IRT Final Report Comments (Post-delegation Process and other Comments),” October 2009, [https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark\\_protection:20091006224010-0-1875/original/summary-analysis-irt-final-report-04oct09-en.pdf](https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:20091006224010-0-1875/original/summary-analysis-irt-final-report-04oct09-en.pdf).

<sup>82</sup> Anthony J. Biller and Jennifer Bisk, “Who is Going to Own DotAmazon? The Pending Domain Name Land Grab,” *Landslide 2* (2009).

<sup>83</sup> ICANN, “Joint Statement from ALAC/At-Large and NCUC made at Sydney Meeting re IRT Report,” June 25, 2009, [http://st.icann.org/gns0-liaison/index.cgi?at\\_large\\_irt\\_process\\_working\\_group](http://st.icann.org/gns0-liaison/index.cgi?at_large_irt_process_working_group).

transparency nor openness” and announced their formal opposition to the GPML, Uniform Rapid Suspension System and thick Whois proposals.<sup>84</sup>

Following the IRT report, the Board sent a letter on October 12, 2009 to the GNSO Council for rapid review, saying it would implement several IRT recommendations unless the GNSO Council voted otherwise.<sup>85</sup> On October 28, 2009, the GNSO called for participants from all stakeholder groups to form a broad “Special Trademark Issues” working group (STI). The STI worked to produce a consensus representing tradeoffs and compromises among positions. Its December 11, 2009 report<sup>86</sup> was approved by the GNSO Council, which “resolve[d] that the STI proposal to create a Trademark Clearinghouse and a Uniform Rapid Suspension procedure as described in the STI Report are more effective and implementable solutions than the corresponding staff implementation models that were described in memoranda accompanying the Draft Applicant Guidebook Version 3.”<sup>87</sup> The GNSO posted the STI report for public comment between its December 2009 meeting and January 26, 2010.

ICANN revised the IP clearinghouse and Uniform Rapid Suspension System proposals in the DAG to reflect the STI recommendations and posted these new proposals for public comment on February 15, 2010. At the March 2010 meeting, the Board voted to analyze public comments on the new proposals and to create guidelines accordingly to add to the Draft Applicant Guidebook for new gTLD applicants. The Board also resolved to analyze public comment on the PDDRP and to “synthesize those comments, as appropriate,” in the DAG.<sup>88</sup>

In the opinion of some interviewees, the STI working group was an example of the bottom-up, multi-stakeholder model of policy development to which ICANN is committed. Some expressed the view that ICANN should have formed the STI working group in response to initial concerns over trademark protection, rather than delegating these issues to the IRT. This view was generally tied to the belief that, although the IRT was officially tasked with developing recommendations relating to the implementation of the trademark protection policies developed by the GNSO, in reality, its work also included policy development. As the GNSO is the body responsible for “developing and recommending to the ICANN Board substantive policies relating to generic top-level domains,”<sup>89</sup> some interviewees felt that trademark issues should have been referred to the GNSO once substantial concerns had been raised by the community.<sup>90</sup> Other

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<sup>84</sup> ICANN, “Joint Statement from ALAC/At-Large and NCUC made at Sydney Meeting re IRT Report,” June 25, 2009, [http://st.icann.org/gnsol-liaison/index.cgi?at\\_large\\_irt\\_process\\_working\\_group](http://st.icann.org/gnsol-liaison/index.cgi?at_large_irt_process_working_group).

<sup>85</sup> GNSO, “Letter from Rod Beckstrom & Peter Dengate Thrush to GNSO Council,” October 12, 2009, <http://gnsol.icann.org/correspondence/beckstrom-to-gnsol-council-12oct09-en.pdf>.

<sup>86</sup> GNSO, “Special Trademark Issues Review Team Recommendations,” Special Trademark Issues Work Team, December 11, 2009, <http://gnsol.icann.org/issues/sti/sti-wt-recommendations-11dec09-en.pdf>.

<sup>87</sup> GNSO, “GNSO Council Minutes,” December 17, 2009, <http://gnsol.icann.org/meetings/minutes-council-17dec09-en.htm>.

<sup>88</sup> ICANN, “Adopted Board Resolutions — Nairobi,” March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>.

<sup>89</sup> ICANN, “Bylaws for Internet Corporation for Assigned Names and Numbers”, amended June 25, 2010, <http://www.icann.org/en/general/bylaws.htm>.

<sup>90</sup> Interviews, September 2010.

interviewees felt ICANN was right to consult experts for advice on implementing the GNSO's policy recommendation that "strings must not infringe the existing legal rights of others."<sup>91</sup>

The current version of the DAG states that requested gTLDs will be reviewed for similarity with existing TLDs, reserved names (a list of 34 strings such as "example," "test" and "tld"), applied-for gTLDs and strings requested as Internationalized Domain Name country code TLDs. Second level domains will not be included in the string similarity review process. Trademark holders may file objections to gTLD applications in accordance with the draft WIPO Rules for New gTLD Dispute Resolution.

### ***3.5 The Role of the Governmental Advisory Committee***

In March 2007, the GAC submitted a list of principles relating to new gTLDs to the ICANN Board.<sup>92</sup> The preamble to this list emphasizes the "sovereign right of States" over "international Internet-related public policy issues" as laid out in the 2003 World Summit on the Information Society Declaration. It also points to ICANN's own Bylaws, which commit the organization to "seeking and supporting broad, informed participation reflecting the functional, geographic and cultural diversity of the Internet at all levels of policy development and decision making" and "recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations." Following the preamble is a list of principles that the GAC states "need to be respected."<sup>93</sup>

The final section of the document states that, in line with ICANN's Bylaws, "ICANN should consult the GAC, as appropriate, regarding any questions pertaining to the implementation of these principles" and that "if any individual GAC members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them."<sup>94</sup>

Throughout the development of the new gTLD program, the GAC has submitted inputs to the ICANN Board via a number of different channels, including the March 2007 GAC principles document, Communiqués published after each of its meetings, and direct letters.

The interviews highlighted tensions among various stakeholders as to the specific role of the GAC in the development of the new gTLD program. Specific issues included the timeliness of GAC advice to the Board, the lack of staff and Board responsiveness to GAC advice, and the role of the GAC in ICANN's policy development process.<sup>95</sup>

- **Timeliness of GAC advice:** Some interviewees expressed concerns that the GAC was delaying the progress of the new gTLD program by providing its advice too late in the process; for example, by raising concerns about the morality and public order standard

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<sup>91</sup> Interviews, September 2010; GNSO, "Final Report - Introduction of New Generic Top-Level Domains," August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>92</sup> GAC, "GAC Principles Regarding new gTLDs," March 28, 2007, [http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf).

<sup>93</sup> GAC, "GAC Principles Regarding new gTLDs," March 28, 2007, [http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf).

<sup>94</sup> Ibid.

<sup>95</sup> Interviews, September 2010.

(see section 3.1) or by communicating its views on one version of the DAG as the subsequent version was published. Some questioned why, when individual GAC members attended working group meetings, the GAC as a whole appeared uninformed about the issues discussed in these meetings, responding to specific issues months or in some cases years after they were first introduced. Other interviewees noted that the GAC typically attempts to develop consensus before providing advice to the Board and that this process involves time-consuming consultation with national governments. Interviewees stated that this process is often complicated by the fact that the GAC receives lengthy documents to discuss just a few weeks prior to its meetings, making it difficult to read through these documents and discuss them with national governments in time to come to a consensus.

- **Staff and Board responsiveness to GAC advice:** Some interviewees expressed concerns that, because the Board primarily receives its information from briefing materials prepared by the staff and because these briefing materials are not made public, it is unclear whether the Board is adequately informed of GAC advice. Some interviewees expressed concerns that GAC advice has been largely ignored by the Board. This would be at odds with ICANN's Bylaws, which require the Board to take GAC advice into account in the "formulation and adoption of policies" and to explain any decision it makes that contradicts GAC advice.
- **GAC role in policy development:** As noted above, some interviewees expressed concerns that GAC advice has not been considered in a timely manner during the development of the new gTLD program. One example is the GAC's position on the use of geographic names as top-level domains: seven official Communiqués and two letters from the GAC between October 2007 and August 2009 expressed the GAC's opposition to the unlimited use of geographic names without government approval and requested more stringent provisions on this issue in the DAG. Other interviewees expressed concerns that the GAC is overstepping its bounds in the advice it has contributed to the gTLD process by attempting to make or influence policy independently while ignoring the policy recommendations of the GNSO. Interviewees also had differing views on the meaning of the GAC's advisory role: some felt the GAC is rightfully given more weight than other advisory committees, while others felt that the GAC should play a weaker role. Other interviewees felt that GAC advice is less helpful than it could be, expressing concerns that the GAC often states certain principles (for example, their views on the use of geographic names as top-level domains) without proposing solutions for how to carry out these principles in practice.

### **3.5.1 Geographic Names**

The GAC principles on new gTLDs state that ICANN should "avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities" and that applicant registries should pledge

to block “at no cost and upon demand of governments...names with national or geographic significance at the second level of any new gTLD.”<sup>96</sup>

According to Internet governance scholar and Non-Commercial Users Constituency co-founder Milton Mueller, the GAC has long been concerned with the use of the names of countries, regions, languages or peoples as domain names. He writes that as early as 1998, the GAC “demanded...that ICANN abstain” from assigning these names.<sup>97</sup> Mueller states that after the first TLD expansion in 2000, the director-general of the European Commission reportedly wrote to ICANN’s President and asked that governments have the first shot at registering ISO country codes in the new TLDs (example: uk.biz and gbr.biz). In 2001, the GAC requested—and ICANN approved this request—that all country names be reserved in the .info TLD for government use. Mueller points out that the Domain Name Supporting Organization (the precursor to the GNSO) was not involved in this decision, despite being responsible for suggesting policy related to TLDs.

In its October 2007 Communiqué, the GAC expressed concerns that the GNSO recommendations for new gTLDs did not “properly take into account” the GAC principles regarding the use of country names in new gTLDs.<sup>98</sup> The GAC expressed this concern again in its June 2008,<sup>99</sup> November 2008,<sup>100</sup> March 2009,<sup>101</sup> June 2009,<sup>102</sup> October 2009<sup>103</sup> and March 2010<sup>104</sup> Communiqués, as well as in letters on April 24<sup>105</sup> and August 18, 2009.<sup>106</sup>

The second version of the DAG, published on February 19, 2009, required “evidence of support, or non-objection from the relevant government of public authority” for applicants for geographic name-based gTLDs.<sup>107</sup> In communications to the Board after the publication of this draft of the DAG, the GAC acknowledged that it was an improvement on the first version but that it did not yet fully represent the GAC’s views.<sup>108</sup> In response, representatives of the Internet Commerce

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<sup>96</sup> GAC, “GAC Principles Regarding new gTLDs,” March 28, 2007, [http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf).

<sup>97</sup> Milton Mueller, “Governments and Country Names: ICANN’s Transformation into an Intergovernmental Regime,” <http://istweb.syr.edu/~mueller/gacnames.pdf>.

<sup>98</sup> GAC, “GAC Communiqué—Los Angeles,” October 31, 2007, [http://gac.icann.org/system/files/GAC\\_30\\_Los\\_Angeles\\_Communique.pdf](http://gac.icann.org/system/files/GAC_30_Los_Angeles_Communique.pdf).

<sup>99</sup> GAC, “GAC Communiqué—Paris,” June 26, 2008, [http://gac.icann.org/system/files/GAC\\_32\\_Paris\\_Communique.pdf](http://gac.icann.org/system/files/GAC_32_Paris_Communique.pdf).

<sup>100</sup> GAC, “GAC Communiqué—Cairo,” November 5, 2008, [http://gac.icann.org/system/files/GAC\\_33\\_Cairo\\_Communique.pdf](http://gac.icann.org/system/files/GAC_33_Cairo_Communique.pdf).

<sup>101</sup> GAC, “GAC Communiqué—Mexico City,” March 5, 2009, [http://gac.icann.org/system/files/GAC\\_34\\_Mexico\\_City\\_Communique\\_English.pdf](http://gac.icann.org/system/files/GAC_34_Mexico_City_Communique_English.pdf).

<sup>102</sup> GAC, “GAC Communiqué—Sydney,” June 24, 2009, <http://gac.icann.org/system/files/Sydney%20Communique.pdf>.

<sup>103</sup> GAC, “GAC Communiqué—Seoul,” October 8, 2009, [http://gac.icann.org/system/files/Seoul\\_communique.pdf](http://gac.icann.org/system/files/Seoul_communique.pdf).

<sup>104</sup> GAC, “GAC Communiqué—Nairobi,” March 10, 2010, [http://gac.icann.org/system/files/Nairobi\\_Communique.pdf](http://gac.icann.org/system/files/Nairobi_Communique.pdf).

<sup>105</sup> Letter from Janis Karklins to Paul Twomey, April 24, 2009, <http://www.icann.org/correspondence/karklins-to-twomey-24apr09.pdf>.

<sup>106</sup> Letter from Janis Karklins, the Chairman of the Governmental Advisory Committee, Ambassador of Latvia to France to Peter Dengate Thrush, the Chairman of the Board, August 18, 2009, <http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

<sup>107</sup> ICANN, “Draft Applicant Guidebook, version 2,” February 19, 2009, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf>.

<sup>108</sup> Letter from Janis Karklins, the Chairman of the Governmental Advisory Committee, Ambassador of Latvia to France to Peter Dengate Thrush, the Chairman of the Board, August 18, 2009, <http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

Association demanded to know why ICANN had chosen the recommendations of the GAC over those of the GNSO, in which geographic names were given less protection.<sup>109</sup>

Some interviewees supported government's rights to object to geographic name TLDs, deferring to government sovereignty. Some supported a limit exercise of these rights, for example with respect to city TLDs, where government sovereignty is clearly defined, but not with respect to regional or other TLDs, where sovereignty is less clear. Others expressed concerns that governmental approval will be too challenging for some TLD applicants to obtain (particularly in the developing world), or that giving governments the right to refuse to permit geographic name TLDs goes beyond governments' current rights to object to the use of geographic names in other areas, such as commercial ventures.<sup>110</sup>

### ***3.5.2 Expression of Interest Proposal***

The ICANN Board introduced the concept of an EOI after the GAC's October 2009 meeting; after receiving a draft EOI proposal from ICANN staff at its December 2009 meeting, the Board resolved to direct the staff to prepare a final model for Board approval at its February 2010 meeting.<sup>111</sup> This vote would have taken place before the next in-person GAC meeting. A public comment submitted by GAC member Bertrand de la Chapelle on behalf of the French government stated that France hoped that "no premature decision will be taken by the Board in February."<sup>112</sup>

Michael Palage has noted that Article III, Section 6 of ICANN's Bylaws requires ICANN to consult the GAC "in those cases where the policy action affects public policy concerns." Palage points to the potential creation of a secondary market for TLD slots and the potential EOI fee as examples of public policy issues raised in the EOI. In January 2010, Palage wrote that if the ICANN Board were to vote on the EOI proposal during its February 2010 meeting, as it had originally proposed, it would be violating these Bylaws. The Board ultimately postponed its decision on the EOI until its March 2010 meeting.

### ***3.5.3 Overarching Issues***

The GAC has also expressed concerns related to the four "overarching issues" identified by ICANN staff in February 2009. In an August 2009 letter, the GAC stressed the importance of a "controlled and prudent expansion" and a "more measured rollout," worried that the potential benefits to consumers might not outweigh the potential harms of such an expansion, and

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<sup>109</sup> ICANN, "Public Comment Analysis Report: Draft Applicant Guidebook, version 2," May 31, 2009, <http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>.

<sup>110</sup> Interviews, September 2010.

<sup>111</sup> ICANN, "Preliminary Report of Special Board Meeting," December 9, 2009, <http://www.icann.org/en/minutes/prelim-report-09dec09-en.htm>.

<sup>112</sup> Bertrand de la Chapelle, "From Black and White to Shades of Blue – Comments by France," January 28, 2010, <http://forum.icann.org/lists/draft-eoi-model/msg00256.html>.

expressed concerns that new gTLDs might confuse consumers and lead to “a multitude of monopolies, rather than increasing competition.”<sup>113</sup>

### **3.6 The Morality and Public Order Standard**

The March 2007 GAC principles state that new gTLDs should respect national, cultural, geographic and religious sensitivities.<sup>114</sup> The current approach to handling governmental objections to nationally, culturally and religiously sensitive gTLD applications is based on the Paris Convention for the Protection of Industrial Property, a 19th century trademark treaty that allowed national governments to refuse to recognize a trademark on the grounds that it conflicted with their local definition of “morality and public order.”<sup>115</sup> The morality and public order standard first appeared in the GNSO final report on new gTLDs; the report’s sixth recommendation stated that “strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.” In its notes on this recommendation, the GNSO Committee on New TLDs explained that it had “examined the approach taken in a wide variety of jurisdictions to issues of morality and public order” and had “sought to be consistent with, for example, Article 3 (1) (f) of the 1988 European Union Trade Mark Directive 89/104/EEC and within Article 7 (1) (f) of the 1993 European Union Trade Mark Regulation 40/94.” The Committee also stated that the reference to morality and public order “remains relevant to domain names even though, when it was drafted, domain names were completely unheard of.”<sup>116</sup>

However, the standard has met with objections from both civil society and the GAC. Opponents point out that there are no globally applicable standards of “morality and public order” and argue that the policy could be used to violate free expression rights.<sup>117</sup> Former GNSO Council Chair Avri Doria submitted a formal comment on the GNSO recommendations that typifies these objections:

*By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all possible religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g, a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality*

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<sup>113</sup> Janis Karklins, Chairman of the Governmental Advisory Committee, Letter to Peter Dengate Thrush, Chairman of the Board, ICANN, August 18, 2009, <http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

<sup>114</sup> GAC, “GAC Principles Regarding new gTLDs,” March 28, 2007, [http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf).

<sup>115</sup> Paris Convention for the Protection of Industrial Property, March 20, 1883 (amended September 28, 1979), [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html).

<sup>116</sup> GNSO, “Final Report—Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>.

<sup>117</sup> Milton Mueller, “ICANN and GAC discuss censorship,” *Internet Governance Project*, June 23, 2010, [http://blog.internetgovernance.org/blog/\\_archives/2010/6/23/4560694.html](http://blog.internetgovernance.org/blog/_archives/2010/6/23/4560694.html).

*without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality.*<sup>118</sup>

In October 2008, ICANN published an explanatory memorandum on the morality and public standard. The document stated that ICANN would likely restrict morality and public order objections to three areas: incitement to violent lawless action; incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin; and incitement to or promotion of child pornography or other sexual abuse of children.<sup>119</sup> A follow-up document released in May 2009 added “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” to the acceptable list of morality and public order objections.<sup>120</sup> This definition is currently part of the DAG, though ICANN has not yet responded to calls from the NCUC and others that it disclose the legal analysis by which it concludes that there are such “generally accepted legal norms.”

As early as October 2009, the GAC expressed concerns about the morality and public order standard as the method of handling governmental objections to proposed TLDs.<sup>121</sup> In its March 2010 Communiqué to the ICANN Board, the GAC stated:

*The GAC questions the appropriateness of the phrase “morality and public order” and is unclear how the proposed mechanism would work in practice. The GAC believes this item should not be listed on the “closed items” list with respect to the new gTLD process and requests a more detailed briefing from the ICANN staff on the anticipated practical implementation of the approach.*<sup>122</sup>

In interviews, some questioned why the GAC had not expressed objections to the morality and public order standard when it was first proposed in the October 2007 GNSO recommendations.<sup>123</sup>

### **3.7 Vertical Integration**

A further question facing ICANN in conjunction with the introduction of new gTLDs is whether registries and registrars should be forced to remain separate. Current ICANN agreements (since 2001) with gTLD registries prohibit registries from owning more than 15 percent of a registrar. This policy was established in response to the previous monopoly position of Network Solutions, which provided both registry and registrar functions for .com, .net and .org. In 1999, Network

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<sup>118</sup> GNSO, “Final Report—Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>119</sup> ICANN, “New gTLD Program Explanatory Memorandum: Morality and Public Order Objection Considerations in New gTLDs,” October 29, 2008, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>.

<sup>120</sup> ICANN, “New gTLD Program Explanatory Memorandum: Standards for Morality and Public Order Research,” May 30, 2009, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>.

<sup>121</sup> GAC, “GAC Communiqué—Seoul,” October 8, 2009, [http://gac.icann.org/system/files/Seoul\\_communique.pdf](http://gac.icann.org/system/files/Seoul_communique.pdf).

<sup>122</sup> “GAC Communiqué—Nairobi,” March 10, 2010, [http://gac.icann.org/system/files/Nairobi\\_Communique.pdf](http://gac.icann.org/system/files/Nairobi_Communique.pdf).

<sup>123</sup> Interviews, September 2010.

Solutions agreed to separate its registry and registrar functions.<sup>124</sup> In 2003, VeriSign (which had acquired Network Solutions in 2000) sold Network Solutions, which continued to operate solely as a registrar. VeriSign retained the registry business; it also retained a 15 percent stake in Network Solutions.<sup>125</sup>

Some stakeholders recommend a clear policy preventing registry operators from acting as registrar for their own gTLDs. Opponents of vertical integration argue that ICANN's current policy "eliminated the conflict of interest inherent in the system and resulted in robust, competitive markets for both registrars and registries, significantly lower consumer prices, and dramatic DNS growth—without jeopardizing stability or security."<sup>126</sup> They argue that allowing registries to act as registrars gives them the opportunity to misuse data regarding consumer demand. In public comments on the issue, the Public Interest Registry has referenced a study by Jonathan A. K. Cave that states that cross-ownership between registries and registrars may give those registrars an unfair advantage in negotiating with other registries. Cave also argues that commercial registries that own registrars may have an unfair advantage over non-commercial registries that do not.<sup>127</sup>

Supporters of vertical integration argue the forced separation between registries and registrars is outdated.<sup>128</sup> Vertical integration, they believe, could in fact lower prices and increase quality of service by allowing new registries to gain a foothold in the market and by fostering innovation in product development.<sup>129</sup>

ICANN has commissioned two independent studies on vertical integration. The first, a report by Charles River Associates International (CRAI), was made available for public comment on October 24, 2008.<sup>130</sup> It contained two primary recommendations: 1) that "single organization" TLDs be permitted to operate both the registry and the registrar selling domains within that TLD; and 2) that a registry may own a registrar, provided that the registrar does not sell domains within the TLDs operated by the registry. ICANN received 32 comments on this report between October 24 and December 23, 2008.<sup>131</sup>

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<sup>124</sup> ICANN, "Approved Agreements among ICANN, the US Department of Commerce, and Network Solutions, Inc.," November 10, 1999, <http://www.icann.org/en/nsi/nsi-agreements.htm>.

<sup>125</sup> Matt Hines, "VeriSign sells off domain registrar," *CNet News*, October 16, 2003, [http://news.cnet.com/VeriSign-sells-off-domain-registrar/2100-1025\\_3-5092316.html](http://news.cnet.com/VeriSign-sells-off-domain-registrar/2100-1025_3-5092316.html).

<sup>126</sup> Supporting True Intra-Registry Separation to Help Prevent Insider Trading, "Open Letter to ICANN in favor of 'True Registry-Registrar Separation,'" <http://intratldregistryregistrarseparation.org/>.

<sup>127</sup> ICANN, "New gTLD Program Explanatory Memorandum: Registry-Registrar Separation," February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/registry-regr-separation-18feb09-en.pdf>.

<sup>128</sup> Tony Kirsch, "Registry/Registrar Separation: Clarifying the Mess!," *AusRegistry*, February 17, 2010, <http://www.ausregistry.com/blog/?p=300>.

<sup>129</sup> Steven C. Salop and Joshua D. Wright, "Registry-Registrar Separation: Vertical Integration Options," January 28, 2010, <http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf>.

<sup>130</sup> ICANN, "Public Comment: CRAI Report on gTLD Registries and Registrars," October 24, 2008, <http://www.icann.org/en/announcements/announcement-24oct08-en.htm>.

<sup>131</sup> ICANN, "CRA Report: Revisiting Vertical Separation of Registries and Registrars — Summary & Analysis of Comments," January 12, 2009, <http://forum.icann.org/lists/crai-report/pdfMQnSWwlenD.pdf>.

ICANN's February 2009 explanatory memorandum on vertical integration contained an ICANN staff summary of public comments on the CRAI report. Some comments were in favor of continued prohibitions against cross-ownership, others supported a limited cross-ownership model, and others were in favor of complete vertical integration. The staff summary of comments described several possible options:<sup>132</sup>

- 1. Cross-Ownership—Finite Threshold Model:** In this model, registries and registrars would remain largely separate. Registries would be permitted to sell domain names through an affiliated ICANN accredited registrar up to a certain limit (somewhere between 20,000 and 100,000 names). This model would support small new registries and enable them to become competitive in the domain name market. A variation of the model would allow registries to sell domain names directly, without going through a registrar, up to a certain limit (50,000 names was suggested).
- 2. Cross-Ownership—Unlimited Threshold Model:** In this model, suggested by Demand Media, no ownership separation between registries and registrars would be required. Registrars would be able to own and sell domain names through a registry. Supporters of the model, including GoDaddy, stated that "if cross-ownership works for the first 50,000 names, there is no sound reason to limit it there."
- 3. Cross-Ownership—Zero Threshold:** This model, suggested by NeuStar, recommends that registries be allowed to own registrars, as long as the registrars do not sell domain names within the TLD owned by the registry.
- 4. Maintenance of Registry-Registrar Separation:** ICANN's Intellectual Property Constituency (IPC) expressed worries that the relaxation of this requirement may force ICANN to adopt a more active role in monitoring and enforcing compliance. The Public Interest Registry also objected to vertical integration on the grounds that "public interest in supporting competition does not favor a breakdown of the current separation of registry and registrar ownership."

ICANN staff considered these options and proposed a model that would slightly relax cross-ownership restrictions. Under the staff model, gTLD registries would be required to use ICANN-accredited registrars and to avoid discriminating between registrars. Registries would also be required to provide six months' notice before changing prices for domain name renewals. Registrars would be allowed to sell domains in an affiliated registry, with a limit of 100,000 domain names. This model was included in the second version of the Draft Applicant Guidebook, published on February 18, 2009, as part of the proposed draft registry agreement.<sup>133</sup>

At the June 2009 ICANN meeting in Sydney, two economic consultants—Steven Salop, Professor of Economics and Law at Georgetown University, and Joshua Wright, Assistant Professor of Law and Economics at George Mason University—gave a presentation on vertical integration and

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<sup>132</sup> ICANN, "New gTLD Program Explanatory Memorandum: Registry-Registrar Separation," February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/regy-regr-separation-18feb09-en.pdf>.

<sup>133</sup> ICANN, "New gTLD Agreement: Proposed Draft (v2)," February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/draft-agreement-clean-18feb09-en.pdf>.

participated in a question and answer session on the implications of registry-registrar cross-ownership.<sup>134</sup> Salop and Wright were later commissioned by ICANN to produce a review of vertical integration options in advance of ICANN's February 2010 Board meeting. The paper was made available to the public in March in order to "inform the public debate on the topic."<sup>135</sup> The review recommends that ICANN adopt vertical separation rules regulating when a registry or registrar may acquire ownership interest in an entity at the opposite level and that these rules be based on market share. It further recommends that ICANN, rather than automatically prohibiting registries and registrars from acquiring this interest when they are above a certain market share threshold, instead notify the appropriate government authorities and make the ultimate decision to allow or disallow the acquisition based on their response.

At the March 2010 ICANN meeting in Nairobi—less than a week after the paper was made public—the ICANN Board resolved that "within the context of the new gTLD process, there will be strict separation of entities offering registry services and those acting as registrars. No co-ownership will be allowed." The Board cited the desire to avoid conflicts with the possible development of a new GNSO policy on vertical integration as well as the need to move forward with the gTLD process as major factors in its decision; it stated that if a GNSO policy is developed and approved by the Board prior to the launch of new gTLDs, that policy will be incorporated into the new gTLD program.<sup>136</sup> In the interviews, it was suggested that this resolution, rather than a final decision by the Board, was a measure intended move the gTLD process forward while forcing stakeholders to work within the GNSO working group to develop a consensus.<sup>137</sup>

The GNSO had previously requested that ICANN staff prepare an issues report on vertical integration for submission to the GNSO Council. This request was prompted by a request from the Noncommercial Users Constituency (NCUC). The NCUC request, made in September 2009, referred to an August 27, 2009 statement by the NCUC that read in part:

*Vertical separation of registries and registrars is a policy issue—one of the most fundamental policies underlying ICANN's regulation of the domain name industry. And yet this important policy change is being handled as if it were an "implementation" decision that can be inserted into new gTLD contracts.<sup>138</sup>*

In the GNSO issues report, published on December 11, 2009, ICANN staff recommended that the GNSO "delay a PDP [policy development process] on vertical integration, and instead...provide focused timely input through the implementation process that is currently underway for the New

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<sup>134</sup> Steve Salop and Joshua Wright, "Vertical Integration Between Registries and Registrars—The Economic Pros and Cons," June 22, 2009, <http://syd.icann.org/files/meetings/sydney2009/presentation-vertical-separation-22jun09-en.pdf>.

<sup>135</sup> John Jeffrey, "Vertical Integration Options Report Available to Community," *ICANN Blog*, March 8, 2010, <http://blog.icann.org/2010/03/vertical-integration-options-report-available-to-community/>.

<sup>136</sup> ICANN, "Adopted Board Resolutions — Nairobi," March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>.

<sup>137</sup> Interviews, September 2010.

<sup>138</sup> NCUC, "Noncommercial Users Constituency statement on vertical separation of registries and registrars," August 27, 2009, [http://listserv.syr.edu/scripts/wa.exe?A3=ind0908&L=NCSG-NCUC-DISCUSS&E=base64&P=4946980&B=-\\_002\\_75822E125BCB994F8446858C4B19F0D78FFC6D85SUEX07MBX04adsy\\_&T=application%2Fpdf;%20name=%22NCUC-Ry-Rr-vertical.pdf%22&N=NCUC-Ry-Rr-vertical.pdf&attachment=q](http://listserv.syr.edu/scripts/wa.exe?A3=ind0908&L=NCSG-NCUC-DISCUSS&E=base64&P=4946980&B=-_002_75822E125BCB994F8446858C4B19F0D78FFC6D85SUEX07MBX04adsy_&T=application%2Fpdf;%20name=%22NCUC-Ry-Rr-vertical.pdf%22&N=NCUC-Ry-Rr-vertical.pdf&attachment=q).

gTLD Program.”<sup>139</sup> The staff also stated that “since the GNSO’s approval is not required, resolving the vertical integration issue through the implementation processes that are currently underway instead of through a PDP would be consistent with the ICANN Bylaws.” In a blog post on the Internet Governance Project, Milton Mueller criticized this description of how vertical integration should be handled within ICANN, writing:

*In this new theory of ICANN, the GNSO has no specific policy making role. Its status as the “home” or starting point of all policies related to generic names is not enshrined in the bylaws; its participation “is not required” either to initiate or to ratify policies pertaining to generic names. What this means, for those of you not steeped in ICANN arcana, is that there is no such thing as a bottom up process in ICANN.* <sup>140</sup>

The GNSO formed a vertical integration working group via a GNSO Council resolution on March 10, 2010. Between March 12 and March 31, 2010, it issued a call for participants.<sup>141</sup> On March 29, 2010, the GNSO Council announced that the Vertical Integration PDP Working Group was seeking comments “on any aspect related to the topic of vertical integration between registries and registrars that [commenters] think should be taken into account by the Working Group as part of its deliberations.”<sup>142</sup> The GNSO encouraged comments on the CRAI report published in October 2008, on the study published by Salop and Wright, and on the March 2010 Board resolution. The public comment period was open until April 18, 2010.

The ICANN staff summary of these comments was published on April 22, 2010. Six comments were received. The summary noted that the working group had requested that constituencies and stakeholder groups submit their statements by May 6, 2010.<sup>143</sup>

The GNSO’s work on vertical integration is still underway. A summary of vertical integration proposals currently being considered by the GNSO working group can be found on the ICANN wiki.<sup>144</sup> Additional GNSO documents on vertical integration can be found on the GNSO site.<sup>145</sup>

### **3.8 Internationalized Domain Names**

Internationalized domain names (IDNs) have existed at the second level, in TLDs such as .cn and .tw, since 2000. At the March 2003 ICANN meeting, ICANN’s IDN Registry Implementation

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<sup>139</sup> GNSO, “GNSO Issues Report on Vertical Integration Between Registries and Registrars,” December 11, 2009, <http://gns0.icann.org/issues/vertical-integration/report-04dec09-en.pdf>.

<sup>140</sup> Milton Mueller, “ICANN Staff finally admits it: There is no bottom up process and no difference between ‘policy’ and ‘implementation,’” *Internet Governance Project Blog*, December 11, 2009, [http://blog.internetgovernance.org/blog/\\_archives/2009/12/11/4402569.html](http://blog.internetgovernance.org/blog/_archives/2009/12/11/4402569.html).

<sup>141</sup> GNSO, “Call for Participation on the Vertical Integration Policy Development Process (PDP) Working Group,” March 12, 2010, <http://gns0.icann.org/announcement/announcement-12mar10-en.htm>.

<sup>142</sup> ICANN, “Public Comment: GNSO Policy Development Process on Vertical Integration Between Registries and Registrars,” March 29, 2010, <http://www.icann.org/en/announcements/announcement-3-29mar10-en.htm>.

<sup>143</sup> ICANN, “Summary of Public Comment on the Initiation of the GNSO Policy Development Process,” April 22, 2010, <http://forum.icann.org/lists/pdp-vertical-integration/pdfTjS7ytxAJ.pdf>.

<sup>144</sup> ICANN, “Vertical Integration PDP,” [https://st.icann.org/vert-integration-pdp/index.cgi?https\\_st\\_icann\\_org\\_vert\\_integration\\_pdp\\_index\\_cgi\\_vi\\_resources](https://st.icann.org/vert-integration-pdp/index.cgi?https_st_icann_org_vert_integration_pdp_index_cgi_vi_resources).

<sup>145</sup> GNSO, “Issues,” <http://gns0.icann.org/issues/>.

Committee submitted a set of guidelines for IDNs. At that meeting, the ICANN Board resolved to endorse the draft, to authorize the President to implement the guidelines it contained, and to allow ICANN to proceed with the registration of IDNs in registries that made agreements with ICANN based on the guidelines.<sup>146</sup> The guidelines were formally published on June 20, 2003.<sup>147</sup> Many TLDs—including .museum and .info—began accepting second level IDNs in 2004.<sup>148</sup>

In September 2007, the ccNSO approved the launch of a policy development process on IDN ccTLDs.<sup>149</sup> The GNSO recommendations for new top-level domains, approved by the GNSO Council the same month, also stated that “some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root.”<sup>150</sup> The current (fourth) version of the DAG allows the submission of applications for IDN gTLDs.<sup>151</sup>

Previously, in December 2006, the ICANN Board had resolved to request the ccNSO and the GAC to produce an issues paper on the introduction of IDN ccTLDs associated with ISO 3166 two-letter country codes (these codes are currently used in ccTLDs, for example .us or .uk).<sup>152</sup> In June 2007, after the ccNSO and the GAC submitted a list of questions to the Board to be considered before the introduction of IDN ccTLDs, the Board “respectfully request[ed] that the ICANN community including the GNSO, ccNSO, GAC, and ALAC continue to work collaboratively, taking the technical limitations and requirements into consideration, to explore both an interim and an overall approach to IDN ccTLDs associated with the ISO 3166-1 two-letter codes and recommend a course of action to the Board in a timely manner.”<sup>153</sup>

On October 30, 2009, the ICANN Board approved the IDN Fast Track Process, which allows nations and territories to register top-level domains reflecting their name or country code in their national languages.<sup>154</sup> The process formally launched on November 16, 2009, and the first four IDN ccTLDs—for Egypt, the Russian Federation, Saudi Arabia and the United Arab Emirates—were added to the root in May 2010.<sup>155</sup>

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<sup>146</sup> ICANN, “Minutes,” March 27, 2003, <http://www.icann.org/en/minutes/minutes-27mar03.htm#InternationalizedDomainNames>.

<sup>147</sup> ICANN, “Guidelines for the Implementation of Internationalized Domain Names,” June 20, 2003, <http://www.icann.org/en/general/idn-guidelines-20jun03.htm>.

<sup>148</sup> Chuck Gomes, “The Why & How of IDN Generic Domain Names,” May 13, 2010, [http://russia2010.intgov.net/files/Gomes2\\_RIGF2010.ppt](http://russia2010.intgov.net/files/Gomes2_RIGF2010.ppt).

<sup>149</sup> ccNSO, “ccNSO Council Minutes,” September 7, 2007, <http://ccnso.icann.org/about/minutes/ccnso-minutes-12sep07.pdf>.

<sup>150</sup> GNSO, “Final Report - Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gnsso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>151</sup> ICANN, “Draft Applicant Guidebook, Version 4,” May 31, 2010, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf>.

<sup>152</sup> ICANN, “Adopted Resolutions from ICANN Board Meeting,” December 8, 2006, [http://www.icann.org/en/minutes/resolutions-08dec06.htm#\\_Toc27198296](http://www.icann.org/en/minutes/resolutions-08dec06.htm#_Toc27198296).

<sup>153</sup> ICANN, “Adopted Board Resolutions—San Juan, Puerto Rico,” June 29, 2007, <http://www.icann.org/en/minutes/resolutions-29jun07.htm#m>.

<sup>154</sup> ICANN, “ICANN Bringing the Languages of the World to the Global Internet,” October 30, 2009, <http://www.icann.org/en/announcements/announcement-30oct09-en.htm>.

<sup>155</sup> Tina Dam, “IDN ccTLDs—The First Four,” *ICANN Blog*, May 13, 2010, <http://blog.icann.org/2010/05/idn-cctlds-%E2%80%93-the-first-four/>.

The announcement of the IDN ccTLD Fast Track Process prompted concerns that IDN gTLDs were being left behind. Some attendees at the public forum held during the October 2009 ICANN meeting expressed worries that, by putting ccTLDs first, ICANN was essentially forcing applicants to submit their domain name applications to governments.<sup>156</sup> Others noted that businesses who wanted to make their web content accessible via IDNs would be required to register multiple domains—one in each ccTLD—rather than registering a single domain in an IDN gTLD.<sup>157</sup>

Some interviewees supported ICANN's decision to separate the progress of IDN ccTLDs from IDN gTLDs in order to avoid unnecessarily delaying ccTLDs and expressed appreciation for the speed at which the IDN ccTLD Fast Track Process was developed. In interviews, it was suggested that the development of the Fast Track Process was a good example of cross-community collaboration between the ccNSO and the GAC. Some interviewees expressed concerns that policy development for IDNs had preceded the thorough setting and evaluation of technical standards for IDNs.<sup>158</sup>

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<sup>156</sup> Evan Ramstad, "Sparks Fly at Icann Meeting in Seoul," *Wall Street Journal*, October 29, 2009, <http://blogs.wsj.com/digits/2009/10/29/sparks-fly-at-icann-meeting-in-seoul/>.

<sup>157</sup> ICANN, "Transcript: Public Forum," October 29, 2009, <http://sel.icann.org/meetings/seoul2009/transcript-public-forum-29oct09-en.txt>.

<sup>158</sup> Interviews, September 2010.