Reply to Comments on
Economic Considerations in the Expansion of
Generic Top-Level Domain Names
Phase II Report: Case Studies

prepared for ICANN

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I. INTRODUCTION

Twenty-six parties filed comments in response to our paper, which we refer to herein as our *Phase II Report*:[1]

1. AFNIC
2. American Intellectual Property Law Association (AIPLA)
3. AT&T (ATT)
4. AusRegistry International (AusRegistry)
5. Bayern Connect GmbH (Bayern)
6. K. Claffy (Claffy)
7. Coalition Against Domain Name Abuse (CADNA)
8. Coalition for Online Accountability (COA)
9. Dansk Internet Forum (DIFO)
10. EnCirca, Inc. (EnCirca)
11. Hogan Lovells
12. International Trademark Association Internet Committee (INTA)
13. Intellectual Property Constituency of GNSO (IPC)
14. George Kirikos (Kirikos)
15. Fred Krueger (Krueger)
16. MarkMonitor (MarkMonitor)
17. Minds + Machines (M+M)
18. Jon Nevett (Nevett)
19. News Corporation (NewsCorp)
20. Elaine Pruis (Pruis)
21. RE/MAX (RE/MAX)
22. Dan Schindler (Schindler)
23. Paul Tattersfield (Tattersfield)
24. Time Warner Inc. (Time Warner)
25. Tucows (Tucows)

1 Michael L. Katz, Gregory L. Rosston, and Theresa Sullivan, "Economic Considerations in the Expansion of Generic Top-Level Domain Names, Phase II Report: Case Studies," December 2010 (hereinafter, *Phase II Report*), *available at* http://www.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf.

26. Verizon (Verizon)

In the present document, we summarize and respond to those comments that address economic issues.[2] To avoid repetition, the comment summaries and responses are grouped by topic.

II. ASSERTIONS THAT THE STUDY IS METHODOLOGICALLY FLAWED

Several commenters raised general or specific concerns about the methodology of the *Phase II Report*.

Comment Summaries

ICANN conducted the economic studies because it was required to do so under its AOC obligations. No one at ICANN, the GAC, the DOC or any other group or person that ICANN has commissioned has presented or even referred to any evidence that economic studies have any value or validity for understanding the effects of new gTLDs, a field with many unknowns. The latest economic study does not provide much helpful guidance for policy makers and its analytical approach is deeply flawed (especially with respect to looking at information from past gTLD introductions like .biz and .info which is more than ten years old as evidence for the conclusion that additional generic, unrestricted TLDs using the Latin alphabet would be unlikely to produce significant additional competition for .com). It would have been more useful to compare an existing successful TLD like .com to information that is less than a few months old—*i.e.,* the ccTLDs .co for Colombia and the IDN version of .rf for the Russian Federation. The study assumes without justification or explanation that all Latin-character unrestricted gTLDs would have the same appeal and are semantically undifferentiated. What makes the authors suppose that new gTLD applicants will choose uncompetitive TLD names, when applicants have been unanimous in their determination to pick strings that have strong appeal?

The sample size used by the *Phase II Report* examining generic words in relation to the issue of whether there is a scarcity of generic second-level domain names was far too small. The study commits a bad mistake by using zone files to try to understand registration patterns because zone files tell you nothing about names not registered for reasons other than being previously registered (*e.g.,* names may be reserved).

Finally, contrary to the .biz TLD which was not the first choice of Neustar, the new round will finally allow people who understand their customers and markets to choose the best names and market them to customers they know. The authors of the latest economic study do not mention this essential point. *(M+M)*

ICANN has failed to commission truly independent and rigorous economic studies of new gTLDs. Instead it produced reports that are engineered to support a predetermined outcome.

[2] In some cases, the comment summaries are direct quotations. In others, the comments have been edited for clarity and brevity. The full text of the comments may be found at http://forum.icann.org/lists/5gtld-guide/ .

Critical questions need to be studied before unleashing a free-for-all that would undermine the stability of the naming system. (*Kirikos; AIPLA)*

The second economic report is not the truly independent peer-reviewed study that was asked for by ICANN stakeholders and governments. It appears to be another commissioned advocacy report from Compass Lexecon, the same entity that authored the first report. The report did not look at the issues that NTIA instructed ICANN to study, including defining the registration market as one or several, looking at the costs for businesses to switch from one gTLD to another.

Verizon is disappointed with the extent of the empirical data presented and analyzed in the *Phase II Report*. Among others, Verizon identified the costs of past defensive filings, UDRP cases, ACPA litigation, and monitoring trademark abuse as potentially useful data.

The data that are included the *Phase II Report* only prove that prior gTLDs introduced to date have not achieved any measure of success and there is no support to indicate that new gTLDs will fare any differently. Most importantly, the report does not analyze whether the RPMs proposed in the DAG are "adequate trademark protections" and makes no effort to even attempt to calculate existing much less future costs to trademark owners. (*Verizon*)

The *Phase II Study* lacks empirical rigor and is not a proper study. It completely fails to look at what the DOC in a 2008 letter told ICANN to study (*e.g.,* market structure, substitutability, switching costs). Nor did the authors attempt to perform a true study of the aftermarket for domain names, or consider efficient allocation mechanisms (*e.g.,* tender processes or the ascended TLDs proposal which uses the legal concept of "easements"). *(Kirikos)*

Response and Analysis

The launch of the IDN version of .rf is so early in its life cycle that it would be difficult to draw firm conclusions from its experience to date.[3] Moreover, in the *Economic Framework*, we indicated that IDNs appeared to offer a greater prospect of offering net social benefits. Thus, a finding that the launch of the IDN version of .rf had been successful would not counter the conclusion in the *Economic Framework* that we did not see a reason to study the effects of a generic, Latin-alphabet gTLD on .com because the likely benefits were low.[4] We observe that this conclusion was not challenged by first-round commenters, although Tindal questioned our reasoning regarding the difference between Latin-alphabet gTLDs and IDNs.

In looking at the registration patterns of a small sample of generic words, we sought only to show that even very "desirable" words are not used in all of the available gTLDs. Other parties

[3] In addition, an investigation of the registrar RU-CENTER is reported to have found that it reserved more than 60,000 domain names in the Cyrillic TLD .rf in order later to auction them. (*See, e.g.,* "Web registrar RU-CENTER violated .rf domain rule — regulator," PRIME-TASS, January 27, 2011, *available at* http://www.prime-tass.com/news/0/%7B64123920-5E12-4582-B6AF-378D8A86DF74%7D.uif .)

[4] *See* Michael L. Katz, Gregory L. Rosston, and Theresa Sullivan, "An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names," June 2010 (hereinafter, *Economic Framework*), ¶ 28.

are free to provide more comprehensive studies if they believe the data of such studies would support a different conclusion.

We agree that it is helpful to know whether there are external reasons names are not registered (*e.g.,* whether they are held as reserved names). We noted in our report that some of the unregistered names we examined were in fact reserved by one or more TLDs.[5]

It seems unlikely that the choice of ".biz" itself is the reason the TLD was not very successful in creating demonstrable competitive pressure for .com. As the *Phase II Report* states, targeted business models may be effective, but that is not the same as an assertion that another Latin gTLD with no differentiating features other than its name would be effective.

The *Phase II Report* did not address issues of substitution and market power as described by NTIA because, as the report explained, a traditional antitrust analysis of whether a gTLD has market power in the sale of affirmative registrations is not useful in assessing the costs of defensive registration in a given TLD. This is so because, for the purpose of protecting a trademark in one TLD, a registration in another TLD is not a substitute.[6] The focus of the *Phase II Report* is on defensive registrations because, as the *Economic Framework* explained, the costs of defensive registrations constitute external costs, and external costs are a source of divergence between public and private benefits.

We assigned a low priority to studies of consumer switching costs because, in principle, there may be significant benefits from new gTLDs even if some consumers have high switching costs. Switching costs would be of greater interest if the primary intended benefit of new gTLDs were to provide price competition for .com.

The *Phase II Report* did not analyze all possible policy alternatives. The report is one component of a larger decision-making process and is intended to provide information on economic magnitudes of relevance to a wide range of policy analyses.

Although the *Phase II Report* did not cite specific figures for the costs of researching registrants, sending cease-and-desist orders, and filing UDRP complaints, the *Economic Framework* did.[7] In addition, third parties were free to submit data as part of the first-round comment process.

Lastly, regarding claims of the sort that the *Phase II Report* is a "Commissioned advocacy report" (Verizon) that was "engineered to support a predetermined outcome" (Kirikos) we cannot help but note that some commenters (including Verizon and Kirikos) claim that the report shows that ICANN should not proceed with gTLDs while others claim the report shows that the introduction of new gTLDs would be very beneficial. We turn to those claims in the next section.

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5 See Table 1 in *Phase II Report*.

6 *See*, *Phase II Report*, note 114.

7 *Economic Framework,* ¶ 76.

III. ASSERTIONS REGARDING THE IMPLICATIONS OF THE *PHASE II REPORT*

Several commenters asserted that the *Phase II Report* reached various conclusions and/or supported drawing particular conclusions, particularly when viewed in the light of additional information. Some commenters asserted that the study supports going ahead with the launch of new gTLDs, while other commenters reached the opposite conclusion.

A. THE STUDY SUPPORTS GOING AHEAD WITH THE LAUNCH OF NEW GTLDS.

Comment Summary

To date the economic studies have been inconclusive. The "experts" have only reached one conclusion—that it appears that the benefits of the new gTLD program outweigh the costs, but we cannot be sure. The future is not determined and knowable but rather is probabilistic. It is possible that the new gTLD program will be a complete bust, but it is also conceivable that it will be highly successful. In the scenario where the new gTLD program is unsuccessful, the costs are relatively low and the benefits are low. The costs might very well outweigh the benefits but both numbers are small enough that the only conclusion would be that ICANN had wasted its time with gTLDs. In the "success scenario" –*e.g.,* 50 million or more registrations for the entire new gTLD program—it is hard to argue that costs exceed benefits. If 50 million people choose a new domain name product, then by definition there is consumer demand for that product. Certainly the costs to brand owners will increase, but using the Minds + Machines UDRP study, the best case for this cost increase would be 25 percent—ignoring any effect of the URS regime. To recap, either the new gTLD program will be a failure in which case ICANN and trademark holders really have nothing to worry about—or it will be a success, in which case the benefits will clearly outweigh the costs. *(Krueger)*

The recent success of .co and the IDN for .rf show there is demand, competition will be created and that users will benefit. (*AusRegistry)*

The launches of .co and .rf have been very successful. *(Bayern Connect)*

Response and Analysis

Because, as Krueger notes, the future is not determined, the *Phase II Report* attempted to shed light on the consequences of new gTLDs by looking at gTLD introductions in the past. Contrary to Krueger's assertion, the *Phase II Report* did not offer a conclusion as to whether the benefits of new gTLDs outweighed the costs. The study is part of a larger process. The study's role is to provide information that is useful to others in reaching policy conclusions.

In the example given by Krueger, a popular gTLD may attract many defensive registrations and so it is not possible to say that the benefits exceed the costs simply because many domain names are registered. Indeed, the Minds+Machines study referenced by Krueger states that one would expect a higher *rate* of infringement and typosquatting problems in gTLDs that are popular with large brands and attract "high-volume websites." Furthermore, the Minds+Machines study considered only the costs of UDRP proceedings, and not the costs of other means of enforcement, of monitoring, or of costs to anyone other than trademark owners.[8] A blanket statement that costs are small in total because one category of costs is small is without basis.

Similarly, the assertion that .co and .ru have been successful because many names have been registered fails to account for defensive registrations and external costs.[9]

B. THE STUDY DOES NOT SUPPORT GOING AHEAD WITH THE LAUNCH OF NEW gTLDS.

Comment Summaries

The *Phase II Report* sends the same message as the *Economic Framework*—an open entry process may not lead to the socially-optimal number of new gTLDs. The new gTLD launch should be re-oriented to focus on the types of applications that offer the greatest potential benefits for the public, while minimizing costs for third parties. The Board should either follow the advice its consulting economists have given it, or explain persuasively why it is in the public interest not to do so. (*COA; Time Warner)*

The *Phase II Report* presents an ambiguous picture of benefits of new gTLDs. Because the costs and benefits are uncertain, we still do not have a report that is able to support ICANN's expectations of the indisputable benefits of new TLDs. (*DIFO)*

In support of its conclusion that ICANN has not ensured that the introduction of new gTLDs will be in the public interest, RE/MAX states that the *Phase II Report* suggests "additional generic, unrestricted TLDs using the Latin alphabet would be unlikely to provide significant additional competition for .com," and found no evidence that scarcity of generic second-level domain names is a pervasive problem, and that even for differentiated TLDs, "the incremental benefits of the new gTLD might be low." *(RE/MAX)*

The *Phase II Report* is further evidence that ICANN should pull in the reins on the proposed adoption of new gTLDs and consider taking a different path altogether. Adoption of new gTLDs is proceeding far too rapidly based on non-existent or uncertain benefits coupled with certain increased costs that currently fall disproportionately on trademark owners and the public at large. It would be reckless and contrary to the public interest for ICANN to ignore the many issues raised in the report.

- The *Phase II Report* notes that IDNs may provide "psychic benefits" but the benefits created are difficult to measure and thus somewhat speculative. ICANN should give more consideration to Whois, dispute resolution, and associated language issues related to IDNs.

- INTA agrees with the *Phase II Report* that it is all too easy to over-estimate the benefits to society of any new gTLD, as happened with .info, .biz, .mobi, etc., and that any

[8] For a summary, *see, Economic Framework,* ¶ 69.

[9] In addition, *see* footnote 3 above.

alleged benefits based on a restriction of website functionality are highly speculative at best.

- INTA agrees with the *Phase II Report* that gTLDs that purport to offer benefit by limiting ownership (*e.g.,* .museum, .aero) have thus far proven to be of very limited value to the public or to owners of domains within those gTLDs. Benefits from future gTLDs that limit ownership are questionable at best. It is likely that users, rather than thinking about gTLDs in a new way and relying on them more as certification and navigation tools, will be overwhelmed by a plethora of new gTLDs. Instead users will rely more on search engines. Past experience does however clearly show that abusive registrations are far less likely to occur in restricted or sponsored TLDs due to the upfront verification processes utilized by such registries.

- The *Phase II Report* found the benefits from domain name content restrictions, such as allowing content relating only to a specific geographic area, to be speculative. Some second level domains (*e.g.,* nyc.com) could offer the same functionality without the need for a new gTLD. INTA questions how enforceable any such restrictions could be. The only potential benefit cited by the report (with no evidence to support such a benefit) is potential "psychic benefit of community recognition and respect."

- The *Phase II Report* identifies at least five specific external costs that adopting new gTLDs can impose on the Internet community and society more broadly (*i.e.,* misappropriation of intellectual property, domain navigation "dilution," harm to users from cybersquatting, reduced investment in IP, and losses from failed gTLDs). The report states that whatever rights protection mechanism is adopted for a particular TLD, there will be significant post-launch external costs to brand owners (*e.g.,* monitoring, defensive registrations, cease and desist letters, UDRP proceedings or official dispute mechanisms (*i.e.,* lawsuit)). INTA notes that the extensive cost of monitoring and investigating applies even where the domain name at issue is registered in good faith. The report further enforces the point that the cost of monitoring and enforcement (and harm to the public from cybersquatting) will rise dramatically with the adoption of new gTLDs, with very little or no benefit.

- Other findings in the report cast further doubt on the alleged benefits of adopting new gTLDs—*e.g.,* that .com remains the default domain for most brand owners examined in the report and that these brands have not registered in other gTLDs like .biz and .info, and also that many non-.com registrations are done for defensive reasons with little perceived potential for generating affirmative benefits for brand owners. *(INTA)*

The report notes that new undifferentiated gTLDs is not likely to have a significant competitive impact. The report debunks the alleged problem of "name scarcity" and concludes that "scarcity is not a current problem" and that "relief of name scarcity is unlikely to be the principal source of social benefits derived from new gTLDs." *(INTA; COA)*

The *Phase II Report* makes a pretty strong case that there has been no demonstrated significant consumer or social benefit from gTLD expansion in the past, followed by the vague conclusion that ICANN should move forward anyway. There is no coverage of the concerns in previous public comment periods, except for additional depth in the case studies which suggest the opposite of the report's conclusions. There is no analysis of public comment. If ICANN is going to ignore overwhelming concerns from every other industry except those that are perceived to have captured ICANN years ago, then it is time for a hard stop and a hard look at the process. *(Claffy)*

In a 23 November 2010 letter to the GAC, ICANN admits that the economist reports to date reflect that the benefits of innovation, or the effectiveness of trademark protection developed by the intellectual property constituencies, are "too speculative to predict with accuracy." This demonstrates that ICANN has failed to meet is Affirmation of Commitments obligations to prove that benefits exceed costs when making decisions. (*Kirikos)*

The *Phase II Report* supports the notion that new gTLDs could be both too expensive and too risky for the community, consumers, companies and the Internet to sustain, and an initial roll-out should contain only community-based gTLDs. *(MarkMonitor)*

Response and Analysis

The *Phase II Report* did not reach conclusions on the desirability or undesirability of moving forward with new gTLDs, nor was it intended to do so.[10] The report is one component of a larger decision-making process.

IV. COMMENTS SUPPORTING TRADEMARK-OWNER PROTECTION BEYOND A SUNRISE PERIOD

The *Phase II Study* concluded that there is value in giving trademark holders the ability to block the use of trademarked terms beyond a sunrise period. The following comments supported expanded trademark protection.

Comment Summaries

INTA also agrees with the report's statement that there is value in giving trademark holders the ability to block the use of trademarks in a domain name beyond a sunrise period. *(INTA)*

Surely, greater RPMs, including blocks of trademark use beyond a sunrise period would have mitigated the Time Warner companies' having to recover thousands of infringing domain names in the existing gTLD space (*e.g.,* over 1,000 domain names were recovered for just two of its well known brands—CNN and CARTOON NETWORK). *(Time Warner)*

The Time Warner companies' current domain portfolio (numbering in the tens of thousands) already consists of well over 90 percent costly and wasteful defensive registrations. In fact, Time Warner estimates that at least 99 percent of the Time Warner companies' registrations outside of .com are defensive. Without modification, the proposed new gTLD launch appears ripe for additional costs and resource burdens to brand owners and consumers. (*Time Warner)*

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10 *Phase II Report,* ¶ 119.

MarkMonitor called for stronger rights protection mechanisms including a globally protected marks list. *(MarkMonitor)*

Comments on Issues outside the Scope of the Economic Phase II

I. COMMENTS ON ICANN PROCEDURES

Several comments were critical of ICANN procedures. We summarize those comments below. They fall outside the scope of the *Phase II* assignment to conduct case studies to assess the costs and benefits of delegating additional gTLDs, and we do not respond to them.

Comment Summaries

ICANN has not provided any summary of the public comments of the previous (all) four economic studies of new gTLDs. More careful public summaries of and responses to the comments of all four reports are needed. The most recent "economic framework" report fails to address the majority of previous public comments, and the parts that do address comments make an even stronger case against additional gTLDs than the previous reports. The vast majority of the public comments reflect an abundance of distrust of ICANN internal process, pointing out veiled connections with previous specious study by Compass Lexecon, lack of expertise and relevant (DNS industry) knowledge, clear affirmations of the need for more data collection, more scientific study, and importance of trademark and consumer protection. Those in favor of moving forward with gTLDs typically omitted their affiliations, which might have revealed potential conflicts of interests. Those opposed were generally more transparent about the (typically commercial) interests funding the comments. *K. Claffy (15 Jan. 2011).*

ICANN has ignored the concerns that have been raised in the previous comments about the economic framework. *K. Claffy (15 Jan. 2011)* (reposting *K. Claffy (20 July 2010)* comments addressing the economic framework paper.)

The lack of both comment analysis and community discussion on the economic studies is very concerning and as a result there are still significant serious concerns buried in the detail. E.g. what happens if Microsoft secures .search? Trademark law does not allow such advantage; nor should ICANN. We fail to see how granting the most economically advantaged private corporations such implicit DNS branding advantage can ever be in the public interest. There are massive potential externalities hidden in the detail of the new gTLD process which is not helped by the plan to allow the economists to summarize and analyze the comments at some point in the future while presenting a draft final guidebook. Comments on the 4th overarching issue have never been summarized since 2009. The comments contain a lot of valuable suggestions, some of which could have been used to get a much less worrying DAG and get the community to discuss these issues. *P. Tattersfield (10 Dec. 2010).*

The deadline to have published the economic study has passed (supposed to have been published 15 working days prior to the start of the Cartagena meeting). Thus the so-called "final report" cannot be final, as the community cannot even discuss any economic study at Cartagena. If proper attention to the moral hazard issue was taken, the case for unlimited new TLDs would be destroyed. The GAC, NTIA, DOC and DOC should ensure that ICANN is not allowed to become yet another irresponsible "subprime mortgage broker" pushing risky loans (new TLDs) where the losses are socialized but the profits are privatized. *G. Kirikos (17 Nov. 2010). G. Kirikos (24 Nov. 2010).*

ICANN has not yet provided a summary of public comments on the Phase I economic study. The results of the economic studies to date have not made the case that new TLDs would be a net benefit to the public. The public comments on Phase I were completely ignored. Instead, ICANN rushed ahead with the Phase II study with a predetermined result due to ICANN's bias. The authors were never allowed to write "New TLDs should not proceed" despite facts and empirical data regarding new TLDs. The public deserves that things be done "right". If the costs of new TLDs exceed the benefits, as almost everyone except a few ICANN insiders agrees is the case, then the new TLDs plan should be dropped. NTIA/DOC/DOJ and GAC should hold ICANN accountable to ensure that the public interest is being held above the interests of a few ICANN insiders who have been gaming the process for several years. *G. Kirikos (12 Jan. 2011).*

In short, this work [the Phase II Study] was too little, too late (published after the deadline to be even discussed at the Cartagena meeting). ICANN needs to abandon the new gTLD project once and for all. *(Kirikos)*

We have had only a matter of days to consider the Phase II economic study published on 3 December 2010 and in such a short time cannot adequately address the information therein and potential impact on our present comments. *Hogan Lovells (9 Dec. 2010).*

ICANN has not publicly followed up on the June 2010 Economic Framework in any meaningful way. The choice that the Board seems to have made in Norway and to have embodied in the proposed final AG is to act as if the Economic Framework paper, which called for significant changes in the ICANN approach to new gTLDs, had never been issued. This is irresponsible. If the Board has chosen not to follow the advice of its consulting economists on the launch of new gTLDs, it must at least explain why, or else abandon any claim that it is acting in an accountable and transparent manner. *COA (3 Dec. 2010). Time Warner (9 Dec. 2010). MarkMonitor (9 Dec. 2010). IPC (9 Dec. 2010).*

The guidebook has moved to "proposed final" form before the delivery of the required economic study of costs and benefits. The GAC shares the BC view on the importance of the economic study. The guidebook should not be finalized until study results have been adequately considered and commented upon by stakeholders. *BC (6 Dec. 2010). News Corporation (9 Dec. 2010). CADNA (10 Dec. 2010). Verizon (10 Dec. 2010).*