

March 16, 2012

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Via E-Mail (jlevec@jonesday.com)

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Jones Day  
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Re: **name.space**

Dear Mr. LeVee:

I am writing in response to your letter dated March 2, 2012. This letter is without waiver of any of **name.space**'s rights.

**name.space** is the originator and creator of the 482 gTLDs that were identified in the attachment to my February 24, 2012 letter, and a participant in the 2000 Application Round.

*First*, with respect to the 2000 Application Round, **name.space** submitted an application for delegation of 118 gTLD strings, along with its \$50,000 application fee, in accordance with ICANN's rules permitting an unlimited number of strings in a single application provided they conform to a single business model. Once this application was lodged, it remained under consideration until it was resolved. **name.space** has never, to this day, been told that the status of its application has been resolved, and the 2012 Application Round materials appear to reserve on this issue.

The status of **name.space**'s 2000 application is of particular importance to **name.space** given its business model that incorporates the simultaneous operation of a significant number of gTLDs—a feature that drives not only **name.space**'s revenue model but also its competitive appeal to other rights holders. The 2012 Application Process appears to have been designed intentionally to preclude or at least impede such a business model, by requiring application fees for each gTLD for which an application has been submitted. Indeed, **name.space** appears to be uniquely situated in this regard as its application contains 118 gTLDs already in service that predate the ICANN process and for which **name.space** has already sought recognition by proceeding through the ICANN process in good faith, beginning even before the formation of ICANN itself. At a minimum, the 118 gTLDs

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submitted in **name.space**'s 2000 application should be considered as part of the 2012 Application Round without requiring **name.space** to pay additional application fees.

*Second*, with respect to **name.space**'s priority and/or proprietary rights in the 482 gTLDs at issue, **name.space** has originated and used those gTLDs in commerce continuously since 1996 by making them available for registration and resolution, among other services, to those users who choose to operate on **name.space**'s network. Those users, as a result, identify and associate those gTLDs with **name.space** and its services, and **name.space** has common law trademark rights in those gTLDs as well as potential federal trademark rights. As ICANN is undoubtedly aware, while the U.S. Patent and Trademark Office ("USPTO") regards TLDs as generally serving no source-indicating function, the USPTO has recognized that "[a]s the number of available TLDs is increased by the Internet Corporation for Assigned Names and Numbers ("ICANN"), or if the nature of new TLDs changes, the examining attorney must consider any potential source-indicating function of the TLD and introduce evidence as to the significance of the TLD." TMEP § 1209.03(m) (8th ed. Oct. 2011). The USPTO has explicitly recognized that TLDs could, in fact, serve source-indicating functions. *See id.*; TMEP § 1215.08(a).<sup>1</sup>

Accordingly, **name.space**'s gTLDs—such as .NOW, .POWER, .SPACE and .SUCKS, to name a few—would be infringed by competing gTLDs delegated under the same name. **name.space** has begun the process of registering its trademarks in Europe for select gTLDs, and intends to do the same in the U.S.

Moreover, **name.space** currently provides services to websites and various network services in operation on the Internet that use domains under its gTLDs. Any delegation by ICANN of those gTLDs to others will therefore cause disruption to **name.space**'s existing services and to the content on its network, not to mention confusion as to where each gTLD in conflict resolves. Given **name.space**'s priority in first establishing those gTLDs and providing services thereto, any conflicting delegation by ICANN would amount to interference with **name.space**'s services as well as infringement and unfair competition by the delegated party, and possibly by ICANN.

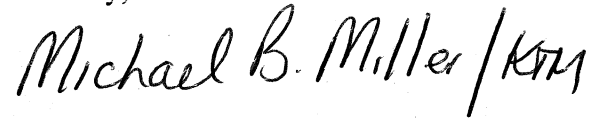
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<sup>1</sup> **name.space** is aware that the USPTO currently takes the position that "a mark [that] is composed solely of a TLD for 'domain name registry services'" is not entitled to registration, but **name.space** provides services beyond mere domain name registry services, such as searching, hosting and content delivery services. Moreover, this limitation only applies to U.S. federally registered trademarks, and is not applicable to common law trademarks or foreign registered trademarks.

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In sum, given **name.space**'s unique position, we need to discuss these issues with you as a matter of urgency.

Sincerely,



Michael B. Miller