

## 3.2 New gTLD Applicant Freedom of Expression

3.2.1 Noting that the 2007 Final Report on new gTLDs tried to balance the rights of applicants (e.g., Principle G) and rights holders (Recommendation 3), do you believe that the program was successful in doing so? If not, do you have examples of where either an applicant's freedom of expression or a person or entity's legal rights were infringed?

- **Afilias & RySG – were not able to reach agreement on a response to this question.**
- **NCSG - The goal of balancing the rights of applicants and rights holders settled by the Final Report on new gTLDs must continue with special attention to whether the GAC's Advice, Community processes or the reserved names have impacted this goal in any way. Bearing in mind that providing an adequate consideration to the protection of Human Rights, and therefore, the right of freedom of expression, freedom of association, freedom of religion and principle of nondiscrimination are of utmost importance in this process.**

## 3.5 Accountability Mechanisms

### General Comments

- **GAC** - The GAC has previously proposed the establishment of an appeal mechanism for community applications (see 3.3 above) and to challenge decisions on confusability related to applied-for IDN ccTLDs (Prague Communique 2012).
- **John Poole** - Since I only support complete revision of the new gTLDs program in accordance with the 2008 recommendations of the US DOJ Antitrust Division (see my answers hereinabove, the subject of this work track would need to be completely revised and is irrelevant).
- **NCSG** - This topic is an exclusivity of the New gTLD Subsequent Procedures as the work and further recommendations of the Cross Community Working Group on Enhancing ICANN's Accountability with the revision of the accountability mechanisms should be taken into consideration on this topic.

#### 3.5.1 – Do you believe that the existing accountability mechanisms (Request for Reconsideration, Independent Review Process, and the Ombudsman) are adequate avenues to address issues encountered in the New gTLD Program?

- **Jim Prendergast** - Clearly no. The fact that the ICANN Board Governance Committee (BGC) has had to create a separate subcommittee to deal with reconsideration requests related to new gTLDs is Exhibit A. They are not equipped to handle these. It was also the case that IRP decisions found that the BGC violated the ICANN by laws in their handling of reconsideration requests.
- **BRG, RySG, AfiliAs** - The perception of inconsistent outcomes in objection proceedings led to overreliance on existing accountability mechanisms, particularly the Reconsideration Request process, which was ill suited to address the objection related issues as Reconsideration Requests are intended to address action or inaction by ICANN staff or the ICANN Board and not determinations by a third-party panel. This situation was detrimental to applicants, who were left without adequate recourse mechanisms, and the ICANN Board's Governance Committee, which was inundated by an unprecedented number of reconsideration requests that it could not process on a reasonable time frame. It also drove the creation of post-decision mechanisms which were only made available to a narrow subset of applicants who faced the most obviously inconsistent objection

determinations.

Specific to the application process we believe that a narrowly-tailored appeals process should be introduced for objection procedures, to better-address perceived inconsistent outcomes and areas where applicant believes that objection panels failed to apply the proper standard. Our recommendations for an appeals process, including a discussion of several possible approaches to the introduction of an appeals process can be found in our response to Question 3.1.2.

Beyond this proposed mechanism, which is specific to the application process, we believe that this question is premature and may be beyond the WG's scope. First, some of the accountability mechanisms under discussion have changed significantly since the 2012 round as part of the CCWG-Accountability, and others remain under discussion and may be altered as a result of Workstream 2 of the CCWG Accountability work. Second, these mechanisms go beyond the scope of the gTLD application process, and are more appropriately considered in devoted review or policy processes like the CCWG-Accountability or the Accountability and Transparency Review Process.

- **ALAC** - Yes, considering the new review mechanisms implemented as a result of the ICANN Accountability measure and subject to the response to 3.5.2.

**3.5.2 – Should there be appeal mechanisms, specific to the New gTLD Program, introduced into the program? If yes, for what areas of the program (e.g., evaluations, objections, CPE)? Do you have suggestions for high-level requirements (e.g., if the appeal should be limited to procedural and/or substantive issues, who conducts the review, who is the final arbiter, safeguards against abuse, etc.).**

- **INTA** - INTA believes that an appeals process would be beneficial. In the previous round it was decided not to allow appeals from most decisions, however in practice this has resulted in extensive use of time consuming and complex requests for reconsideration and independent reviews. In order to allow fair recourse for applicants, appeals processes should be identified prior to future releases of new gTLDs, with clear criteria for appeal identified and those who made the initial decisions are not part of any appeals panel.

- **Google - Address inconsistencies experienced within application objection procedures through the introduction of a streamlined and balanced appeals process.**

During the 2012 Round the String Confusion Objection Process resulted in numerous inconsistent outcomes. For example, despite conditions being effectively the same, one ICDR panel came to the conclusion that .HOTEL and .HOTELS were not confusingly similar, while another determined that .PET and .PETS were confusingly similar. There were multiple other examples of such inconsistencies, e.g., .CAR and .CARS found not similar (in a proceeding involving Google Registry), and .GAME and .GAMES similar. Unfortunately, even the ad hoc mechanisms created by the ICANN Board to address these discrepancies were inadequate, as they were not made available to both sides of a particular contention set, creating the presumption that the rights of gTLD applicants were given more weight than the rights of objectors.

We support the recommendation made in the comments by the RySG that a more equitable approach is to introduce the option of a defined appeals process for all applicants that identify either a reasonable inconsistency in outcome or a specific argument as to why the panel failed to apply the proper standard. A narrowly-tailored appeals process with explicitly delineated grounds for appeal and a relatively high standard for overruling panel decisions, e.g., a “clear error” standard, should also alleviate stress on the Reconsideration Request process, which was infrequently used prior to the 2012 Round but became inundated by requests from applicants to review unfavorable outcomes related to the objection procedures.

- **BRG, Afiliias, RySG - Some of the objection processes for contested applications had common issues between them. The next gTLD rounds working group identified some of the problems that post-decision mechanisms, such as appeals, may help reduce or solve.**
- Lack of panelist training and consistency as evidenced by decisions that were decided differently, despite having substantially similar fact patterns,
  - Random opportunities to present new evidence or re-argue a position based on how vehemently a party insisted on the right.
  - No opportunity to have the merits of a case revisited – a problem where the providers didn’t properly train panelists.

The perception of inconsistent outcomes led to overreliance on existing accountability mechanisms, particularly the Reconsideration Request process, which was ill suited to address the objection related issues as Reconsideration Requests are intended to address action or inaction by ICANN staff or the ICANN Board and not determinations by a third party panel. This situation was detrimental to applicants, who were left without

adequate recourse mechanisms, and the ICANN Board's Governance Committee, which was inundated by an unprecedented number of reconsideration requests that it could not process on a reasonable time frame. It also drove the creation of post-decision mechanisms which were only made available to a narrow subset of applicants who faced the most obviously inconsistent determinations. This situation was inadequate to address the larger issues identified above. We recommend that, in a subsequent application process, a limited appeals process be introduced for the objection procedures for parties that identify either a reasonable inconsistency in outcome or a specific argument as to why the panel failed to apply the proper standard. We propose below several models to consider for potential appeal options:

- **Delayed appeals:** For parties that were the first few cases under a new procedure or mechanism, allow the losing party to request a delayed review by panelists who have experience deciding similar cases under the new system, to cross-check for consistency.
  - **Pros:** Ensures the first cases are not prejudiced by early learnings by the first panels.
  - **Cons:** Prevents certainty for the prevailing party. Implies objections are subject to stare decisis.
- **Master panel:** A traditional appeals process appears to simply substitute the judgment of panelist B for that of panelist A. Instead, hand-pick "master" panelists who have demonstrated consistent, sound judgment in the first round and ensure that they are provided with high-quality briefing materials regarding any changes in the next round. These materials should be approved by the community members who work on any changes to the AG. ICANN can use application fees to pay the Master panel to read every opinion to form its knowledge base. The Master panel may be responsible for providing routine panelist training on each objection process, to be paid by application fees. The Master panel can be retained by ICANN or by one of the Providers (subject to its ability to contract with each of the chosen master panelists). Master panelists may be forbidden from hearing objections in the first instance, to reduce conflict.
  - **Pros:** Uses proven experts to try to create more consistent outcomes. Application fees fund the effort toward consistency, but parties still pay for their own cases.
  - **Cons:** No party control over master panel selection, risk of master panelists "going rogue." Provider that offers the master panel may be at odds with other providers. ICANN- run master panel may invite conspiracy theories. Master panel appointment may become "political."
- **ICANN Review:** A panel or team within ICANN could be established to conduct independent reviews of objection outcomes and to make follow up recommendations.

- **Pros:** The cost would be borne by applicant fees. If the process is transparent, the community may trust the experts more than panelists hired by third-party providers.
- **Cons:** ICANN- run review process may invite conspiracy theories and the experts may not receive community trust if ICANN is not transparent about how the review process works. Without an actual appeal mechanism where facts are re-heard, the community may feel like a review does not go far enough. Similarly, ICANN may be overly conservative in this review for fear of picking winners and losers as part of the application process.
- **Appeals:** A template exists for this in the URS, TM-PDDRP, and RRDRP. The community would need to decide if all appeals should be heard by a three member panel in order to avoid the perception that it's always just another coin flip. Using those existing procedures as guides, the community could define the appeals process it wants. Some examples include: expedited timelines to avoid dragging out an objection, a rehearing based on the already-submitted data, the use of a short list of panelists who are generally conflict-free and available (similar to the master panel), and clearly-defined fees to be prepaid. Appeals could be limited to specific issues, as determined by the community – each objection process would need to come up with the types of appeals that would be acceptable.
- **Pros:** Eliminates concerns about ICANN having the ultimate authority, allows Providers to perpetuate a consistency amongst the panelist list, and provides a basis of competition between panelists (pricing, time-to-decision, quality of training and opinions).
- **Cons:** Additional, possibly uncapped, expense. If Panelist training problems persist, an appeals process is still a blind shot.
- **Existing accountability mechanisms:** Existing mechanisms are best utilized if a Provider goes rogue or underperforms, but the Board's expertise is not policing the day to day work of ADR providers.