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Looking Back on the First Round of New gTLD Applications: Implications for the Future of Domain Name Regulation

Jacqueline D. Lipton



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ABOUT THE GLOBAL COMMISSION ON INTERNET GOVERNANCE

The Global Commission on Internet Governance was established in January 2014 to articulate and advance a strategic vision for the future of Internet governance. The two-year project conducts and supports independent research on Internet-related dimensions of global public policy, culminating in an official commission report that will articulate concrete policy recommendations for the future of Internet governance. These recommendations will address concerns about the stability, interoperability, security and resilience of the Internet ecosystem.

Launched by two independent global think tanks, the Centre for International Governance Innovation (CIGI) and Chatham House, the Global Commission on Internet Governance will help educate the wider public on the most effective ways to promote Internet access, while simultaneously championing the principles of freedom of expression and the free flow of ideas over the Internet.

The Global Commission on Internet Governance will focus on four key themes:

- enhancing governance legitimacy — including regulatory approaches and standards;
- stimulating economic innovation and growth — including critical Internet resources, infrastructure and competition policy;
- ensuring human rights online — including establishing the principle of technological neutrality for human rights, privacy and free expression; and
- avoiding systemic risk — including establishing norms regarding state conduct, cybercrime cooperation and non-proliferation, confidence-building measures and disarmament issues.

The goal of the Global Commission on Internet Governance is two-fold. First, it will encourage globally inclusive public discussions on the future of Internet governance. Second, through its comprehensive policy-oriented report, and the subsequent promotion of this final report, the Global Commission on Internet Governance will communicate its findings with senior stakeholders at key Internet governance events.

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EXECUTIVE SUMMARY

Internet domain names became valuable cyberspace commodities almost as soon as the system became commercialized in the 1990s. As the Internet became an unprecedented global market for the exchange of ideas, goods, services and personal interactions, the ability to easily find an entity's website was invaluable. Initially, Internet users relied directly on domain names as online addresses to find websites, and subsequently search engines incorporated domain names as key indicators of a user's desired location via proprietary algorithms. The Internet Corporation for Assigned Names and Numbers (ICANN) is the body that, among other things, administers the domain name system with respect to generic top-level domains (gTLDs) — that is, the string of characters to the right of the “dot.” While constituted as a technical, administrative body, ICANN soon found itself embroiled in intellectual property policy concerns about who had rights to which domain names. The challenges for ICANN increased exponentially when it released its new gTLD program. The first round of applications for new gTLDs took place in 2012, and applications are still being processed. With the second round of applications forthcoming, this paper looks back at some of the lessons learned from the first round with respect to trademarks, domain names and freedom of expression.

In particular, it focuses on:

- the history and policy behind the new gTLD program;
- the lessons learned from domain name disputes in second-level domains prior to the advent of the new program;
- the use of pejorative term such as “sucks” in domain names generally, and with respect to new gTLDs in particular, and the guidelines that have been developed through Uniform Domain Name Dispute Resolution Policy (UDRP) arbitrations for balancing free speech and proprietary trademark interests within such domain spaces;
- the treatment of “generic” versus “proprietary” new gTLDs in terms of balancing free speech and other interests against proprietary trademark interests;
- the treatment of “closed” versus “open” domain spaces under the new gTLD process; and
- the treatment of geographically significant terms incorporated into new gTLDs.

The paper concludes with some reflections on what has been learned from both traditional second-level domain name disputes and oppositions to new gTLD applications, with the expectation that these lessons can be carried forward into future application processes for new gTLDs.

INTRODUCTION

In 2012, ICANN opened the door to a new procedure that enabled applications for new gTLDs; that is, applications to run a registry for new strings to the right of the “dot” in a domain name. A domain name registry is a database of domain names and associated registrant information in a particular gTLD space.

Applications were made for 1,930 new gTLDs, of which 803 had been granted at the time of writing. Some applications were withdrawn, some were not approved, and some are still in process. The next round of applications for new gTLDs has not yet been opened.

This interlude between the first and second round invites consideration of some of the lessons learned from the first round, with particular reference to the protection of trademarks and freedom of expression. ICANN itself is evaluating the initial process with a view to streamlining the procedures the next time around.

This paper focuses on specific situations that arose under the first process, with particular reference to balancing interests in trademarks against interests in free expression. It is not offered as a statistical overview of the process; it is, rather, a more impressionistic reflection on some of the key issues implicated in the balance of proprietary and expressive interests online. Specifically, it addresses the question of whether the advantages of the new gTLD system outweigh its costs in the new domain spaces, given the significant resources expended by applicants and opposers in the context of the application process.

THE NEW gTLD PROCESS: BACKGROUND AND UNDERLYING POLICIES

It seems almost a misnomer to refer to this program as “new” given that the window for new applications opened and closed in 2012, but applications are still being processed. However, it is the first iteration of a program that may have a significant impact on how business is conducted online. It is unclear how significant the new domain names will be in practice, given Internet users' tendency to rely on search engines to find online information and given how prominent the .com gTLD remains. Nevertheless, a number of entities have expended, and continue to expend, significant resources in applying for, and subsequently supporting or opposing applications for, new gTLDs.

First, a word on terminology. The acronym “gTLD” stands, as noted, for “generic top-level domain,” which in simple terms means the alphanumeric string to the right of the dot in the domain name. Prior to the new gTLD process, ICANN authorized a number of entities around the world to maintain registries so one could register domain names

in the second level of the gTLD, or to the left of the dot. The number of gTLDs available prior to the new program was 22, including the ever-popular .com, .net, .biz and .org, which are open-use domains. Other gTLDs were limited to particular types of industry or institutions, such as .edu for American universities and the country-specific suffixes, such as .ca or .ru.

In these original gTLDs, entities desiring a Web presence within a gTLD apply to an ICANN-authorized registry for a domain name that incorporates the relevant gTLD; for example, Nike Inc. registered nike.com.

While multiple registries administer one or more of the existing gTLDs, the new gTLD program makes it possible for an entity to operate as the sole registry for a new gTLD. Thus, the European Broadcasting Commission now runs the registry for .eurovision and the British broadcasting company BSkyB administers .sky (Register.eu 2015).

The policy aims of the new gTLD program are to increase competition and to avoid scarcity in domain spaces. ICANN began to formulate the program around 2005, with input from a multi-stakeholder process. It developed an applicant guidebook for the program and opened the doors to applications in 2012.

In formulating the new process, ICANN was sensitive to concerns about protecting intellectual property rights in new gTLD strings, as well as attempting to avoid improper use of new gTLDs with a view to protecting various interests, such as culturally specific terms, competing brand names and geographically relevant terms. In its *gTLD Applicant Guidebook*, ICANN (2011) articulated the following four specific grounds for objection to an application for a new gTLD: “(a) string confusion, (b) legal rights, (c) limited public interest, and, (d) community” (ibid., module 3.2.1). String confusion contemplates that the applied-for gTLD is too similar to an existing TLD or another applied-for gTLD. Legal rights objections refer to infringements of existing legal rights of the objector, which naturally include trademark rights. Limited public-interest objection applies when a string is “contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law” (ibid.). Community objection relates to substantial opposition from a significant proportion of a community to which the gTLD might be explicitly or implicitly targeted. The government advisory committee (GAC) to ICANN has been extremely active in the area of community objections during the first round of applications.¹

The guidebook puts in place specific procedures to oppose the granting of a new gTLD application. A number of applications were challenged. Some challenges are still

in process. Challenges have been largely decided by arbitrators who have some familiarity with resolving domain name disputes under the UDRP in existing domain spaces. The GAC and other parties have also made representations to ICANN in the course of the process to clarify the rules applying to first-round applications.²

The following discussion focuses on four specific classes of concerns that have arisen in the new gTLD space: “gripe sites” (i.e., criticism sites) under new gTLDs, generic versus proprietary TLDs, closed versus open gTLDs, and geographically significant and other “public interest” forms of gTLDs. Before considering those categories of contentious applications, it is worth briefly summarizing how the balance of rights and interests in existing domain names (domains registered in the second level of pre-existing gTLDs) have been dealt with both legally and as a matter of market practice.

DISPUTES IN SECOND-LEVEL DOMAINS

Obviously, the introduction of the new gTLD process did not raise the prospect of balancing trademark rights and other important interests in the domain space for the first time. Registered domain names have grown exponentially over the years, as have the number of disputes, particularly since the advent of the UDRP, which makes the management of these conflicts fast, inexpensive and global. Despite the UDRP’s success and popularity as a mechanism for resolving disputes about competing interests in the domain space, it is important to bear in mind that the system does not oust the jurisdiction of national courts. Domestic laws, including trademark laws, can still be applied to domain name disputes in appropriate contexts. The same is true of new gTLDs. Online activities, including uses of domains in the new gTLD spaces, will still be subject to national laws, however the ICANN dispute-resolution processes develop and however market practices develop. While this paper focuses on ICANN and international market practices, the spectre of domestic litigation is still very real in both existing and new gTLD spaces.

The UDRP was implemented by ICANN in 1999, largely as an attempt to prohibit cybersquatting: registering a domain name corresponding with someone else’s trademark in order to profit in bad faith from the domain

¹ See <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>.

² See <https://newgtlds.icann.org/en/program-status/odr/independent>. This paper does not provide a detailed summary of the application process, nor of the opposition procedures, but rather focuses on specific issues that have arisen in the context of the first round of applications. Readers interested in more details of the process, including the innovation of adding an independent objector as an ICANN-appointed officer empowered to make objections to particular applications and the auction process for disputed domain names, should consult ICANN’s website at <https://newgtlds.icann.org/en/applicants/auctions>. ICANN maintains and publishes voluminous records of all aspects of the new gTLD process, including issues that will be reviewed prior to opening the second round of applications.

name, either by offering it for sale to the trademark holder or to a competitor, or otherwise disrupting the trademark holder's business (ICANN 1999, section 4a). However, soon the UDRP was being applied to a variety of situations that did not necessarily fit the traditional cybersquatting mould. The UDRP has been applied to disputes involving unauthorized fan webpages, gripe sites, parody websites and commentary websites. These disputes have emphasized the importance of balancing a trademark holder's proprietary interests against the ability of individuals to criticize or comment on the subject of the domain name. Ideally, trademark-based regulations should not quell freedom of expression. This has always been a challenge for domestic trademark laws, and naturally affects the regulation of domain names based on trademarks. A detailed consideration of how disputes involving free speech versus trademark rights tend to be resolved by both domestic courts and UDRP arbitrators is beyond the scope of this paper; however, there is a growing body of scholarship available to those interested (for example, Lipton 2008; 2010; Lindsay 2007).

The World Intellectual Property Organization (WIPO), whose arbitrators hear the most UDRP disputes, has also helpfully provided, and continually updates, a summary of the consensus views by arbitrators on particular types of disputes (e.g., disputes involving personal names, disputes involving gripe sites) (WIPO 2011). For example, one consensus view on gripe sites is that:

The right to criticize does not necessarily extend to registering and using a domain name that is identical or confusingly similar to the complainant's trademark. That is especially the case if the respondent is using the trademark alone as the domain name (*i.e.*, <trademark.tld>) as that may be understood by Internet users as impersonating the trademark owner. (WIPO 2011, section 2.4)

While the WIPO overview summaries theoretically do not hold precedential value because the rules of *stare decisis* do not apply to UDRP arbitrations, they offer useful guidelines about which rights and interests are typically prioritized above others in existing domain spaces. Those views might well inform the determinations of similar disputes in new gTLD spaces, and have certainly informed ICANN-authorized arbitrators dealing with disputes as to who has the right to a new gTLD.

Similar issues may well arise in new gTLD spaces as those that have arisen previously under existing gTLDs. Hypothetically, if a dissatisfied customer wanted to criticize a particular hotel franchise under the proposed .hotel gTLD using the "franchisename.hotel" domain, and was successful in securing the domain name, would the franchise be able to secure a transfer or cancellation

of the domain name? The WIPO consensus view cited above suggests that there is something special about the "trademark.tld" versions of trademarks within a domain space. Would this apply to new gTLDs as well as existing and extremely well-known gTLDs, such as .com? This remains to be seen in practice, but the current WIPO consensus views may be particularly useful in resolving these kinds of disputes.

GRIBE SITES UNDER THE NEW gTLD SYSTEM

Some issues arising in the new gTLD spaces will, of course, be quite different from those arising in the pre-existing system. For example, some new registries will operate as closed registries, meaning that the applicant for the gTLD will not open registrations in the second-level domains to third parties. Thus, for example, if our hypothetical hotel franchise in the previous paragraph applied for a new gTLD comprising its trademark (".franchisename") and elected to operate it as a closed registry, it could ensure that disgruntled customers could not use any of the second-level domains under the gTLD for gripe sites. Disgruntled customers could still set up criticism websites under other gTLDs, like "franchisename.com" or "franchisename.biz" if those domain names were available. It could also register "franchisename.sucks" under the recently granted (and somewhat controversial) new .sucks registry (see Kay 2015).

The .sucks registry in particular — the registry is run by a Canadian corporation, Vox Populi — opens a whole new can of worms for the domain name system. Previously, the registration of a second-level domain name including a pejorative such as "sucks" (for example, franchisenamesucks.com) was generally unobjectionable as long as the use was not commercial and was for a legitimate gripe site, and not an attempt to deceive customers (WIPO 2008). Trademark owners were always free to register pejorative versions of their brand names for themselves, and often did, as defensive registrations to prevent others from using those names (Kay 2015). Those registrations are generally inexpensive under the existing systems because of the competition among registries, which keep registration prices low.

However, registries that control pejorative domain extensions such as .sucks, for example, could charge much higher fees for certain types of registration. At the time of writing, Vox Populi has actually implemented a pricing scheme that attributes higher values to certain kinds of domain spaces, seeking to onsell those names to registry services that will profit from selling third-level domains in the relevant domain space. Some premium non-trademarked terms, such as "life.sucks" or "divorce.sucks," are suggested for onsell at higher prices than standard terms under Vox Populi's current plans, such

that a purchaser could then operate a third-level domain registry for customers interested in registering names such as “my.life.sucks.” Vox Populi also suggests that some “market premium names” will be released for significantly higher prices than other terms. Vox Populi also offers the ability to block the use of market premium names at a lower rate.

Ultimately, of course, the market will decide what price tag, if any, to place on these kinds of domains. However, to the extent that pejorative terms in domains are regarded as useful online forums, the costs of speech could increase. It is simply too early to know for sure how problematic, or helpful, such gTLDs might be, assuming most want the Internet to be an inexpensive and efficient forum for both speech and commerce.

It may be that the market continues to place its faith in existing gTLD spaces and these newer gTLDs will not come into widespread use, but, again, it is too early to gauge the popularity of any given new gTLD space.

GENERIC VS. PROPRIETARY gTLDs

Outside of concerns about specific new gTLDs, general concerns have arisen about different categories of gTLDs. One of the distinctions, implicit in the discussion of the .sucks registry, is that some gTLDs are generic terms whereas others connote proprietary terms (trademarks, business names). Generic terms include general words and phrases that might be applicable to a number of commercial interests, such as .hotel, .public or .free. Proprietary/trademark gTLDs, on the other hand, correspond to individual trademarks or business names — .google, for example.

Some terms correspond with both trademarks and generic words simultaneously. For example, “Amazon” is a geographical term when applied to the river, for example, but a trademark term when applied to the online retailer of that name. “Delta” is a generic word when applied to a geographical feature and a trademark when applied to the airline or faucet company.

The ICANN guidebook contains some guidelines for considering the balance between trademark interests in a potential new gTLD and other competing interests, such as those of governments that may have an interest in specific geographical regions. The community objection (see above) is an obvious example of an attempt to strike this balance in practice. However, it is difficult to formulate a clear rule that will apply fairly in all situations. Amazon is a particularly interesting example in that more than one national government has objected to the granting of the .amazon gTLD, which was withdrawn from the first-round process. The GAC objected to the granting of the application because of concerns raised by Brazil and Peru. However, the online retailer intends to continue fighting

for the gTLD. In a letter to ICANN, the co-chairs of the US Congressional Trademark Caucus, J. Randy Forbes and Suzan DelBene, argued that neither Brazil nor Peru had legal right to the term Amazon and that the gTLD should be granted to the online retailer consistent with ICANN’s stated policies (Ribeiro 2015).

While Amazon is a geographic term, the majority of generic terms do not correspond with geographic regions or geographic features as regards gTLDs. Thus, the potential concern about a private entity monopolizing a term does not necessarily have an obvious champion in terms of opposition during the application process. There are few who would have the wherewithal or knowledge to raise opposition. Private entities such as Amazon and Google applied for a number of generic terms such as .free and .public (Amazon) and .search (Google) in the first round. Objections to these applications came both from the GAC, on public-policy grounds, and also from other commercial entities who were concerned about the monopolization of those domains. The GAC issued a communiqué from Beijing on April 11, 2013, in which it suggested that safeguards be implemented for applications for certain categories of generic terms, including terms pertaining to children (e.g., .kid), the environment (.earth), financial issues (.capital), gambling (.bet), charity (.care), intellectual property (.film), professional services (.doctor), corporate identifiers (.gmbh), generic geographic terms (.city) and “inherently governmental functions” (.army) (see ICANN 2013). Private objections were also made to businesses operating closed registries for generic terms. For example, Microsoft objected to Amazon and Google’s respective applications for large numbers of generic terms that they intended to run as closed private registries. Microsoft’s concern was that if Amazon, for example, monopolized the .book domain space for its own proprietary innovations, it would give them an unfair advantage in the marketplace.

ICANN ultimately called for submissions from the general community in response to objections to closed registers for generic terms, and ultimately decided, contrary to the provisions of the original guidebook (or at least not addressed by those provisions), that generic terms had to be operated as open registries (Burke 2014). The result is that successful applicants for generic terms as gTLDs are required to allow third parties to register in the second-level domains under that gTLD.

CLOSED VS. OPEN gTLDs

The move to distinguish between closed and open gTLDs was controversial, particularly as individual entities had expended significant funds in applying for “generic term” gTLDs that they intended to operate as closed domains. For example, Amazon had wanted to operate a closed registry for the gTLD .author. Amazon could have used that gTLD to set up webpages promoting its own authors,

or providing services to new authors, or simply creating fan sites for established authors. Similarly, Google wanted to operate a closed registry for the .search gTLD. However, concern was raised about corporations monopolizing generic terms like these.³

The problem of closed versus open registries for generic terms as TLDs is even more complex than these two simple examples may suggest. While some terms are clearly generic, others are only generic in a certain context (delta, for example). Thus, even with a policy that does not allow closed registries for generic terms, ICANN and its authorized arbitrators are still faced with the problem of determining when a term is generic or proprietary. A policy that does not allow Amazon to monopolize the .book space might make sense, but it seems more problematic to determine whether a company such as Delta Airlines or Delta Faucet should, theoretically, be disallowed from operating a closed registry for a .delta domain. Of course, the delta example also raises the issue of multiple trademark holders each claiming the right to run a closed registry under the gTLD string that corresponds with its trademark.

With respect to generic domain names, in the case of multiple applications for the same gTLD, ICANN incorporated an auction procedure in its initial guidebook to determine who should be granted the domain name. The prices at which the names are ultimately sold at auction are additional to the original application fees, which were already close to US\$200,000 per application (US\$185,000 plus associated expenses). Some recent auction results underscore how valuable certain generic domains are deemed to be in the marketplace; .app was auctioned for just over US\$25,000,000, for example.

Once a domain name application is successful, the registry will have significant discretion how to implement it and how much to charge for second-level domains. The .sucks example above illustrates how lucrative some successful applicants expect certain second-level domains to be in practice. Charleston Road Registry, the new owners of the .app gTLD, obviously plans to profit from running an open registry for the gTLD. Interestingly, Charleston Road Registry is a wholly owned subsidiary of Google. In the wake of the determination that generic terms could not be operated as closed registries, Google clearly plans to try its hand at profiting from registering second-level domains as a registry for new gTLDs.

While companies such as Google and Amazon are not able to pursue some of their earlier plans to establish innovative services within closed registries for certain new gTLDs, they are certainly exploring the option of extending into the domain name registration business. It remains to be

seen whether these companies are able to profit in an already crowded domain name registration market.

GEOGRAPHICALLY SIGNIFICANT TERMS

As noted above, geographically significant terms have proved to be a particularly difficult case in the new gTLD space. Deliberations over the ability of private entities to run registries under such gTLDs have been time consuming and cost intensive. Additionally, even where a private entity is granted the right to run a registry for a geographically significant term, presumably most, if not all, such registries would have to be open on the basis that the term is, at least in some respects, generic. The .patagonia gTLD, for example, although initially applied for by the Patagonia sporting-goods company as a closed registry, is in fact being operated as an open registry by the Instra Corporation, an Australian domain name registry business. When Patagonia initially applied for the string, objections were raised by the governments of Chile and Argentina, and by ICANN's independent objector, an individual intended to represent the public interest. The company ultimately withdrew its application.

Geographically significant terms have also been problematic under the pre-existing gTLD system, given that the main dispute-resolution procedure for most existing domain names (i.e., the UDRP) prioritizes trademark interests over many other rights. The WIPO consensus document dealing with common issues arising in UDRP disputes notes that, generally, geographic terms cannot be protected under the UDRP unless they also comply with trademarks (WIPO 2011). It has proved difficult for the legal authority of a particular geographic region to establish unregistered trademark rights in jurisdictions where that authority has not registered a trademark (ibid.).

Thus, the various stakeholders in the global domain name community cannot glean much useful information from the pre-existing system as to how best to deal with geographically significant new gTLD applications. The result of several of the first-round applications for such TLDs has been that the terms in question are not used at all (e.g., .amazon). The expenditure of significant resources in applications and objections to such applications could be regarded as wasteful in situations where a prospective gTLD is not approved for anyone's use. The lesson learned from the first round of applications may, in fact, be that corporations whose trademarks happen to correspond with geographical terms are simply out of luck with respect to new gTLDs corresponding with their trademarks, and should not apply for the gTLD in the first place unless they are prepared to run an open registry. Many such corporations probably do not want to go to the trouble of running an open registry, and it may defeat their purposes for applying for the gTLD in the first place.

³ At the time of writing, applications have not been finalized and there are no known outcomes on bids.

Even when corporations are prepared to run open registries, objections to such applications may still be made by community groups, governments, the GAC and the independent objector, consistent with the policies set out in the original ICANN guidebook. For the near future, it is likely that applications for geographically significant terms under the new gTLD program will continue to be a costly and risky proposition.

Interestingly, the problems may not be so severe for gTLDs corresponding with personal names. Despite the fact that personal names (of celebrities, politicians, athletes, etc.) have raised particular concerns in pre-existing domain spaces, this is not likely to be the case under the new gTLD program. Many individuals have complained about registrations of .com names corresponding with their personal names by fans, cybersquatters and those who seek to criticize them (Lipton 2008; 2010). These disputes tend to arise under the UDRP because it is the fastest, most inexpensive and most effective way for an individual to deal with what they perceive as unfair practices involving personal names. The WIPO consensus document discusses personal names in much the same manner as geographical terms: they are only protectable under the UDRP if they correspond with trademark rights (WIPO 2011, section 1.6). However, unlike geographical terms, many names of well-known individuals have been regarded by UDRP arbitrators as comprising trademarks (ibid.).

Under the new gTLD system, it is unlikely that anyone would go to the trouble of seeking to apply for an entire domain name registry, and incurring the resultant costs, with respect to a personal name. While some surnames are so popular that it may be worth running a registry (e.g., .smith, .jones, .wang), the idea of paying upwards of US\$200,000 for an application to run a registry for a person's full name, such as ".hillaryclinton," seems unlikely.

CONCLUSION

While the discussion above is not comprehensive, it has highlighted some of the more significant issues that have arisen during the first round of applications for new gTLDs. Principles developed in relation to dispute resolution over names registered in pre-existing gTLD spaces have been helpful in foreseeing and resolving some of these issues. Some novel issues have arisen as well. It is too early to gauge the overall likely impact of this "new" gTLD program on use of proprietary terms and on freedom of expression in cyberspace. However, some areas bear close scrutiny in coming years, in particular with respect to the second round of applications.

The present gTLD program significantly moves the regulatory focus in the domain space away from old-fashioned cybersquatting to other concerns, such as wasted resources in cyberspace. From a public-policy perspective, the early

days of the domain name system illustrated a regulatory focus on those who registered second-level domain names corresponding with well-known trademarks, with a view to profit from trading in or exploiting the marks. The UDRP was largely implemented to provide an efficient mechanism for trademark holders to protect their intellectual property rights in the digital environment. However, the new gTLD system is not particularly concerned with cybersquatting for much the same reason that personal name strings are not particularly problematic: it is simply too expensive for an applicant to target an individual or trademark holder by applying for a new gTLD string corresponding to the relevant alphanumeric string. Moreover, such an application would not likely be successful because of the pre-grant opposition procedures, under which an affected person or trademark holder could readily oppose the grant. And of course, cybersquatting in the second level of any newly granted gTLDs would be effectively handled under existing dispute-resolution mechanisms, such as the UDRP.

Unlike the pre-existing gTLD system, however, the present system creates the potential for significant amounts of wasted time and resources in the initial application procedures. Because of the costs of applications (with no guarantee of success) and the often lengthy and costly opposition procedures — and given the possibility of a competing application for the same string, which can result in an auction — hundreds of thousands of dollars can easily be incurred in a new gTLD application. ICANN's willingness to change the rules during the process (as it did when it disallowed closed registries for generic terms) also adds to the risk of wasted resources if an applied-for name is no longer desirable to the original applicant following a rule change.

While many business entities applied for new gTLDs, a number of them may not be so keen in the next round. Two of the leading applicants, Amazon and Google, were surprised by the objections to their proposals to run closed registries for certain generic terms in the new gTLD space. While they comprised a significant number of the applications, they (along with others who may have harboured similar business plans) will not likely be in the market for new gTLDs in the second round. The big winners seem to be those who seek to run competitive registries in new generic spaces. This will undoubtedly expand the domain name system and make more domains available in second-level spaces, likely at competitive prices.

However, a new registry that controls an entire gTLD will not be under the same competitive pressures as a registry that competes with other registries for services involving second-level domains in existing gTLD spaces, such as .com. For example, while multiple entities provide services to register second-level domains in the .com space, the only registry administering the second level of the .patagonia space is Instra, and, perhaps more worryingly, the only registry administering the .sucks space is Vox Populi. The

latter is already suggesting that it will engage in a pricing model that attributes more value, and more cost, to certain terms in second-level spaces. It remains to be seen whether pricing models that attribute high values to certain domains are viable in the marketplace, or whether they are of little interest to anyone other than, perhaps, a trademark holder seeking to defensively register second-level domains to prevent gripe sites. Defensive registrations increase the costs of commercial practices online and may ultimately amount to little more than wasted resources, which are eventually passed on to consumers.

Individual governments, the GAC and the independent objector have led the charge with respect to preventing the granting of certain gTLD applications in situations where no one other than the applicant is likely to want the gTLD in question. Does this amount to wasteful activity and wasted online resources (the lack of domain names that otherwise would have been granted and used for commercial, social or generally communicative purposes)? It is simply not clear. Corporations such as Google and Amazon appear to have no shortage of domain names to use for their various business services, but, in contrast, governments like those of Brazil and Peru do not seem to have plans for an application for the .amazon gTLD.

Domain names are unquestionably big business. The exponentially increasing number of UDRP disputes every year attests to that, alongside the willingness of many entities to apply for and expend additional resources defending oppositions or bidding at domain name auctions for new gTLDs. The question remains as to whether the advantages of the new gTLD system outweigh its costs. At the end of the first application round, when all the applications have been dealt with, will the gTLD program look more like an exercise in wasted resources than an important cyberspace innovation? What will the level of interest in a second-round application process look like, and how much might the rules change before then? It is too early to tell with any degree of certainty. Because many of the high-profile disputes, disagreements and uncertainties under the first round are highly case-specific to the parties involved, it will be difficult to extrapolate any general principles about the benefits and challenges inherent in the system. Some issues are clear: closed registries for generic terms in the new gTLD spaces have proved problematic in practice, and geographical terms are highly problematic, with no clear uniform rules forthcoming, in particular in cases where geographical terms correspond with valuable trademarks.

Many trademark holders did not apply for gTLDs corresponding with their marks in the first round, either waiting to see how the system worked out or feeling that it was a wasteful and unnecessary expenditure of resources. The way the application process has unfolded in recent years is unlikely to make any of those businesses more interested in applying for their trademarks as new gTLDs in subsequent rounds. Again, ICANN has given the cyberspace

law and policy community much food for thought, and some interesting current and forthcoming challenges about balancing commercial interests and freedom of expression in the domain space.

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