# Demand Media Comments on the Applicant Guidebook (April 2011)

Demand Media is pleased ICANN has published an updated gTLD Applicant Guidebook and provided this opportunity for comment. This version of the Applicant Guidebook provides an excellent framework for gTLD applicants and while it is not perfect, no set of laws or regulations such as this ever is. Like any law or regulation, there will be a need for amendments and changes after implementation based on real issues and experiences. That is expected and we are secure in the knowledge that ICANN has a strong process in place to allow for these changes if necessary.

That being said, we believe there is a fundamental issue that ICANN must address immediately, as it is a pre-launch issue and is critical to the integrity of the application process.

Section 1 of the Proposed Final New gTLD Applicant Guidebook details what is generally a reasonable process for ICANN to perform background checks on the applicants for any new gTLD. Section 2.1 works in conjunction with Section 1 and details certain eligibility criteria for the applying individuals and entities.

Section 1.2.1 states that ICANN will "perform background screening in only two areas 1) general business diligence and criminal history; and 2) history of cybersquatting behavior. " In regards to a "history of cybersquatting behavior," DAG 4 elaborated on this applicant restriction by stating that the applicant would be disqualified if the applicant or an individual named in the application are "the subject of a pattern of decisions indicating liability for, or repeated practice of bad faith in regard to domain name registration, including:

a) Acquiring domain names primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the owner of a trademark or service mark or to a competitor, for valuable consideration in excess of documented out of pocket costs directly related to the domain name; or
b) Registering domain names in order to prevent the owner of the trademark from reflecting the mark in a corresponding domain name; or
c) Registering domain names primarily for disrupting the business of a competitor; or
d) Using domain names with intent to attract, for commercial gain, Internet users to a web site or other on-line location, by creating a likelihood of confusion with a trademark or service mark as to the source, sponsorship, affiliation, or endorsement of the web site or location of a product or service on the web site or location.

This more detailed history of cybersquatting definitional language of DAGv4 is changed in the latest draft to now state more generally that an otherwise qualified applicant may be denied their application for a new gTLD if the applicant or an individual named in the application has "been involved in a pattern of adverse, final decisions indicating that the applicant or individual named in the application was engaged in cybersquatting as defined in the UDRP, ACPA or other equivalent legislation or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or other equivalent legislation. Three or more decisions with one occurring in the last 4 years will generally be considered to constitute a pattern."

**We believe this updated definition is problematic for several reasons and urge ICANN to modify the terms back to the language under DAGv4**

To begin with, denying an entity the opportunity to operate a gTLD because of 3 (adverse) UDRP decisions is an extremely broad standard that we believe will unintentionally disqualify otherwise qualified applicants.

This standard does not allow for contextual analysis such as whether the person or entity owns or has owned thousands of domain names. If they do/did, then losing a few contested UDRP cases in what amounts to a tiny percentage of their total domain name portfolio certainly doesn't seem to constitute a "pattern" as most people would define the term. To us, a pattern of behavior is a customary way of operation or behavior. Certainly by all reasonable standards, it is difficult to conclude that an entity or an individual has engaged in a history/pattern of cybersquatting when they own hundreds or thousands of domain names and have lost a few UDRP or similar proceedings.

To be clear, we support ICANN's goal of examining a gTLD application to determine whether the applicant truly has a background and history of cybersquatting and other similar nefarious actions. Someone should not be operating a registry for the primary purpose of producing domain names that infringe trademark rights. However, there appears to be no language in this new section to permit analysis as to whether this person or entity operated in bad faith or repeatedly attempted to abuse trademark rights in the past ---it is just a matter of whether they have lost three or more UDRP cases. A hard and fast line just does not fit here.

In addition, intellectual property rights are the subject of thousands of good faith disputes in courts around the world. Oftentimes the decisions in such cases, as in UDRP decisions, are close calls. However, just because a particular company loses several contested patent, copyright or trademark infringement lawsuits, laws and policies do not prohibit that defendant company from ever applying for their own patent, copyright or trademark in the future. If we were to apply this logic then many of the great innovators would be excluded from ever applying for a patent in the future and we would lose out on untold global benefits.

Furthermore, the proposed language is not clear on what constitutes cybersquatting. The UDRP and ACPA are sited in the Guidebook but in fact do not contain definitions of cybersquatting. Rather, they list certain actions under general categories that may constitute, essentially, trademark infringement.

It is simply not equitable, nor in ICANN's best interests to adopt a standard that is so rigid and low. ICANN should be more reasonable in defining and executing this aspect of the applicant review process and should not be seeking to exclude an applicant for anything but serial/egregious intellectual property violations.

We suggest that ICANN revert to the DAGv4 definition of "bad faith in regard to domain name registration" (a-d above) and in conjunction with this definition, utilize a definition of history or pattern of cybersquatting that does not involve a specific number but rather, is closer to "a customary way of operation or behavior" and thus allows for a contextual analysis for each applicant.

Once again, we congratulate ICANN on providing an excellent applicant guidebook and urge the ICANN staff to make these few final changes so the ICANN board can meet next month and approve the launch of the new gTLD program.

Sincerely,

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Demand Media