



Comments on the Draft Applicant Guidebook Version 4

The Coalition Against Domain Name Abuse (CADNA) appreciates the opportunity to submit its comments on the fourth version of the Draft Applicant Guidebook (DAG-V4) but remains firm and unchanged in its opinion on the launch of new gTLDs as expressed in the comments that it submitted for the DAG-V3.

Trademark protection, security and stability, and malicious conduct are the most pressing concerns associated with the potential launch of new TLDs. As a result, **CADNA would like to reiterate its strong belief that it is still premature to proceed with the new TLD launch at this time. This launch should not be allowed to advance any further without further review and revision. It is imperative that any plan put in place will guarantee the safety of Internet users and protect the rights of all parties. This is a measure that CADNA does not believe has been fully addressed by the current version of the DAG.**

CADNA is encouraged by and appreciates ICANN's efforts to improve the DAG, and the changes that have been implemented in this version, but ultimately remains concerned about ICANN's decision to expand the domain name marketplace and its proposed process regarding the implementation of applications for new gTLDs. As a coalition of brand owners, CADNA is specifically concerned about trademark and security issues that might arise in the new TLD space and remains uncertain that ICANN is adequately addressing the needs and concerns of brand owners and the broader trademark community.

CADNA would also like to take this opportunity to briefly address ICANN's recent Economic Framework document. Although ICANN's emphasis on caution and prudence in releasing the report before moving forward with the rollout of new gTLDs is positive, CADNA ultimately believes that the document is premature, offered a marginal window of opportunity for review by the trademark community, and does not adequately address the issues with which the trademark community is concerned. CADNA continues to insist that the launch of new gTLDs is premature and must be preceded by a more thorough economic analysis, one that takes into account actual consumer demand for new gTLDs as well as the cost that will be incurred by trademark owners. CADNA recommends therefore, that ICANN decelerate its plans for the launch of new gTLDs and take the time to ensure that the costs do not end up outweighing the benefits for registrants and Internet users.

DRAFT APPLICANT GUIDEBOOK VERSION 4

CADNA would like to offer the following comments on the DAG version 4.

I. Intellectual Property Violations Should be Priority in Background Checks

CADNA took note of the fact that the Background Check section of the DAG4 has been revised extensively and hopes that this is a sign of ICANN’s commitment to conducting thorough investigations in order to ensure the validity and true intentions of potential applicants. Although encouraged by these changes, CADNA still has some reservations. CADNA would like request more detailed information on the identity of the third party chosen to conduct the background checks and how that process of selection will work. In addition, CADNA would also be interested in knowing how high a priority background checks on past intellectual property violations will be.

II. ICANN Should Require Proof of Good Standing

CADNA noticed that in this version, ICANN eliminated the requirement for applicants to submit “proof of good standing” documentation with their initial applications. CADNA is concerned about the effect that this could have on the entire application process and is worried that it could potentially lead to a greater number of applicants with illicit intentions ending up in the overall applicant pool. Even if these ill-intentioned applicants will be eliminated at some point in the process – the DAG4 mentions that the issue of “good standing” will be addressed during the background check, which is done after an application is accepted – it may still result in a waste of time and resources for ICANN along with other involved parties, when it could have been prevented earlier on in the process.

III. WHOIS Requirements Should be Uniform

CADNA continues to support the fact that ICANN requires applicants to provision WHOIS support. This is not a comment on a new addition to the DAG. Instead, CADNA is trying to stress that this section should be stronger in terms of its emphasis on the importance of enforcing this requirement. ICANN should be as specific as possible about its rules, and should ensure that accurate WHOIS data is maintained. Applicants should also be held to a uniform set of requirements in order to avoid any discrepancies. CADNA worries that without such provisions in place, applicants could pose a serious threat to brand owners. False WHOIS information poses a threat to consumers as well, in the form of malicious registrants that can spread malware and viruses undetected.

IV. Mandatory Sunrise Period Should Not Hold Domain Names Hostage

CADNA noted the addition of a mandatory sunrise period and believes that this could be beneficial to the trademark community as long as the domain names are not offered for inflated prices. This addition could force registries to recognize the rights of authorized trademark owners and give them a head start in terms of registering domains that should rightfully be theirs, but should not hold the domain names “hostage” by requiring trademark owners to pay more than anyone else would for their own trademarks.

TRADEMARK CLEARINGHOUSE

CADNA would like to offer the following comments on the Trademark Clearinghouse.

I. Trademark Clearinghouse Should be More than a Database

CADNA does not believe that the Trademark Clearinghouse will adequately address the trademark protection issues raised by new gTLDs. CADNA’s main concern involves the actual purpose of the Trademark Clearinghouse. ICANN states that the Clearinghouse’s purpose is to be a repository for information. This implies that the Clearinghouse will essentially just be a large database containing information related to certain trademarks. This is disappointing, considering that it was created and developed by the Implementation Recommendation Team (IRT), which is charged with the responsibility of identifying and proposing rights protection mechanisms for trademark holders within the new gTLD program. ICANN needs to review the purpose of the Clearinghouse, as a mechanism for trademark owners, and reevaluate whether it is truly paying attention to the concerns that have been raised by the trademark community since the first draft of the DAG.

II. Certain Clearinghouse Services Should be Limited

The Trademark Clearinghouse was created with trademark owners in mind and is likely therefore to contain valuable data having to do with specific trademarks. As a result, ICANN must clarify who will have access to the data and services provided by the Clearinghouse in order to provide trademark owners with the appropriate measures to be able to police their own trademarks. In addition, under “Use of Clearinghouse Data”, there is a section that causes CADNA particular concern. ICANN states that there should be no bar for providers to provide ancillary services on a non-exclusive basis. Such services could include the release of lists of generic words or common typographical variations of various trademarks. ICANN must reconsider this measure because it is exactly this kind of information that facilitates and enables cybersquatting and typosquatting. Such data should not be available on a non-exclusive basis, and CADNA advises ICANN to draft and implement measures that would guard such data and guarantee its exclusive use by relevant trademark owners.

III. The Term “Text Mark” Should be Clearly Defined

ICANN’s language regarding the Trademark Clearinghouse needs to be clearer. ICANN states that registries must recognize all text marks that have been or are nationally or multi-nationally registered, court-validated, or protected by a statute or treaty currently in effect and that was in effect on or before 26 June 2008. What ICANN does not clarify, is what the definition of a “text mark” is and what it will accept as a text mark. This could pose a serious problem and cause unnecessary confusion for those seeking to make sure that their trademarks are recognized. For the sake of these trademark owners, ICANN must clarify and define what exactly constitutes a text mark. CADNA suggests that a proper definition of a “text mark” would include protection for stylized letters and text with design components.

IV. Cost Should be Shared by All Stakeholders

CADNA believes that the Trademark Clearinghouse still fails to adequately address where the burden of the costs will fall. The current version states that costs should be completely borne by the parties utilizing the services. ICANN needs to clarify that brand owners are not the only stakeholders that will benefit from this resource and therefore should not be the only ones required to pay for the TM Clearinghouse.

V. Decision on Third-Party Contractor Should be Open and Transparent

CADNA noted that ICANN will essentially have nothing to do with the Trademark Clearinghouse, and has chosen instead to hire that responsibility out to a third-party contractor. CADNA would like to strongly urge ICANN to choose a contractor with extensive experience in trademark protection issues and to do so via an open and transparent process. CADNA would also like to request a preview of the proposed contractual agreement in order to acquire a fuller understanding of what this role will entail.

DRAFT UNIFORM RAPID SUSPENSION SYSTEM

CADNA would like to offer the following comments on the Uniform Rapid Suspension System.

I. URS Decisions Should Have More Weight

CADNA believes that URS decisions do not have enough weight. As currently outlined by ICANN in this draft of the URS, a determination made in favor of the complainant only requires that the domain name be suspended for the balance of the registration period, which could be a matter of months. The complainant would also have the option to extend the registration period for an additional year at commercial rates. By CADNA’s standards, this measure is not adequate. The domain name should not be released again so quickly; such domain names are at risk of

falling into the possession of cybersquatters once again.

II. URS Should be Able to Transfer Domain Names

CADNA suggests that the URS have the power to transfer domain names to trademark owners as well. During suspension periods, domain names are virtually useless. Instead of having the option to put the domain names in question to use, trademark owners will be forced to monitor the status of each domain, while worrying that the domain name could be released and lost to another cybersquatter. CADNA realizes that the URS should not mimic the UDRP too closely, but also that the value of transfer of domain names could be an extremely beneficial and useful addition to the URS.

III. URS Should be Expedited

CADNA is disappointed because it had hoped that the URS would prove to be an expedited, cost-effective alternative to the UDRP. CADNA's expectation was that the URS would be a valuable and important tool to be used by trademark owners to combat cybersquatting, but found that the current draft of the URS falls short. The URS timeline is approximately the same length as that of the UDRP, and in some instances, could even take longer. This is problematic; the URS was conceived of as rapid mechanism, as evidenced by its name. Part of the problem is the fact that the registrant is given 20 days, with the option of an additional seven, to respond to a complaint. In addition, a decision does not have to be reached for three business days and 14 unspecified days, with plenty of room for an extension. All this while, the domain is "locked", continuing to resolve to the same content that brought the domain name under scrutiny in the first place. ICANN should heed the attention called to this issue by the trademark community, and work to revise and streamline this process so that it will benefit trademark owners and adequately take into account their concerns and recommendations.

IV. URS Should Utilize Forms

CADNA recommends that in order to streamline the URS, ICANN should implement the IRT's proposed form complaint, answer and decision and make it a requirement. The form will help to keep the process consistent and uniform, eliminating confusion and discrepancies that would slow or complicate the process. The current draft of the URS states that the form of the complaint should have a 5,000-word limit, excluding attachments, along with a list of items that must be included in the complaint. CADNA believes that this method is inefficient, given that the URS is to be used for instances of clear infringement. Such a complaint form will not expedite the process, nor render it more cost-effective in comparison with the UDRP.

TRADEMARK POST-DELEGATION DISPUTE RESOLUTION PROCEDURE

CADNA would like to offer the following comments on the Trademark Post-Delegation Dispute Resolution Procedure.

I. Registry Operators Should be Held Accountable

CADNA is deeply concerned about a revision made to the “Standards” Section of the Trademark PDDRP. The section effectively relieves registry operators of an enormous amount of liability and creates no incentive for them to monitor domain names being registered or already within their registries, for infringing names. This sets the standard for registry operators dangerously low, and does nothing to prevent or eliminate the problem of cybercriminals and cybersquatters. This section poses a serious threat to the trademark community, and CADNA urges ICANN to revise the section. Much more accountability needs to be created for registry operators; they should be held responsible to a certain extent, for domain name infringement that occurs within their registries.

II. PDDRP Should Not Unnecessarily Burden Complainant

The PDDRP should not discourage Complainants from using it. Unfortunately, in its current form, that is exactly what it does. In many cases, the PDDRP will make it difficult for Complainants to make their cases by requiring them to make their cases in much greater detail and with substantially greater evidence for their arguments than they would for the UDRP. For example, in a second level complaint, Complainants must prove that there is a substantial pattern of practice of specific bad faith intent by the registry operator to profit from the sale of trademark infringing domains. In most cases this would be extraordinarily hard to prove, creating a much more complicated and burdensome process for the Complainant.

III. Expert Panel Decisions Should be Enforced

The expert panel is severely weakened in this draft of the PDDRP in the section titled “The Expert Panel Determination”. It states that ICANN has the authority to impose remedies and implement decisions that vary from those of the Expert Panel. CADNA takes issue with this section of the PDDRP because it undermines the Expert Panel, increases uncertainty, and causes unnecessary complications. In its current form, ICANN risks decreasing the value of the PDDRP and the likelihood of trademark owners to use it over other available methods. CADNA recommends that ICANN abide by and defer to the Expert Panels’ decisions, unless they threaten to violate ICANN’s own registry agreements. Otherwise, ICANN runs the risk of putting the Expert Panel into an advisory role, by freeing itself of the obligation to comply with the Panel’s decisions or to take any recommended actions against registries.

IV. ICANN Should Set Limits for Costs

CADNA is extremely concerned by the description of the costs associated with PDDRP. The only information on costs that ICANN provides is that the Provider will estimate the costs for the proceedings and that they are intended to be reasonable. After termination of the proceeding, the prevailing party will be refunded its advanced payment of costs. This explanation is vague and fails to mention any limit on the cost of proceedings. ICANN's passing statement that costs are intended to be reasonable does not mean that they will be. ICANN either needs to implement a maximum cost for proceedings, or provide the involved parties with more say in how the costs will stack up, otherwise Complainants will have no incentive to use the PDDRP and will instead look for alternative methods to solve their disputes.

REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE

CADNA would like to offer the following comments on the Registry Restrictions Dispute Resolution Procedure.

I. ICANN Should Combine the RRDRP and the PDDRP

CADNA appreciates the fact that the RRDRP deals with trademark issues and the fact that it was created to handle complaints dealing with community-based restricted gTLD registry operators not meeting their obligations. At the same time, CADNA would recommend that ICANN consider combining this procedure with the PDDRP. They were both created to provide administrative procedures, deal with trademark owner issues, and have similar procedures. By combining the two, ICANN could create a process that would be efficient, uniform and consistent in terms of standards, as well as a valuable resource for different groups within the trademark community to eliminate any disparities that might arise by using one procedure and not the other.