Demand Media Comments on the Draft Application Guidebook Version 4

We appreciate this opportunity to comment on DAGv4 and congratulate the ICANN staff and Board for reaching this point. They have digested, considered and incorporated an extraordinary amount of worldwide public input into what should be the final *draft* version of the applicant guidebook. The DAG in its current form is not perfect, but no set of "regulations" such as this ever is.

Like any law or regulation, the Applicant Guidebook may need to be amended after implementation based on real issues and experiences and that is something the community should be expecting. There will be new issues that come up "post-launch" that have not been contemplated or discussed; this is a normal part of policy implementation. Processes are in place to modify the gTLD rules as necessary based on real-world implementation experiences and issues. The important point at this juncture is to acknowledge that many issues and concerns have been addressed by ICANN and DAGv4 represents sound judgment and consensus in most respects. It's almost time to move to the implementation stage and ensure ICANN and the community is prepared for the launch and operation of the new gTLD program.

Demand Media has been involved in the ICANN new gTLD policy-making process since the beginning and it is our strong belief that the proposed TLD program will provide more choices for consumers, genuine uniqueness and specificity in TLDs, and greater competition among registries.

Having made these general comments, we would like to opine on several specific DAGv4 issues that we believe will foster the competition and choice the Internet community needs and deserves:

Trademarks owners are well-protected by DAG4:

We believe ICANN has gone to great lengths to provide additional and useful protections for trademark owners, and DAGv4 has strong protections that Demand Media has advocated for some time. Some people may continue to quibble over details, but much of the quibbling will come from those who are seeking any reason to keeping delaying new gTLDs.

The panoply of RPMs now firmly entrenched in the DAG may not be perfect but we cannot expect perfection. Rather, excellent ideas and significant experience from the entire community have been refined and synthesized into an excellent set of RPMs. There is simply no question that trademark owners will enjoy more protections in new gTLDs then they do in current gTLDs and many ccTLDs. The new RPMs are ready for implementation. Upon implementation, it could become evident that certain aspects need fine tuning, but again that is the nature of any policy making process and this is ok so long as there are mechanisms for change in place, as there are within ICANN's processes.

Regarding specific new provisions of DAG 4, we see the Trademark Clearinghouse as a very practical step that will minimize brand protection costs by providing a one-stop shop of sorts for trademark validation that will result in lower costs and greater efficiencies for trademark owners. The cost savings will be especially meaningful if the trademark holder is seeking trademark protected domain names from more than one registry that must, pursuant to their registry contract, use this singular Clearinghouse.

We also view the URS as a strong tool for Trademark owners in cases where there is a clear and actual infringement of their trademark rights. The URS will allow for a rapid takedown thereby removing the infringing site from the Internet and limiting any damage that may occur. Trademark owners will be able to utilize this expedited process for a reasonable fee thereby allowing for more frequent and rapid takedowns of infringing websites. At the same time we also agree that the URS has a proper balance with respect to limiting abusive complaints and protecting domain name registrants. ICANN must ensure that these elements protecting registrants remain in effect along with the annual review of the URS, thereby keeping this a fair and balanced process.

The bottom line is the Trademark Clearinghouse and URS are significant additions to previously agreed upon RPMs for new gTLDs---mandatory participation in the UDRP, mandatory top level legal rights objection, a mandatory requirement that applicants detail measures to reduce abusive registrations, mandatory centralized, and thick whois for registries and mandatory implementation of a Sunrise or IP Claims process. Taken together, these RPMs represent a good example of the ICANN community and leadership together working through a lengthy and thorough process to produce a balanced approach that undeniably provides more meaningful and effective protections and remedies for trademark holders.

The Vertical Integration language is unfair, biased, and potentially violates antitrust and consumer protection laws:

It is our view that the latest language in the DAG (1.2.1) prohibiting applications from an ICANN accredited registrar or their Affiliates is anti-competitive and has not been justified on competition policy grounds (or any other policy grounds for that matter). The decision making process has been top-down, biased towards incumbent registries, and lacking in any real explanation. We believe the DAGv4 vertical integration language is not only anti-competitive and unfair, but also could be subject to governmental investigation or legal challenges that could potentially delay the new gTLD process.

With the implementation of ICANN's new gTLD program, the top level and second level domain marketplaces will drastically change. The monopolistic situation that precipitated vertical separation in the first place will not be present with a couple hundred of new gTLDs, none of which will have any market power. So what is the reasoning that ICANN has given for the wholesale exclusion of ICANN accredited registrars from participating in the new gTLD marketplace, where there will be no TLD with market power? **None!**

A. ICANN has presented no valid reason to single out registrars for exclusion from participating in new gTLDs

There is nothing in DAGv4 that explains why a registrar who fulfills all the application requirements in the DAG should be excluded. Why are ICANN accredited registrars who are the main force behind the innovation and competition that has come to the domain name market being excluded? Why are ICANN registrars who have a long history of working within the ICANN process, with Compliance rules, Trademark Protections and Law Enforcement being excluded? If this restriction is included beyond DAGv4 the specific reasons should be highlighted so ICANN accredited registrars and other ICANN participants can understand the purpose for such a policy. In our view, those who support the strict separation have not justified the perpetuation of such a restrictive and anti-competitive policy that is present in virtually no other industry.

The original ICANN rules separating registrar and registry functions were developed when .COM possessed a near 100 percent share of the domain name marketplace and, thus, this artificial policy was arguably necessary to promote competition in the domain name industry. However, this degree of market dominance is no longer present with the success of ccTLDs and to a lesser extent, other gTLDs. With the pending introduction of at least a couple hundred new gTLDs and potentially (with the right vertical integration policy) many new registry companies, the policy of restricting registry ownership is not only unjustified, it will actually deter the promotion of competition which is the underlying policy justification for the new gTLD program.

Let's be clear, the greatest beneficiaries of a restrictive registry ownership policy will be the incumbent registries who are opposing vertical integration. The very registries who for so long have benefitted from monopoly status are, with the current DAGv4 language, being given the same protections in new gTLDs. Put another way, the registrars who have worked so hard to build the registries' businesses for them are now being precluded from competing with these registries in new gTLDs.

B. Excluding registrars from participating in new gTLDs could be construed as anti-competitive and invite regulatory scrutiny.

The United States and other nations have strong laws and regulatory enforcement agencies to guard against anticompetitive activity and unfair trade practices. Efforts or policies that prevent registries from owning registrars and vice versa clearly limit competition for the respective markets, whether registries or registrar services, and thus have a negative effect on consumer welfare. Consumers are denied the benefits of open competition; namely, better prices and services. The competitive process only works when the market provides services in a free and independent manner---not when a body such as ICANN gives its incumbent "contractors" special preference.

These comments should not be construed as legal advice to ICANN, or as accusations against any person or party of improper activity. It is not our place to dispense such advice or lodge allegations. However, we do respect ICANN as an institution and prefer not to see ICANN and

up-standing members of the ICANN community embroiled in antitrust disputes or under investigation by government authorities and/or regulators, whether launched by the government itself or as the result of a complaint filed by a frustrated ICANN participant. This would not be a good outcome for ICANN, the gTLD program and the general public that will benefit from the expanded choices and services that a competitive gTLD marketplace will bring. We are supportive, not fearful, of robust competition. It is best promoted by an even playing field, not by anticompetitive polices and conduct that might suppress superior products, innovative services, and consumer benefits.

Finally, the severe vertical integration restrictions that ICANN has put in place in DAGv4 will cancel out the stated goal Rod Beckstrom has included in his opening letter to this Guidebook -- that ICANN is here to promote competition and choice. In fact, they will do the opposite.

Module 2 Evaluation Procedures
Background Check

Section 2.1 details a reasonable process for ICANN to perform background checks on the individuals and entities applying for any new gTLD. We believe it is fair that the background checks will be conducted at both the individual and entity level and it is rational for ICANN to note that "identified issues with an individual named in the application will be handled on a case by case basis depending on the individual's position of influence on the applying entity and registry operations." This makes sense and should alleviate fears that ICANN will look for *any* connection to nefarious conduct, no matter how remote, to bring down a gTLD applicant.

We recognize that some in the Community are ringing some very loud alarm bells over the fact that the checks may include, but are not limited to, "areas of corruption and bribery, terrorism, serious and organized crime, money laundering, corporate fraud and financial regulatory breaches, arms trafficking and war crimes, and intellectual property violations." In the DAG, ICANN cites the following examples of when an application might not pass the background check: "1) the applying entity has been found liable in a series of cybersquatting proceedings and 2) the application names a corporate officer who has previously been convicted of a felony related to financial activities or 3) the background check reveals that the applying entity has been disciplined by the government in its jurisdiction for conduct involving misuse of funds, however, that information was not disclosed in the application."

This background check language is appropriate, provided ICANN will not be looking to exclude an applicant for anything but serial intellectual property violations that have been adjudicated in a court of law. Large and established entities are more likely to be involved in intellectual property disputes, and thus more likely to be excluded by a strict interpretation of the above language. For example, many large patent holders have been found guilty in court of infringing patents and have paid very high damages, but are not prohibited from obtaining new patents. Similarly, it would be unfair for ICANN to adopt a standard that would, for example, exclude an entity from applying for a gTLD that has been on the losing side of several contested UDRP proceedings, or lost a patent or copyright infringement lawsuit, absent a showing of willful and serial violations. That being said, we believe ICANN will be reasonable in this aspect of the applicant review process.

Registry Agreement – Specification 2

Although DAGv4 explicitly prohibits registrars from applying or participating in the new gTLD process, we would like to submit our comments on Specification 2, the Data Escrow process. We believe this type of insight and experience into the registry process is another reason why ICANN is being shortsighted in its wholesale exclusion of registrars.

The registry escrow process is in place to mitigate the risk a registry might fail and lose the ability to support their domains. The primary mechanism in this process is the Incremental data extract process. The idea of an Incremental addition is to provide the necessary data while minimizing data volume and processing time, but we believe it will have the opposite effect. It will increase complexity, development cost, and lead-time to loading data.

Several issues that we see with the Incremental approach:
- The process for importing a Full data set is relatively straightforward. However, the processes necessary to extract, import, and validate an Incremental set are much more complex, time consuming on import, and more prone to failure.
- Given the assumed intent of this data, the data volumes involved, and complexity of the data structures being discussed, it is likely that an incremental process would REDUCE a third party's ability to meet the timelines set forth in DAGv4.
- Simplifications to incremental data processing could be achieved through adding "delete" actions to the normal incremental tables (i.e. remove the DomanStatusDel table and instead add a delete reason code and delete date to the DomainStatus incremental table).
- Several data structures necessary to support knowledge that a delete action has taken place are missing from the specification.
- Several tables identified as intended to hold incremental data are missing reason code or action date. These values will be necessary to any processes that must manage applying the incremental data to an existing data set.

We are very interested in understanding any other reasons that would necessitate an incremental data extract process, and look forward to working with ICANN to complete the specification of the incremental processing as needed.

CSV files are specified (RFC 4180). Many of the pieces of information associated with addresses, organizations, and people may contain a legitimate comma. Advice needs to be provided on how to deal with data imbedded within fields which may contain commas. Optionally, a different delimiter should be specified. A [TAB] character is recommended as the delimiter.

Many of the business processes associated with domain deletion, transfer, activation, redemption, etc. require an understanding of the dates domains entered a particular status. The DomainStatus entity does not include this action-date. This data escrow will not allow business processes that are based on the date some status was applied to match the initial source of the

data, i.e., since we do not have dates associated with when a domain is deleted, we cannot fully mirror the domain redemption grace period. Addition of this value would be relatively easy, and add a great deal of value

Conclusion:

Now is the time for ICANN to digest one more round of public comments, go public with the operable guidebook and proceed with accepting applications for new gTLDs. A great deal of work has occurred over the past two years and DAGv4 forms a solid basis for the community to proceed to an operable gTLD program so DNS innovation, competitiveness and consumer choice can be unleashed.

Sincerely,

Jeffrey Eckhaus
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Demand Media