

Maintaining a Good User Experience with New gTLDs

This paper is about the importance of maintaining a good, consistent experience across the entire Internet for domain name registrants (and all Internet users) in connection with the introduction of new gTLDs, including IDN gTLDs, at all levels. The Registries Constituency (the RyC - representing all of the generic top level domain Registries) is deeply concerned that the interests of the Internet consumer have been neglected in the development of policy governing new gTLDs and IDN gTLDs. The Constituency believes that there is a very real resulting risk of Internet fragmentation and an environment in which stability and security are endangered. This paper is intended to address these interests and highlight the concerns.

There are common issues of importance to the Internet consumer in the proposed ICANN procedures for new gTLDs and for IDN gTLDs. In this paper, Section 1 explains the Registries Constituency (RyC) position regarding the importance of avoiding 'confusingly similar' TLD strings - an important issue in the introduction of all new gTLDs, including IDN gTLDs. Section 2 focuses on five related aspects of protecting consumers' interests in IDN gTLDs.

1. Protecting the Consumer's Interest in all new gTLDs - avoiding confusingly similar new gTLDs

In its September, 2007 Report to the ICANN Board¹, the GNSO Council made a number of recommendations. Recommendation 2 states:

“Strings must not be confusingly similar to an existing top-level domain.”

A separate recommendation (3) provides:

“Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law”

1.1 Recommendation 2 v. Recommendation 3

Some confusion has arisen regarding the distinction between these two recommendations. There is a substantive distinction between them. In Recommendation 2, the phrase “confusingly similar” was adopted from the terminology found in internationally accepted principles of trademark infringement law. It is used there as a convenient means

¹ ICANN Generic Names Supporting Organisation Board Report, Introduction of New Generic Top-Level Domains, 11 September 2007 (<http://gnso.icann.org/issues/new-gtlds/council-report-to-board-pdp-new-gtlds-11sep07.pdf>),

of expressing the concept that consumers (domain name registrants and Internet users) should be protected from the inevitable confusion that would arise if domains that are similar to a confusing extent are put in the root. Recommendation 3, on the other hand, is explicitly intended to address the legal (primarily trademark) issues that arise from the creation of new domains. These latter issues are analogous to those addressed by the Uniform Dispute Resolution Policy (UDRP) in dealing with cybersquatting at the second level of the domain.

Of course, it must be recognized that trademark law is simply one aspect of the protection of consumers. In the words of an Internet web site on the subject: “Trademark law frequently refers to the confusion of consumers or the probable confusion of consumers. The reason for this is that trademark law is not as much about protecting business interests as it is to protect consumers. By providing a business with the incentive of increased profits by the grant of exclusive rights in a mark, and imposing a duty upon that owner to stop others from using that same mark on competing products, trademark law gives consumers some amount of control over the quality of products they buy. If one brand pleased the customer more than another, that customer can easily find the brand they liked without having to read ingredient labels or scrutinize packaging, materials and workmanship. This saves the consumer time, and allows him or her to make informed purchase decisions. For this reason, the standard of when a trademark right is being infringed has entirely to do with whether or not a consumer is going to be confused, and thus deprived of making informed purchasing decisions.”²

1.2 The meaning of “Confusingly Similar”

In initial discussions in the GNSO New gTLD Committee, it was suggested that the definition should be restricted to visual similarity alone. However, the final approved recommendation did not impose such a restriction.

The rationale of the final recommendation is that translations of words, for example, “Munich” and “München”, if used as top level domains, could easily cause confusion.

This concept has been recognized in UDRP decisions. In 2006, a case determined that “The Little Prince” in a domain name was confusingly similar to “*Le Petit Prince*”.³

RyC supports the broader definition of ‘confusingly similar’ as described in the detailed discussion for Recommendation 2 in the GNSO Board Report.⁴

² Confusion in Trademark Law By [Pliam Law Firm](http://www.marklaw.com/trademark-glossary/confuse.htm), <http://www.marklaw.com/trademark-glossary/confuse.htm>

³ <http://www.wipo.int/amc/en/domains/decisions/html/2005/d2005-1085.html>

⁴ ICANN Generic Names Supporting Organisation Board Report, Introduction of New Generic Top-Level Domains, 11 September 2007 (<http://gnso.icann.org/issues/new-gtlds/council-report-to-board-pdp-new-gtlds-11sep07.pdf>), pp.31-38

2. Protecting the Consumer's Interest in IDN gTLDs

RyC believes that the principles for IDNs should be global in scope and should be applicable to all peoples using scripts representing all languages.

It is therefore our belief that the following five basic principles must be embedded in the foundation of all discussion on IDNs:

1. Retain public trust—The public trust earned by existing domains must not be betrayed, or trust in the Domain Name System (DNS) itself may be eroded;
2. Encourage competition without complicating the user experience
3. Minimize regulatory burdens—Fragmented regulation will add needless complexity and retard DNS expansion rather than aid it;
4. Foster a balanced approach to intellectual property protection and dispute resolution—The need for uniformity dictates fewer authorities;
5. Maintain consistency with proven Internet principles--.The relevant RFCs urge single maintainers for symbols with common meaning.

In greater detail, the principles are as follows.

2.1 Retain Public Trust

Stewards of the technical administration of the Internet are committed to act in the best interests of the public (current and future domain name registrants and Internet users).

All registry operators of top level domains are obligated to operate in accordance with the technical requirements and guidelines set by ICANN and the IETF. The generic Top Level Domains (gTLDs) and many country code Top Level Domains (ccTLDs) have become globally recognized brands as a result. Users and registrants have an expectation of ubiquitous yet coherent worldwide resolution of the gTLDs and have grown accustomed to consistency in registration and resolution processes. Regardless of the continent from which a user accesses a TLD, users expect and deserve a ubiquitous, consistent and coherent experience at the level in the DNS where actual resolution, propagation and delegation of domains occur.

Users have arrived at a reasonable conclusion that the operator of a globally resolving TLD registry can be trusted to deal with significant operational issues as they arrive in the domain; it is reasonable for them to expect the same comparable level and quality of service in all scripts that represent the same domain label worldwide.

By way of example, the Registry responsible for the .mobi TLD has developed certain technical protocols, tools and services which when applied to content and services associated with the domain, ensure a consistently good user experience for those interacting with the domain via a mobile device. This is the cornerstone of the .mobi value proposition, a 'trustmark' by which the domain has become known with its users. Should an operator of an IDN version of the .mobi domain choose not to apply these standards and best practices or indeed apply them in a different manner, the user

experience would be significantly diminished and that element of public trust in the domain would be removed, resulting in brand fragmentation.

2.2 Encourage Competition without Complicating the User Experience

The Registries Constituency welcomes and embraces competition in the market, but not at the risk of sacrificing well-established principles. Competition in the top levels of the DNS should be fostered by calling for competition to establish new strings. These new strings must not be confusingly similar to existing gTLDs, and should be chosen through equitable and transparent processes that evaluate the proposed strings and their operators on their merits. There are infinite opportunities for new IDN gTLDs without risking user confusion arising from different registry operators for different IDN versions of the same string.

Moreover, the principle and importance of TLD differentiation is explicitly recognized by ICANN in its registry contracts of some sponsored TLDs (e.g., .mobi, .asia, .jobs). Part 7 of Appendix S to those agreements provides:

"ICANN and Registry Operator acknowledge that a criterion included in the application process in which the [.mobi/.asia/.jobs] TLD was selected, and in the previous TLD application expansion round, was that a new TLD be 'clearly differentiated from existing TLDs.' ICANN, when undertaking to effect the delegation of new TLDs, shall take into consideration Internet community input received, including any objections interested third parties may have under policy considerations or applicable law or otherwise, regarding the creation of new TLD strings."

In the next new gTLD application round, when a new IDN gTLD version of an existing gTLD is proposed, the RyC believes that the differentiation criterion must apply. To accomplish this, the criterion needs to be entirely clear that an applicant for an IDN version of an existing gTLD may be challenged to substantiate the differentiation of its proposal. In order not to compromise other goals of the application process and in order to achieve objectivity and certainty for new gTLD applicants, and to strike the right balance, the challenge process should be available only to existing gTLD registry operators. In answering a challenge, an applicant for an IDN gTLD should, at a minimum, be required to substantiate how the new IDN gTLD would achieve differentiation, thereby serving the best interests of users by avoiding confusion.

It should be remembered that there are now nearly one and one half million second level IDN names in the gTLD name space. Of these, approximately 900,000 are registered in two domains, .COM and .NET, and of those, seventy-five percent are registered in China, Japan and Korea. It is reasonable to predict that, especially among this subset of all registrants, there would be massive market confusion if the principle of differentiation is not included in the application process for IDN gTLDs.

2.3 Minimize Regulatory Burdens

One of the secrets of success of the Internet has been its growth and expansion generally free of undue regulatory burdens imposed by governmental and intergovernmental authority. It should be a primary goal of policy development for IDNs to recognize that multiple jurisdictions asserting regulatory authority over the same TLD in different IDN representations would hinder and not help the expansion and utility of the domain name system.

In addition, a single regulatory jurisdiction over all versions of what is essentially the same gTLD offers other advantages, some of which are enumerated below:

- a: Simplification of contact by law enforcement authorities
- b: Single source of information for users
- c: Uniformity and established relationships with users
- d: Simplification of the dispute resolution processes.

The Internet is a crucial engine for economic growth and free speech. The Internet remains open to innovation and progress due to the existence of a system free of conflicting regulatory burdens.

Governmental and inter-governmental interests should both respect the achievements and legitimate interests of each registry in maintaining its identity and, in addition, help to reduce end-user confusion across the full range of ASCII and IDN expressions.

2.4 Foster a Balanced Approach to Intellectual Property Protection and Dispute Resolution

The uniform application of guidelines providing a consistent process for Intellectual Property protection and dispute resolution is necessary for all users of the Internet.

Intellectual property challenges have always been present in the DNS and are likely to become even more complex in IDN representations of domain names. It would not be wise to complicate the dispute resolution process unnecessarily. If there were multiple registry operators for various IDN versions of ASCII gTLDs, then there would likely be multiple registry operators involved in dispute resolution proceedings for second-level domain names.

An additional advantage of keeping IDN versions of a single gTLD in one registry is that trademark owners would not feel so compelled to file defensive registrations in multiple gTLDs if a single proceeding could be filed to eliminate cybersquatting in all IDN versions of a gTLD. If, for example, ten different IDN versions of a gTLD domain were to be managed by ten different registries, it would be necessary to file ten UDRP proceedings to attack cybersquatters in each IDN domain, and trademark owners would likely feel compelled to file defensive registrations in each of the domains.

Uniformity and consistency with handling of second level domain disputes by the UDRP are essential elements of that policy. In any event, the implementation of dispute resolution policies for the same TLD in different IDN representations could seriously compromise public trust in trademarks and brand names and inevitably lead to consumer confusion. All users of the Internet are entitled to the benefits of a balanced and uniform approach to the protection of intellectual property issues that will inevitably arise.

2.5 Maintain Consistency with Proven Internet Guiding Principles

The IAB (Internet Architecture Board) has provided significant relevant guidance for the DNS in the following RFCs from May of 2000:

- RFC 2825: A Tangled Web: Issues of I18N, Domain Names, and the other Internet Protocols; and
- RFC2826: IAB Technical Comment on the Unique DNS Root.

In RFC 2825, two statements provide useful guidance:

- 1) "...solutions must not cause users to become more isolated from their global neighbors even if they appear to solve a local problem."
- 2) "One aspect of the challenge is to decide how to represent the names users want in the DNS in a way that is clear, technically feasible and *ensures that a name always means the same thing.*" [emphasis added]

One of the significant challenges of implementing IDNs is to avoid fragmenting the Internet and isolating users. RyC believes that a key means of avoiding this problem is to allow all manifestations of a given top level domain to be managed by a single entity. This simple solution will also address the second issue: ensure that each TLD name always means the same thing.

In RFC 2826, the IAB wisely observed that: "Effective communications between two parties requires two essential preconditions:

- The existence of a common symbol set, and
- The existence of a *common semantic interpretation* of these symbols. [emphasis added]

Failure to meet the first of these conditions implies a failure to communicate at all, while failure to meet the second implies that the meaning of the communication is lost."

Further, the IAB says: "Names are then constant symbols, whose interpretation does not specifically require knowledge of the context of any individual party."

Most, if not all, existing TLDs have achieved a "common semantic interpretation."

Importantly, RFC 2826 goes on to say:

“Since the DNS is hierarchically structured into domains, the uniqueness requirement for DNS names in their entirety implies that each of the names (sub-domains) defined within a domain has a unique meaning (i.e., set of DNS records) within that domain. This is as true for the root domain as for any other DNS domain. The requirement for uniqueness within a domain further implies that there be some mechanism to prevent name conflicts within a domain. *In DNS this is accomplished by assigning a single owner or maintainer to every domain, including the root domain*, who is responsible for ensuring that each sub-domain of the domain has the proper records associated with it. This is a technical requirement, not a policy choice.” [emphasis added]

Insofar as any registry’s domain in different scripts is considered the “same domain,” RFC 2826 appears to *require* that it be managed by a “single owner or maintainer.” To the extent that a domain in different scripts is considered a “different domain,” ICANN should establish an equitable and transparent process for evaluating both the value of a new domain as well as its prospective management.

Another well accepted principle, the “Principle of Least Astonishment” also dictates that TLDs be managed in the most consistent manner possible so as to lead to the least confusion. Under the IAB principles outlined above, a “common owner or maintainer” is the likely best solution for this issue as well.

3. CONCLUSION

In summary, the Registries Constituency’s position is that it fully supports the advancement of the IDN space. The Constituency believes such advancement must be concerned with new and unique top level domains, as opposed to collision with existing domains.

The public interest in IDN and all new gTLDs requires a focus on consumer experience and existing well established practices. The avoidance of confusingly similar names and continuing support for well established principles for IDNs are two aspects of respect for a consistent experience that will best serve all Internet users. A failure to acknowledge and address these principles could do great harm to the ubiquitous experience of the Internet that users have come to expect.