

## Comments on the New gTLD Applicant Guidebook Version 5

The Coalition Against Domain Name Abuse (CADNA) appreciates the opportunity to submit its comments on the proposed final version of the New gTLD Applicant Guidebook but is frustrated with ICANN's continued disregard for the concerns and comments of the trademark community and disappointed to see the numerous flaws and shortcomings still present in the Guidebook.

From the publication of the very first Draft Applicant Guidebook (DAG-V1), CADNA has been insisting that it is premature to proceed with the policy for a new TLD launch for a wide variety of reasons. The biggest issues that CADNA identified with DAG-V1 have yet to adequately be addressed two years and four versions of DAG later:

- ICANN has not provided an economic analysis that adequately examines the impact that a widespread launch would have on Internet users, businesses, and the general economy.

The economic analyses of the TLD launch that have been conducted by ICANN to this point have been weak, with no hard numbers that attempt to calculate expenses, traffic or the cost of cybersquatting. These studies, which are far from comprehensive, have not provided any compelling facts that show demand for or the potential benefits of the massive influx of new TLDs that ICANN envisions. In his letter to Rod Beckstrom, Assistant Secretary for Communications and Information in the U.S. Department of Commerce (DoC), Lawrence Strickling, writes that he is “troubled that despite ICANN’s commitments in the Affirmation to adequately address this and other issues prior to implementation of an expansion program, you still have not performed the studies to answer the threshold question whether the benefits of expansion outweigh the costs.” Despite the subsequent publication of *Economic Considerations in the Expansion of Generic Top-Level Domain Names Phase II Report: Case Studies*, ICANN has yet to prove that the benefits of the expansion would outweigh the costs. If anything, the most recent analysis admitted that part of the “success” of new TLDs will be the result of brand owners rushing to defensively register domain names, which is hardly to be considered a “benefit” or indication of demand.

- The lack of adequate rights protections in the Guidebook makes it unwise to move forward with the release of new TLDs. This launch should not move forward without a more detailed and well thought-out plan in place that will ensure the safety of Internet users and protect the rights of all parties.

As a Coalition of brand owners, CADNA is deeply concerned with ICANN's choice to largely ignore the trademark community's comments instead of incorporating them into the Guidebook. Many commentators have proposed alternatives and revisions to the Guidebook and the introduction of new TLDs, in a thoughtful and neutral manner, which ICANN should re-read and seriously consider. ICANN has already lost the trust of the public, which it has consistently and deliberately kept in the dark about many of the negative implications of new gTLDs in order to



expand its own interests, power and resources, which, as others have been quick to point out, is not what it was intended to be when it was first created as a trustworthy guardian of the naming system on a small and stable budget.

CADNA's concerns also stem from the fact that not only will ICANN's actions impact the naming system, a massively critical issue in and of itself, but will impose externalities upon third parties as well; government and private sector. As the Guidebook is now, it gives registries room to act as they please, forces governments to deal with the legal problems that will be created as a result of new TLDs and leaves a number of loopholes for cybersquatters and other cybercriminals to take advantage of, leaving registrants vulnerable and at a tremendous disadvantage. ICANN should not continue to repeat the same mistakes, considering the impact that its actions have on the global community.

ICANN needs to be more transparent in the way that it conducts its policy development. What the new TLD policy development process has made clear is that ICANN is not an organization that addresses the expressed needs of its stakeholders. Though it claims to have a "bottom-up" policy development process that takes into account its multi-stakeholder constituency, it consistently makes decisions and acts in its own interest and in the interest of its contracted parties.

CADNA has consistently called on ICANN to provide the public with a thorough and accurate representation of its responsiveness to the public comments it has received. These calls have unfortunately fallen on deaf ears, despite the number of organizations, companies, government representatives and individuals that have made similar demands.

In letters reacting to the latest DAG, the DoC and the World Intellectual Property Organization (WIPO) have both expressed concerns regarding the lack of transparency in ICANN's policy development process. WIPO lists examples of what it calls "the drive toward conclusion without more meaningful dialogue," the DoC states that ICANN has "failed to meet" the commitment to "provide a thorough and reasoned explanation of decisions take, the rationale thereof and the sources of data and information on which ICANN relied", a commitment outlined in its Affirmation of Commitments (AOC). Even the Chair of ICANN's own Governmental Advisory Committee (GAC) is urging ICANN's Board to honor the commitment made in the AOC.

CADNA takes issue with this Guidebook because of its flaws and the many critical questions that it leaves unanswered and strongly recommends that ICANN reconsider its strategy. With regard to the New gTLD Applicant Guidebook Version 5, CADNA would now like to offer the following constructive comments and recommendations:

**I. Delegation will never exceed 1,000 per year no matter how many applications are received.**

CADNA is concerned that 1,000 new gTLDs per year is still an incredibly overwhelming number not only for registrants and the ICANN community but for ICANN itself, which will necessarily result in a variety of ill effects. CADNA expects that ICANN and its DNS



maintenance resources will most likely be stretched very thin, leaving it unable to properly enforce its rules and policies pertaining to registries and registrations, which in turn will create new opportunities for cybercriminals looking to take advantage of the introduction of new gTLDs. CADNA would like to know what research/studies were conducted to arrive at and justify this number and would also like to see the number significantly reduced to prevent such problems.

## **II. Notification by a government doesn't mean that the application will be denied**

Once again it seems that ICANN is barreling ahead with its agenda without the input of others. ICANN should consult U.S. and foreign governments, considering the significant impact that new TLDs may have on them. ICANN needs to outline in what instances government notification would result in denial of an application, and the formal channels that need to be taken to provide such notification and have it taken into account.

## **III. New gTLD program was designed with multiple stakeholder protection mechanisms**

This is a baseless claim unless ICANN can actually provide evidence that it has heeded the countless concerns and comments submitted by the trademark community over a number of public comment periods. ICANN might think that it has provided a sufficient number of mechanisms that will adequately protect stakeholder, but judging by the number of comments that continue to be submitted voicing the concerns of the trademark community, there is much disagreement with this assessment. CADNA would like to see a detailed explanation from ICANN of what comments in particular were taken into account and had a significant influence in terms of modifications and revisions to this version of the Guidebook.

## **IV. Applicant involvement with regard to cybersquatting as defined in the UDRP, ACPA or other equivalent legislation**

This point needs to be explained much more clearly. While this is a slight improvement to the last draft version of the Guidebook, CADNA still has some questions about the process and policies involved. Of particular concern is the possibility of shell companies taking the fall for patterns of cybersquatting while their parent company remains free to apply for a new TLD.. Also, there is the issue of the applicant applies as an entity or a community so that his or her name does not come up when investigated for past involvement in domain name disputes or cybersquatting. There is also the dilemma of poor WHOIS records, another issue with which CADNA has taken issue in the past, which essentially allows some cybersquatters from being linked to UDRP cases and therefore, unsearchable in WIPO and NAF databases.

## **V. New gTLD program will not negatively impact the security of stability of the DNS but also hinges upon this assumption**

CADNA is concerned about ICANN's claim that new gTLDs will not negatively impact the security or stability of the DNS. If this is true, then why would ICANN need to add a provision concerning what will happen if new gTLDs do end up negatively affecting the DNS? This seems like an afterthought. Clearly ICANN will benefit from the introduction of new gTLDs and wants the launch to take place as soon as possible, which means ICANN is necessarily motivated to

make this claim. CADNA would like to see the reports and studies conducted to back this claim up and who they were conducted by. ICANN has been the subject of some scrutiny for the supposed “independence” of their independent experts and studies and should look towards a truly objective analysis that is based on hard numbers, facts and evidence.

## **VI. Note on applicant compliance with WHOIS specifications and request for public comment**

WHOIS is an area of particular concern to CADNA as it is to many other in the trademark community. It is a source of constant frustration for those who have had to deal with inaccurate records when it comes to UDRP proceedings. WHOIS is also an area on which many have submitted comments and voiced grave concerns over already, with little response from ICANN in terms of adjustments or revisions. It is commendable that ICANN is asking for more input on this topic, but it is an empty gesture if ICANN does not take such comments into account. If ICANN is serious in its request for public input, then it needs to be more transparent about how it will process these comments and make some real changes in a new version of the Guidebook.

## **VII. String similarity review**

String similarity is an important issue and, unfortunately, CADNA is of the opinion that some of the language and policies, as currently presented in the latest Guidebook, need to be revised. One section addresses the issue of string similarity review and mentions contention sets that will be used by the string similarity panel. In order to streamline the process, ICANN should clarify that string contention sets will not include those cases in which the similar strings requested by the applicant are simply linguistic variations of each other. This is important particularly for large international brands, with audiences who speak a variety of languages. By adding this revision to the Guidebook, it will make it easier for those applying for new gTLDs to offer legitimate translations or transliterations of their TLD string.

## **VIII. Applicant commitment to security standard for registry operation**

This section is on the right track, but is still too vague. As it is right now, applicants have to provide ICANN with the security policies and procedures they have planned for their proposed registries. CADNA would like ICANN to be more specific with the community as to what their standards are regarding the security measures are put into place. This will clarify how ICANN is going to set the bar in terms of what it finds acceptable and what it does not, and will better explain what security standards ICANN expects applicants to commit to operate under in their applications.

## **IX. Objections to applications**

CADNA is concerned that some of the language pertaining to raising objections to applications is confusing. In a section on limited public interest, the Guidebook states that an applied for gTLD string may be considered contrary to generally accepted legal norms. First of all, the term “generally accepted” needs to be clarified, because it could be interpreted in a number of ways. The Guidebook also states that the one raising the objections has to prove substantial opposition within the community it is representing. Again, CADNA feels that this language is too vague and too open to interpretation. The term “substantial opposition” also needs to be more defined much



more specifically by ICANN.

#### **X. A Limited Public Interest objection that is manifestly unfound may be considered an abuse of the right to object**

This is an issue to CADNA for a number of reasons. First of all, CADNA is concerned about a situation in which there is evidence against an applicant that proves that it should clearly be disqualified from applying for new gTLDs. If trademark owners are worried about the possibility of their objections being deemed “abuse” or “harassment” when trying to protect their brands, they might become more hesitant to raise such objections, allowing more applicants with bad intentions into the pool. Another issue that CADNA has is with the provision that filing fees paid by the applicants will be refunded. This is dangerous because those applying in bad faith have a lot less to lose. What is to stop them from applying over and over again, knowing that they will never lose substantial amounts of money? This would lead to negative effects for legitimate applicants. ICANN should clarify and specify circumstances in which abuse of the application process would not result in a refund.

#### **XI. Independent Objector will still be selected by ICANN**

CADNA is concerned with this provision, considering that ICANN has a history of conducting independent studies that have turned out to be anything but. ICANN either needs to get a third party or a portion of the ICANN community involved in the selection of an Independent Objector, or needs to be much more transparent about the process and perhaps offer a way for the ICANN community to raise an objection in order to ensure that the objector is actually independent and will not simply carry out ICANN’s agenda.

#### **XII. The Clearinghouse structure**

CADNA currently harbors serious concerns about the Clearinghouse structure and the burden that it unfairly places upon *bona fide* trademark owners. This is another topic on which CADNA has commented extensively upon in the past, therefore it is frustrating to see yet another Guidebook released which fails to adequately address the problem. As it is now, the Clearinghouse will most likely place significant monetary burdens on trademark owners. CADNA requests that ICANN take the time to review the Clearinghouse and see if some changes can be made to provide more information on criteria and fees, as well as jurisdictions.

#### **XIII. The URS procedure for temporary suspensions**

The URS is another item on which CADNA has commented in the past and it is frustrating to see that little has been done to improve it. It’s original purpose as an enforcement tool is a good one, but much needs to be done to make it a viable, useful option for brands and trademark owners. As it is currently it is a cumbersome process and does not live up to its name as a “rapid” system. CADNA also agrees with others who have pointed out that there is a fundamental imbalance in the URS as well, between the procedures outlined and the actual solution, which is temporary suspension of domain names. ICANN needs to review the URS procedures and revise some of the guidelines for timelines, appeals, panel examinations and translation requirements, just to name a few.



#### **XIV. PDDRP structure**

CADNA is concerned that there are some serious flaws with the PDDRP that need to be addressed by ICANN before it moves forward with the Guidebook. For one, the proposed threshold review panel seems to be superfluous. The purpose of the panel is to conduct an administrative compliance review, which already falls under the responsibilities of the PPDRP provider. There are also a number of other elements to the current PDDRP structure, which seem to cater to and favor the respondents in the event of a dispute. This is very troubling. The stakeholders' best interests should not be overlooked and ICANN needs to revise its policies with regard to enforcement to ensure that the PDDRP is more fairly balanced.