.MUSIC Public Comments for Specification 13   2/4/2014

The Proposed Specification 13 change in the Applicant Guidebook attempts to give preferential treatment to brand owners by making additional material changes in the Applicant Guidebook (AGB), contrary to the Rules of the AGB on Material Changes (http://newgtlds.icann.org/en/applicants/customer-service/change-requests).

If ICANN implements such a change in the Applicant Guidebook to give preferential treatment to one type of Applicant, then, under the same token, ICANN should also lower the threshold of 14 points to pass Community Priority Evaluation (CPE) to community-based Applicants with demonstrable community support.

The Government Advisory Committee (GAC) advised ICANN in its Beijing Communique[1] that:

> "In those cases where a community, which is clearly impacted by a set of new gTLD applications in contention, has expressed a collective and clear opinion on those applications, such opinion should be duly taken into account, together with all other relevant information"

The GAC reiterated its advice to ICANN from the Beijing Communiqué in its Durban Communique[2] for ICANN to give:

> "…preferential treatment for all applications which have demonstrable community support, while noting community concerns over the high costs for pursuing a Community Objection process as well as over the high threshold for passing Community Priority Evaluation."

GAC's advice to ICANN was to enable:

> "better account of community views, and improve outcomes for communities, within the existing framework, independent of whether those communities have utilized ICANN's formal community processes to date."

ICANN has yet to make any GAC-advised changes in the CPE process to improve "outcomes to communities" and give "preferential treatment" to community-based applicants with authentic, "demonstrable support" to pass the CPE threshold given the "high threshold for passing Community Priority Evaluation."

[1] https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2

[2] https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2

If ICANN agrees to the proposed Specification 13 then ICANN should also adopt a similar proposition which follows GAC Advise to give preferential treatment to community-applicants with demonstrable support.

Furthermore, the proposed Specification 13 creates unintended consequences: It harms community-based Applicants (i) with non-exclusive access, community-based Applications, (ii) with bona-fide trademarks in the class of domain-related activities, and brand-name Applicants (iii) who were Objectors to exclusive-access applications in the Legal Rights Objection process with the World Intellectual Property Organization (WIPO)[3]. Such cases include those of .MUSIC in regards to its bona-fide trademark(s) ".MUSIC" and "DOTMUSIC" in nearly 30 countries and its globally-recognized brand use in commerce in the sectors relating to domain names and music.[4]

A brand name which has a descriptive trademark should not be used by brand owners as an exclusive-access registry to block community members with activities under the descriptive sense of a trademark. For example, the brand Apple (which applied for .APPLE) should not be allowed to block apple-related entities from registering a domain in .APPLE relating to apple-services. In this case, Apple should only be allowed to block second-level domains relating to its trademark's class of goods and services. It is noted that ICANN has already implemented a material change in the Applicant Guidebook to remove exclusive-access language in its new registry Agreement.[5]

Respectfully Submitted,

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[3] http://www.wipo.int/amc/en/domains/lro/
[4] .MUSIC is holder of many .MUSIC trademarks in nearly 30 countries e.g. http://music.us/lro/dotmusic-limited-trademark-owner-008139792.pdf. For more information on .MUSIC's globally-recognized brand see supporting .MUSIC Community Member Organizations (http://music.us/supporters.htm) and other relevant evidence and media press (http://music.us/lro/)
[5] 3(c) and 3(d) of Specification 11 provided that: (c) Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies. (d) Registry Operator of a "Generic String" TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" [. . .]. "Generic String" means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those others" (New gTLD Registry Agreement, July 2nd, 2013, https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d).