

Tuesday, December 1, 2010

Ms. Heather Dryden
Interim Chair, Government Advisory Committee

Mr. Peter Dengate-Thrush
Chair, Board of Directors, ICANN

Dear Heather and Peter,

I have been following the exchanges of comments between the GAC and the Board and now write to comment on one point in the exchange of views of 23 September and 23 November.

The GAC note of 23 September contains the following, at para 2, page 6 of 7:

“Applications for gTLDs which are city names will need careful handling. The GAC considers that the provisions in version 4 of the DAG in relation to city names carry the danger that an applicant could seek to avoid the safeguards of government support or non-objection if the application simply states that the intended use of the name is for non-community purposes. The GAC asks ICANN to review the proposal in the DAG in order to ensure that this potential loophole does not arise.”

Trademark law in general seeks to prevent consumer confusion. While exceptions exist to the general principle that TLDs are operated in the public interest,¹ in particular ccTLDs, consistent with RFC 1591,² the overwhelming majority of Internet users associate the secondary meaning of a territorial jurisdiction when using geographic identifiers, identified by the “dot” prefix, when encountering top-level domain names. Users of the DNS rely upon ccTLDs to be government interests with all the rights, protections and due process generally afforded by their physical counterparts.³ The IANA, and subsequently ICANN, have promoted this reliance for the past fifteen years. Therefore, allowing

¹ Delegation of a New Top Level Domain. Delegation of a new top level domain requires the completion of a number of procedures, including the identification of a TLD manager with the requisite skills and authority to operate the TLD appropriately. The desires of the government of a country with regard to delegation of a ccTLD are taken very seriously. The IANA will make them a major consideration in any TLD delegation/transfer discussions. Significantly interested parties in the domain should agree that the proposed TLD manager is the appropriate party. ICP-1, Internet Domain Name System Structure and Delegation, May 1999, in *The Management of Delegated Domains*, (a) Delegation of a New Top Level Domain.

² The country code domains (for example, FR, NL, KR, US) are each organized by an administrator for that country. These administrators may further delegate the management of portions of the naming tree. These administrators are performing a public service on behalf of the Internet community. RFC 1591, *Domain Name System Structure and Delegation*, section 2, *The Top Level Structure of the Domain Names*, March 1994, at page 1 of 7.

³ The top 20 ccTLDs account for 75% of the 76 million domains in 240 ccTLDs.

individuals to purchase city names is contrary to settled policy and will only lead to consumer confusion.

The Board note of 23 November contains the following, at para 6, page 6 of 10:

“It is acknowledged in the Guidebook (and in previous missives to the GAC) that city names present challenges because city names may also be generic terms or brand names, and in many cases no city name is unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process. Thus, city names can not be afforded universal protection. However, the process does provide a means for cities and applicants to work together where desired.”

Thus, the means provided by the process is only effective if the city and the applicant for the city’s name desire to work together. However, where the applicant for the city’s name does not desire the burdens of revenue sharing or restrictions on registration, the applicant is unlikely to desire to work together with the city. As the GAC points out, applicants for city names that do not desire to work together with cities need only state that the intended use of the name is without restriction.

The Board’s note offers three grounds for declining protection to city names. All city names are indeed generic terms – only some city names are trademarked, and only some of these trademarks can be infringed upon by the delegation of the city name to party other than the trademark holder. Of these names, delegation to a city government is adequately protected by the acquired secondary meaning associated by the prefix of a “dot” before the name, and the name existing in the context of a domain name. As these names do not currently exist in the IANA root, no existing trademark holder can claim a pre-existing secondary meaning. As this secondary meaning is already attached to all city names prefixed by a “dot” before the name, an adequate interest exists to support delegation of city names to city governments.

Some names are used by more than one city, however this number is actually quite small, particularly when the cost of ICANN’s current one-time application fee and recurring costs and fees are realistically considered.⁴ Among the 479 cities with populations of one million or more, that is, sufficiently large to support an economically sustainable registry, only two⁵ occur more than once.

Several choices exist for lists of cities. Lists such as “Table 8, Population of Capital Cities and Cities of 100 000 or More Inhabitants,”⁶ published in the *United Nations*

⁴ Current costs are a quarter of a million dollars or more in application preparation and fee, and every ten years requires an additional quarter of a million dollars or more as contract maintenance, in addition to operating costs.

⁵ Birmingham, UK and US, and Hyderabad, IN and PK.

⁶ <http://unstats.un.org/unsd/demographic/products/dyb/dyb2008/Table08.xls>

*Demographic Yearbook*⁷, or Thomas Brinkhoff's list of the 479 agglomerations of the world with a population of 1 million inhabitants,⁸ used above to consider the non-uniqueness issue, can be used.

In conclusion, the expectation that names associated with territorial jurisdictions are in fact public resources is an expectation that has been fostered by the IANA and by ICANN for the past 15 years. To make the argument that the new gTLD evaluation process cannot rationally implement a check for government support or non-objection because of the listed difficulties is not supported by the evidence.

Therefore, only applications which have government support or which can demonstrate non-objection should be allowed by ICANN, and no private individual should be allowed to assume the color of government.

Thank you both for your time and attention.

Yours Sincerely,

Eric Brunner-Williams
In an individual capacity

⁷ The United Nations Demographic Yearbook collects, compiles and disseminates official statistics on a wide range of topics. Data have been collected from national statistical authorities since 1948 through a set of questionnaires dispatched annually by the United Nations Statistics Division to over 230 national statistical offices.

See: <http://unstats.un.org/unsd/demographic/products/dyb/dyb2.htm>

⁸ Thomas Brinkhoff: The Principal Agglomerations of the World

See: <http://www.citypopulation.de>