



FairWinds' Comments on the Applicant Guidebook

FairWinds is pleased to have the opportunity to provide its comments on ICANN's Applicant Guidebook. We believe that the public comment period is an important way for ICANN to receive feedback and hone its policies accordingly. Due to the potentially catastrophic ramifications that this release could have on the Internet if it moves forward without much needed safeguards, we urge all those involved to carefully consider the objections posed by the Internet community and the concerns that are raised therein.

As a basic tenant, those responsible for policymaking must serve the greater community by performing due diligence and fully researching the need and demand for any change, as well as the potential cost and community impact of the decisions they choose to move forward with. As a vocal member of the Internet community and a participant in ICANN, we would like to express our fear that this duty of care has not been met by ICANN in its decision to expand the domain name space. We fear for the long-term viability of ICANN if decisions like this, which will have irreversible long-term ramifications on the Internet as we know it, continue to proceed unchecked. Conceptually, we are not against changes to the name space as long as those changes are brought about with proper care and for the greater good of the Internet community—not just for the greater good of those who will profit from TLD applications and unnecessary corporate sunrise registrations.

As a group that is closely involved with these issues, we confidently state that this TLD launch is not yet supported with a documented need for new TLDs, a clear understanding of the cost impact that the launch would have or an assessment of the launch's impact on public safety. For these reasons, we must ask that the ICANN board move to stay the release pending further professional and external review of the economic and public safety impact of the expansion of the space.

We formally request that ICANN complete a full economic study to determine the impact of a TLD release. This was discussed, and promised, but has yet to occur. In addition, we call upon ICAAN to commission a complete security analysis so that we collectively can understand the impact on the Internet and its users and proceed with implementing new protective safeguards as needed

If this launch of a potentially unlimited number of TLDs must move forward, it is imperative that it is done in a carefully timed and cautious manner that will not sacrifice the safety or stability of the Internet. This is no small feat given the rampant abuses present in the existing TLD space, let alone the level of infringement that can be expected in an expanded one. As a result, there should be a concerted effort to institute strong rights protection mechanisms throughout the application process. Hopefully this effort,



along with an effort to maintain transparency and accountability in the application process and in the newly expanded space, will curb abuses and allow legitimate practices to flourish.

With regards to the published Guidebook itself, FairWinds believes that it is lacking much needed detail. For example, there are undefined timelines and dispute resolution processes that have yet to be developed (such as the “A tie-breaker mechanism” mentioned in 4.3). There is also a great need for rights protections to be worked into the launch process; as it stands, brand owners are the only ones protecting the wider Internet community from infringements, a task that is burdensome and costly. These gaps, along with many other pressing concerns, need to be addressed before the launch process can be properly judged in terms of its potential for success.

In terms of what information is provided about the process, FairWinds would like to offer the following comments on the Applicant Guidebook:

Module 1

1.1.2.2 Administrative Completeness Check

Transparency throughout the application process is key to establishing a fair market. Once the administrative completeness check phase is closed, information on the applicants and their intended use of the extension should be made public. This will provide potential objectors with a fair chance to decide whether or not to pursue the extension, and will also allow potential objectors to contact applicants for negotiations.

1.1.2.7 String Contention

The Guidebook states that in order for 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 difference between “probable” and “possible” should be more clearly defined in order to reduce attempts by applicants and objectors to manipulate the language.

Module 2

2.1.1.2 Review for Reserved Names

In order to prevent the registration of trademarks as extensions by third parties and the abusive registrations of trademark domains within new TLDs, trademark owners should be allowed to apply to have their marks added to the reserve name list. This list should not be limited to famous marks, but rather be open to any trademark owner who can meet



a certain set of objective criteria. These criteria could include, but not be limited to, providing documented proof that the trademark is subject to widespread cybersquatting and proof of national trademark registrations.

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 to 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.

Module 6

3. 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.”

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

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application,” and that the “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.”

ICANN should be held accountable for the decisions made throughout this process. FairWinds takes issue with the language found above, as it would release ICANN from all liability.



Addition to the Guidebook

Promoting Accountability in the Space Through Accurate Whois Data

To promote accountability within the domain name space, applicants for new TLDs should be required to maintain accurate Whois information for the domains in their corresponding extension. Registries should be mandated to police their extensions by conducting regular updates of this information.