Applicant Guidebook Comments

The Coalition Against Domain Name Abuse (CADNA) is pleased to have the opportunity to offer its comments on ICANN's Draft Applicant Guidebook. As a coalition of brand owners, CADNA is particularly concerned with the decision to expand the domain name space and the proposed process for releasing the TLDs.

Many brand owners are already under water as a result of having to register defensively and because of the budgetary expenditures required to fight the extraordinary cybersquatting problem in existing TLDs. This problem only continues to grow, virtually unchecked, and now the space could more than double in size without any substantial consideration as to how to curb current or future abuse. Brand owners will be forced to contend with the added complexity of enforcement within the new TLDs due to the expansion. The costs of monitoring, defensively registering, and enforcing the new TLDs will be substantial. This monetary harm is just one of many ill effects, such as brand dilution, proliferation of cybercrime and damage to the integrity of the Internet that may occur.

CADNA believes that it is premature to proceed with the new TLD launch at this time. ICANN has not provided an economic analysis examining the impact that a widespread launch would have on Internet users, businesses, and the general economy and the Guidebook draft leaves much of the launch process unexplained and undeveloped. This, coupled with the lack of adequate rights protections in the Guidebook makes it unwise to move forward too quickly with the release of new TLDs. We strongly recommend that ICANN delay the process of opening up the domain space by at least twelve months to allow for proper analysis, public due diligence, and extensive review by the community.

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. For example, ICANN must do more to ensure that dispute mechanisms within the new gTLD process are effective, accessible, low-cost and efficient for right holders to use. Furthermore, the launch should be rolled out at a pace that allows for reevaluation and adaptation to problems that will undoubtedly arise.

The following are CADNA's specific issues with the Applicant Guidebook:

Module 1: Initial Evaluation/Objection Filing

There is an overall lack of specificity in the Guidebook with regards to timelines; in order for the community to properly ascertain the fairness and potential success of the launch

process, ICANN needs to provide the community with a more detailed outline of the steps involved in that process.

1.1.2.2 Administrative Completeness Check

Will applicants be allowed to correct applications that are found to be incomplete?

CADNA believes that before the initial evaluation phase, a short window of time should be allotted to allow for the correction of omissions and clerical errors. The undertaking of filing an application should not be undone for want of errors that can easily be corrected.

What information will be provided about the completed applications?

In order to ensure that the process is transparent and has a reasonable objection period, information regarding the applicant and the intended use of the string should be made readily available.

1.1.2.4 Objection Filing

The Guidebook states, "the objection filing phase will close following the end of the Initial Evaluation period."

ICANN needs to clarify the timeframe that has been provided for filing objections.

The existing language does not spell out whether the timeframe could vary according to the number of applications submitted during the Initial Evaluation period, or if it will be a fixed number of days, weeks or months. The Guidebook doesn't provide any information as to whether the timeframe will be announced at the beginning of the Initial Evaluation Period or if it will be determined after the Initial Evaluation Period has commenced.

There should also be clarification as to whether an objection filing is counted as an objection to an applicant or an objection to the string. As an example, consider a scenario in which CADNA does not want to register its own TLD, but objects to another party registering and using dot-CADNA. If CADNA objects to one applicant attempting to register dot-CADNA, will CADNA need to pay another objection fee if another applicant attempts to register the same string? While the applicants will be different and may require adjusted objection materials and language, there should be a provision that allows for subsequent objections at a reduced fee.

1.1.2.5 Extended Evaluation

The Guidebook does not adequately detail how much time an applicant has to file a request for an Extended Evaluation.

1.1.3 Accounting for Public Comment

The Guidebook states that, "ICANN will provide all public comments received to DRSPs, who will have discretion to consider them."

Since the public has not been given an indication as to how these DRSPs will be selected, it is impossible to assess their ability to perform this task.

In addition, CADNA believes that ICANN should review the public comments and instruct the evaluators on how to handle the feedback because ICANN is ultimately responsible for the launch of the TLDs.

1.2.2.1 Definitions

The Guidebook states that, "a community-based gTLD is a gTLD that is operated for the benefit of a defined community consisting of a restricted population."

The Guidebook should provide a better definition of a "community" in this section. How restricted should this community be? A community can be defined according to any number of distinctive factors, so what would constitute a restriction? As it stands, an applicant can get an established institution within a self-defined community to endorse his application, but how representative is that institution of the community? This is an area of significant concern because of the apparent preference that will be given to community applications.

Module 2- Evaluation Procedures

2.1.1.1 String Contention

The Guidebook states that, in order for a set of strings to be considered confusingly similar, "it must be probable, not merely possible, that confusion will arise in the mind of the average, reasonable Internet user."

The Applicant Guidebook needs to further define the process that will be used to determine whether there is confusing similarity between extensions.

The distinction between "probable" and "possible" needs to be made clear. Applicants should be provided with a more complete set of criteria that enables them to ascertain both the financial commitment required to move forward with an application and the risk of not participating in the first wave of the application process. For example, if a potential applicant's extension is likely to be part of a contention set, the applicant will know that an application would involve fees relating to dispute resolution and a possible auction for the string. Those that choose not to participate in the initial TLD launch process with the intention of applying for an extension at a later date may be surprised to find that their desired TLD qualifies as a source of "probable" confusion with one that has been awarded in an earlier phase.

Properly defining what constitutes "probable" confusion over "possible" confusion will enable informed discussion of whether ICANN is meeting "the demand for more innovation, choice" that the organization cited as the reason for expanding the domain space.

The Guidebook states that a panel of String Similarity Examiners will scrutinize the contentious string sets for a likelihood of confusion; the algorithmic tool that determines a score for visual similarity will inform the examination.

While the algorithmic tool appears to provide guidance, its current form will lend itself to misinterpretation and manipulation by those attempting to prove or disprove the visual similarity of an extension. If this tool is to provide accepted industry standards for "visual similarity," ICANN needs to consider threshold percentages for determining levels of "visual similarity" and make those available for public comment.

2.1.1.2 Review for Reserved Names

CADNA believes that trademarks that are able to meet a pre-determined set of criteria should be added to the Reserved Name list. This list should not only work to preclude the registration of these trademarks as extensions, but also prevent the abusive registrations of these trademarks in domains within any new TLD. This provision will allow those who believe there is market value in becoming a registry to become one without either accidentally or purposefully supporting infringing behavior. Trademark owners will likewise benefit from such a provision, since it would allow them to register domains according to market strategy rather than as a defensive maneuver.

The coalition is not suggesting that the Reserved Name list constitute a famous marks list; rather, the Reserved Name list should be open to any trademark owner who can meet the pre-determined set of objective criteria. These criteria could include the following:

- The trademark owner must prove ownership of a national trademark registration in at least the majority of the five ICANN geographic regions.
- The trademark owner must demonstrate that their mark has been the subject of widespread cybersquatting. Acceptable documentation to prove this would include successful UDRP proceedings or other proceedings brought in national courts of competent jurisdiction.

Any prospective applicant who wishes to register an extension or domain found on the Reserved Name list can approach the owner of that Reserved Name to negotiate and reach an agreement. If no agreement can be reached, a proceeding could be administered by the arbitration and mediation center of the World Intellectual Property Organization, which has already been identified by ICANN as a potential dispute resolution service provider (DSRP) and has established expertise in resolving trademark and domain name disputes.

Module 3- Dispute Resolution Procedures

The Guidebook lists four grounds for objection: string confusion objection, legal rights objection, morality and public order objection and community objection. In addition to the clarification that is needed within these categories, CADNA believes that there should be a provision that allows for objections to applicants who have a history of abuse in the domain name space.

3.1.2.2 Legal Rights Objection

An objection to the application can be filed if the string infringes upon the existing legal rights of the objector, but it is unclear what guidelines apply if both entities can claim legal rights to the same string. The Guidebook should provide clearer guidelines on how a dispute of this kind would be resolved. It should also be made clear at the outset that a party filing a legal rights objection is not barred from going to court to challenge ICANN's decision regarding the dispute.

3.1.2.3 Morality and Public Order Objection

Who can object on terms of "morality and public order"? The Guidebook currently assumes that this would be the role of governments, but can concerned members of the Internet community object on these grounds?

Who determines the definition of "morality" and "public order," and how can this be

done in a way that is consistent? The assumption is that these two definitions will be consistent with international law, but what exactly does that mean? For example, what happens when there is no international law that speaks directly to the issue or the law is found to be too vague?

3.1.2.4 Community Objection

In this case, a "community" is defined as an established institution with a public history and a level of global recognition; an objection brought by a community that, for example, has banded together solely to influence the gTLD process will not be considered. While this was likely done to prevent excessive checkpoints in the process, this definition of community may be too limited. If a community of concerned Internet users band together with a legitimate issue, it should be of interest to ICANN.

3.4.4 Selection and Number of Panelists

ICANN should explain the process by which these panelists will be chosen.

Module 4- String Contention Procedure

4.2 Comparative Evaluation

When community-based applicants find themselves in a string contention set, they have the option of settling the dispute amongst themselves (which would require one application to be dropped) or moving forward to see if a clear winner will be determined. If the applicants decide to move forward, a panel then examines the applicants against set criteria—the nexus between proposed string and community, the dedicated registration policies, community establishment and community endorsement. In order to be declared a clear winner, an applicant must score an 11 out of a possible 12.

This strict rubric may have negative consequences for the dispute resolution process. By setting such a high threshold to determine a clear winner, the application process essentially leaves applicants with two choices, neither of which are desirable: withdrawal or going to auction. While the Guidebook claims that auctions are a last resort for dispute resolution, requiring a near perfect match score for a clear winner will make auctions a common and expected part of the application process.

4.3 Contention Resolution

The Guidebook mentions an "efficient mechanism for contention resolution" that has yet to be developed; the Guidebook only states a) that the first efficient means of resolution that will be employed is an attempt at a settlement between the two parties, and b) that auctions will be a last resort.

ICANN should develop this mechanism that will come into play after attempts to settle a dispute between two competing applicants.

Auctions as a Last-Resort Resolution for String Contention

The Applicant Guidebook requires further clarification regarding how profits will be allocated.

ICANN maintains that the new gTLD application fee is "designed to be cost/revenue neutral. It factors in costs already forgone, future processing costs and legal expenses that are significant and would be a large drain on the Corporation's established budget."

To promote transparency and accountability for the organization (and in turn foster institutional confidence), ICANN should provide the model that was used to justify the fees set forth in the Guidebook.

The Guidebook states that the "proceeds from auctions will be reserved until the uses of the proceeds are determined through a community consultation."

There should be further clarification as to what would be deemed an appropriate allocation of these proceeds, the time frame for this decision and how this allocation would be determined through "community consultation."

Module 6- Top-Level Domain Application

The Guidebook states that, "ICANN reserves the right to reject any application that ICANN is prohibited from considering for a gTLD under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant."

CADNA believes that the application fee itself, if nonrefundable, can deter attempts to register frivolous TLDs.

The Guidebook states that by agreeing to the process, "applicant agrees not to challenge, in Court or in any other judicial fora, any final decision made by ICANN with respect to the application, and irrevocably waives any right to sue or proceed on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application."

To maintain accountability throughout the process, ICANN should not be allowed to release itself from all liability and participants in the new TLD application process should not have to waive their rights to Court or other judicial proceedings.