



ICANN's New gTLD Applicant Guidebook: April 2011 Discussion Draft – Public Comment

CADNA appreciates this opportunity to provide feedback on ICANN's New gTLD Applicant Guidebook April 2011 Discussion Draft and has prepared the following comments. CADNA would like to recognize the effort that ICANN has made to incorporate previous public comment submissions, as well as feedback received from recent consultations between the ICANN Board of Directors and the Governmental Advisory Committee (GAC). Significant changes that CADNA has observed include the addition of the GAC Early Warning and GAC Advice; government exemption from objection filing fees; implementation of a "loser pays" model in URS; and mandatory rights protection measures. Such changes are an improvement to the Guidebook; however, CADNA remains unconvinced that enough has been done to justify ICANN's actions in moving forward with the launch of new gTLDs.

As a Coalition of brand owners, trademark protection, security, stability, and the prevention of malicious conduct are among our most pressing concerns with regard to new gTLDs and CADNA believes that, once again, ICANN has failed to adequately address these issues. The GAC seems to be in agreement on this point, judging from the document highlighting remaining points of difference between it and the ICANN Board on new gTLD rights protection mechanisms released in April. In addition, the U.S. House Judiciary Subcommittee on Intellectual Property, Competition, and the Internet convened an oversight hearing in May on ICANN and the new gTLD program. This hearing concluded with Subcommittee members voicing concern about new gTLDs and asking ICANN to postpone its launch in order for Congress investigate further and determine how this will ultimately impact businesses and Internet users.

It is not just the timeline of the new gTLD rollout that CADNA takes issue with. We are more broadly concerned that ICANN still has not managed demonstrate a need for new gTLDs, nor that the benefits will outweigh the costs, particularly for brand owners and consumers. In past public comment periods CADNA has pointed out major flaws with the economic studies used by ICANN as the bases for its claims, and until further review and evaluation can be made into this matter, we strongly urge ICANN to pause and think about the consequences of an unlimited number of new gTLDs. Such an action would be an encouraging step in the right direction in terms of ICANN's commitment to maintaining high standards of accountability and transparency, two things that have been lacking in its policy-making decisions of late.

CADNA sincerely hopes that ICANN will take advantage of this public comment period to better its understanding of the many concerns raised by its Internet constituencies, many of whom are among those that would be the most significantly affected by the proposed introduction of new gTLDs. ICANN would be well served to listen and incorporate the perspectives of these communities into its decisions on new gTLD policies. With this in mind, CADNA strongly recommends that ICANN suspend its plans



and re-evaluate the wisdom of this program and whether or not it has truly taken the consequences for all Internet users into account.

CADNA offers the following constructive comments and recommendations:

I. Addition of the GAC Early Warning

CADNA is pleased with this addition to the Guidebook and the way that it more effectively incorporates the GAC into the application process, giving government representatives more meaningful input. While a warning does not require GAC consensus, CADNA noticed that the warning only serves as a notice, not as a formal objection, and does not directly contribute to the rejection of an application. We believe that this measure could be improved upon with stronger wording, forcing the ICANN Board to take a warning into consideration instead of being able to entirely disregard it. Governments should have more and stronger ways of raising formal complaints about a TLD application, of course without being granted the ability to abuse the system.

II. Addition of GAC Advice

Similar to the GAC Early Warning, CADNA is encouraged by the addition of GAC Advice, which enables the GAC to provide public policy advice directly to the ICANN Board for consideration, on any application. Again, though, we feel that this policy should be more strongly worded. The Board must “strongly” consider GAC advice when deciding whether or not to approve an application, but it is unclear what “strongly” means. CADNA suggests that a measure be put in place to show how GAC advice will be taken into account and the reasons for which the Board decides to disregard it and proceed with approving the application.

III. Subsequent Application Rounds

This is a point that is particularly troubling to CADNA, not so much for the policy itself, but for what it presents. One of the biggest points of contention with ICANN’s new gTLD program is that ICANN never provided proof of a demonstrable need or demand for new gTLDs, or that the economic benefits will outweigh the costs. ICANN should not be reviewing the effects of the new gTLD program for security and stability after the first round, it should be conducting those types of studies before it even thinks about launching potentially hundreds of new TLDs and compromising the safety of businesses and consumers around the world. This point is also acknowledgement that ICANN knows that there is a danger associated with new TLDs. CADNA would like more details on how ICANN plans to conduct such studies, considering the controversy that surrounded its earlier economic studies, as discussed in previous comment periods.

IV. Eligibility

CADNA applauds the detail that was put into describing applicant eligibility, considering the concerns that it has with the potential for new gTLDs to enable cybersquatting and other cybercriminal activity. Conducting more thorough background checks and placing tougher restrictions on applicant eligibility will hopefully ensure that there are less

opportunities for applicants with bad intentions to proceed and that only those applicants who should be applying for new gTLDs make it through the process.

V. Objection Filing Fees

This is an important section and demonstrates one of the ways in which ICANN has tried to factor in government concerns and participation in the new TLD application process. Some smaller governments, who might have expressed worries about the cost of objection filing fees, will find that some of their concerns have been relieved by ICANN's guarantee of funding for advance payment of costs and full funding for a minimum of one objection per government. CADNA would like some more information, though, on what will happen for subsequent objections, and in which cases ICANN would be willing to provide the funds for other objection filing fees.

VI. Trademark Clearinghouse

CADNA observed that language stating that no common law marks should be included in the Trademark Clearinghouse Database was removed and wonders what kind of effect this might have on which additional marks might be included in the Clearinghouse. We are pleased with the idea of expanding the definition for inclusion in the Clearinghouse, although it seems that marks that constitute intellectual property of other types than those specifically described will be determined by the registry operator and Clearinghouse. That caveat seems to give those two entities a significant amount of power. CADNA would like more elaboration on this point – common law marks have figured prominently in many UDRP cases, and in some cases, are not recognized internationally the same way that they are within the jurisdiction of the U.S. It is encouraging, though, that rights protection mechanisms have been made mandatory, specifically trademark claims services and sunrise registration services. This seems to be part of ICANN's efforts to take note of the concerns of the trademark community, and should be applauded.

VII. Uniform Rapid Suspension System (URS)

The addition of a limited "loser pays" model to the URS for complaints involving 26 or more disputed domains is an improvement. CADNA is hopeful that this will enable trademark owners to recoup some of the costs that they will necessarily incur while using the URS, while also deterring those considering acting in bad faith by causing them to consider the fees that they might be forced to pay if caught. CADNA also applauds ICANN's new specification that URS Examiners must have demonstrable relevant legal background, such as in trademark law. URS proceedings are meant to be done rapidly, therefore it is critical that the Examiners be properly trained and suited to consider URS cases, in order to deliver the correct determination.

VIII. Trademark Post-Delegation Dispute Resolution Procedure (PDDRP)

CADNA noticed the addition of language that the imposition of remedies shall be at the discretion of ICANN, but absent extraordinary circumstances, those remedies will be in line with the remedies recommended by the Expert Panel. The first part that caused some concern is the implication that ICANN can impose a remedy other than what was



recommended by the panel. CADNA would like some more clarification on when ICANN is allowed to do so, and in what cases. The second part that CADNA would like more clarification on is what qualifies as “extraordinary circumstances”. If ICANN can impose a remedy that is not in line with those recommended by an expert panel then CADNA would like to know what such remedies would entail, and in what situations they would occur.