



IPC Comments on the Preliminary Issue Report on New gTLD Subsequent Procedures

October 30, 2015

The Intellectual Property Constituency of the GNSO (“IPC”) thanks ICANN staff and the New gTLD Subsequent Rounds Discussion Group for the work that went into preparing this Preliminary Issue Report (the “Report”) on New gTLD Subsequent Procedures, and welcomes the opportunity to comment.¹ The IPC looks forward to participating in the policy development processes that will seek to make changes and adjustments to the current policies that govern the New gTLD Program.²

THRESHOLD ISSUES

The IPC supports going back to “first principles” during this process and encourages a “reboot” of the New gTLD Program, rather than just contemplating changes and/or adjustments to the existing policy recommendations. The main question for the community should be: “What makes a good steward for a gTLD?” With the benefit of hindsight and the additional information we have gained from the first round of the program, the ICANN community must consider more than just financial and technical health, but also the potential impact of new gTLDs on users, consumers, IP owners, businesses, governments, etc.

The ICANN community must address, *as a threshold matter* (not lumped into the report, but examined upfront) whether we should restrict applications in subsequent rounds, and the basis for such a restriction.³ This should be determined before diving into any of the other issues identified in the Report. As part of this consideration, ICANN must examine how to support applicants from developing areas, as this was widely regarded as a failure of the current round. Additionally, and also a part of this threshold matter, the IPC encourages a total overhaul of the criteria for geographic and community applications, so that we can be sure that any restrictions are narrowly tailored to achieve whatever the stated goal of the restriction is.

The IPC supports flexibility around identifying issues of concern to the community which need to be addressed before the delegation of future gTLDs, and this should be reflected in any

¹ Preliminary Issue Report on New gTLD Subsequent Procedures, at <https://www.icann.org/public-comments/new-gtld-subsequent-prelim-2015-08-31-en>, August 31, 2015.

² Final Report on the Introduction of New Generic Top-Level Domains, at <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>, August 8, 2007.

³ This is fully consistent with the position IPC has espoused throughout the new gTLD process. See, e.g., IPC comments on Applicant Guidebook – April 2011 Discussion Draft, at 1-2 (“ICANN’s decisions to go forward with an unrestricted and potentially controversial round of new gTLD applications is willfully blind, at best, or reckless, at worst”), available at <http://forum.icann.org/lists/6gtld-guide/pdfBbd4pnZZfa.pdf> (May 15, 2011).

charter(s) that govern the PDP(s) anticipated from this Report. As the reviews mandated by the GNSO and Affirmation of Commitments are only just beginning, it is likely that new issues and new concerns with existing policy recommendations will be identified in the course of these reviews. Of particular concern to the IPC is the RPM Review, the commencement of which will certainly influence the RPM sections of this Report.⁴ In addition, many new gTLD registries applied for in the current round have yet to be delegated and launched, and it is expected that additional issues will arise as Registry Operators find new and creative ways to market and monetize new gTLDs. Any such issues should be added to the relevant charter(s) for examination as they come up without the necessity of a lengthy amendment process.

KEY ISSUES MISSING OR INADEQUATELY ADDRESSED

The IPC presents a non-exhaustive list containing key issues of importance to the IPC which are either missing from the preliminary issue report, inadequately addressed, or so distributed amongst the report that it's unclear that the issue is contemplated appropriately. As suggested below, the grouping of the report is problematic overall, and these issues highlight some of the main problems with the grouping.

Root Stability

The Report adequately contemplates the prospect of issues involving (i) name collisions; (ii) security and stability of the DNS from individual name delegations; and (iii) applicant qualifications to securely operate a registry. Although the Report unfortunately downplays the threat of name collisions going forward, and states that “[n]either JAS [Global Advisors LLC] nor ICANN is aware of even a single instance of a problematic collision,”⁵ the Report nevertheless addresses the prospect that name collision issues may arise in future rounds of delegation, and takes the appropriate position that this should be considered in gTLD issuance procedures going forward.

However, the one issue that could be more directly addressed by the Report is whether the rapid expansion of the root zone (from the aggregate issuance of many gTLDs) could affect the security and stability of the DNS. In June of 2015, ICANN issued an RFP for a study to examine this issue, and report on the effect the gTLD program might have on the security and stability of the DNS (“DNS Study”). Subsequent gTLD procedures and policy should take into account any findings from the DNS Study, which is currently scheduled for publication in 2017. Further, in accordance with ICANN’s previous advice, any further delegations should be postponed until the DNS Study is completed and it is determined that further expansion will not jeopardize the root system’s security or stability.

Pricing/Premium Names/Reserved Names

Since the launch of the 2012 round, the IPC has consistently requested that ICANN examine issues concerning new gTLD premium name and pricing practices, particularly in view

⁴ See, e.g., [Preliminary Issue Report](#), at 70.

⁵ [Preliminary Issue Report](#), at 116.

of abusive practices perpetrated by certain new gTLD registry operators vis-à-vis premium names and pricing.⁶ Despite the importance of these issues to the IPC and other stakeholders, the Report provides very little discussion on matters relating to premium names and pricing. The only mention of premium names and pricing issues in the Report is as follows:

- Should rules, definitions, and requirements be established around the selling and maintenance of premium names?
- Should there be rules and restrictions around registry pricing, particularly around premium names?⁷

The IPC strongly encourages ICANN to provide additional background, context, and guidance regarding premium names, pricing policies and implementation in the Final Report and Charter, to ensure that the PDP Working Group has an adequate basis for considering these issues. More specifically, regulation by ICANN of pricing for registry services is not wholly unprecedented, and the Final Report and Charter should provide additional context to frame future policy considerations. *See, e.g.*, ICANN, .COM Registry Agreement, Article 7.3(d) Maximum Price (1 December 2012) (setting a maximum price of \$7.85 USD).

It may also make sense to include discussion of these issues in other sections of the Report in addition to the “base contract” section, as they likely implicate other phases and components of the new gTLD process. For example, applicants will likely consider pricing and premium names models at the application stage in formulating financial projection templates (or potentially sooner), well before they enter into their registry agreements with ICANN. In addition, these issues can impact rights protection, such as through inclusion of trademarks on premium names lists or the creation of “sunrise premium names” lists as elements of discriminatory pricing schemes aimed at taking advantage of famous brand names and charging exorbitant prices to brand owners, in contravention of the principle that sunrise periods should operate on a “cost recovery” basis.

The IPC notes that the Report identifies whether there should be a policy applicable to registries ability to “reserve names”, including whether there should be limits on the numbers that may be reserved and prohibitions on reserving names registered with the Trademark Clearinghouse. The ability for a registry operator to reserve an unlimited number of strings and to subsequently release them for registration is a loophole in the Base Contract that can and has been used to circumvent rights protection mechanisms and engage in discriminatory pricing schemes.

ICANN Compliance

Throughout the current new gTLD round, questions have been raised about the degree to which the community could rely on representations and undertakings made by applicants, whether in materials submitted to ICANN or in the registry agreements ultimately signed, and

⁶ See, e.g., ICANN, [Letter from IPC to Akram Atallah](#) (Mar. 27, 2015) (identifying various abusive pricing-related practices of the .SUCKS new gTLD registry operator).

⁷ [Preliminary Issue Report](#), at 62.

whether and how such representations could be enforced. The answers to these questions were unclear in some cases, and in others shifted over time. One goal of this review should be to develop much clearer guidance on these questions in advance of any future gTLD round that may be undertaken.

In the current round, statements by applicants gave rise to questions about reliance and enforcement in at least three different phases:

- 1) Initial application. Members of the public relied upon statements made in the applications for a number of purposes: to decide whether or not to submit public comments for consideration by evaluators; to decide whether or not to file objections; to decide whether or not to bring concerns to the attention of the GAC representatives from their countries; and otherwise to determine how to react to a particular application that might affect them, their businesses, a community with which they identified, or the public safety or order of the societies in which they lived. Such statements included, but were certainly not limited to, responses to questions 18, setting forth how applicants planned to operate the domains if they succeeded in obtaining delegation, and 28, discussing planned policies to minimize abusive registrations and uses of the domain names in the registry. At the end of the process, it seems clear that this reliance may have been misplaced, since many of these statements either were changed or superseded later in the process, or were never incorporated into the registry agreement that was ultimately signed.
- 2) Application changes. Although ICANN communicated at the outset of the process that the ability to modify applications after submission would be extremely limited, and confined for the most part to correcting clerical errors or other inadvertent misstatements, in practice change requests were much more liberally granted. While proposed changes were published for public comment, the comment period was quite limited, and no effort was undertaken to ensure that the public at large (in contrast to the community of other applicants who could be expected to monitor the new gTLD program website quite closely) were even aware of proposed changes. To the extent that the public relied upon application statements as summarized above, the ability to modify those statements with minimal public accountability undermined that reliance.
- 3) Registry agreements. Ultimately, the agreements signed by successful applicants included a representation and warranty only with regard to factual statements made in the application (Base Registry Agreement section 1.3.a.i), and not with regard to any of the statements concerning the anticipated operations of the registry, upon which the community may have relied. This approach should be reviewed, and better communication to the community of the extent to which it can or cannot rely upon assertions of applicants (and the extent to which such assertions may be enforced by ICANN) should be addressed in any future round. While the IPC is unaware of any compliance monitoring or enforcement initiatives from ICANN with regards to this provision in the registry agreement, it is difficult to ignore the wide disparity between representations made in a number

of new gTLD applications versus their actual TLD Startup Data, Terms & Conditions, and Policies.

As anticipated, questions of whether ICANN compliance is fully prepared to enforce the new registry agreements in a manner that serves the public interest have arisen frequently since the launch of the program. A related question is the extent to which third parties can participate in the contract enforcement process, either as the source of complaints to bring suspected violations to the attention of ICANN compliance, or in a more formal manner, as contemplated in the PIC Dispute Resolution Procedure. These questions take on even greater prominence in the context of the larger debate in the enhanced accountability space about whether ICANN has a responsibility, as part of its core mission, to authoritatively interpret and to vigorously enforce the contracts it has entered into, and if so whether it is currently fulfilling that responsibility. The planned PDP thus should also address how best to structure any subsequent new gTLD round in order to maximize the benefits that can be gained from proactive and more transparent contract enforcement efforts. Thus, the IPC believes the statement on page 65 of the Report that "...the subject of Compliance is not seen to require any type of policy development" is inaccurate and should be revised in accordance with the above comments.

GROUPING

The Report deals with a substantial number of issues. The IPC agrees that grouping like issues together under headings will be of assistance to any PDP-WG in order to help make it easier to deal with them. However, we have found the present Report very difficult to grapple with due to the manner in which the groupings have been selected, the issues allocated to those Groups, and the order in which issues are discussed within the Groups. In particular:

- 1) The scope of some of the five Groups is quite wide. There could be a benefit to allocating certain issues into additional Groupings based on the part of the community which is most likely to need to address them, such as dealings with registrars (non-discrimination, standardisation of contracts). Other issues seem to fall more naturally into a different Group than the one to which they have been allocated, for example:
 - a) Issues relating to systems (4.2.9) seem more naturally to fall within "Technical and Operational" than within "Overall Process, Support and Outreach", since they presumably will need to be addressed with input from more technical members of the community.
 - b) Considerations around Registrant Protections seem more naturally to fall into Group One and overlap with considerations of different TLD types.
- 2) The numbered issues assigned to each Group have substantial overlap and interrelation. This holds true both within a single Group and across Groups. By way of example:
 - a) The possibility of an exclusive round for applicants from Developing Countries is dealt with in section 4.2.14, but also referred to in section 4.2.16 on Application Submission Limits.
 - b) Issues around community engagement and the adequacy of ICANN's communications and outreach are dealt with across a number of sections.

- 3) Some topics are dealt with in sections which, from the subject title, do not appear to be their natural home. By way of example:
 - a) The lack of geographical diversity is covered in section 4.2.3 "Competition, Consumer Trust and Consumer Choice", although not exclusively so.
 - b) The section regarding the Base Contract (4.3.2) refers to a number of matters which, if changed by a PDP-WG, would require contractual amendments but which primarily require specific consideration outside of any discussions around amending the contract. This would include issues of premium pricing and treatment of premium names, reservation of names, PICs, and TLDs relating to regulated strings. In the case of premium and reserved names, issues raised by the community are closely associated with the effectiveness of the RPMs and should be dealt with accordingly.

- 4) The manner in which issues which might be expected to be dealt with together or sequentially are ordered in the draft Issue Report is not always sequential, so that it is necessary to track back and forth between different sections to determine how an issue is addressed overall. For example:
 - a) Issues around Application Fees are in section 4.2.10, whereas Variable Fees are not dealt with until later in the Issue Report at section 4.2.17. And of course the question of variable fees is associated with considerations about different application types (4.2.15, but also 4.2.3) and accreditation programs (4.2.8).
 - b) Following the initial question of whether there should be subsequent rounds (4.2.1) it would seem natural to consider whether future applications should be in Rounds (4.2.7) and considerations about the length of any application window (4.2.13).

The team of volunteers from the IPC who have worked on this comment have found it quite difficult at times to identify where a specific issue is dealt with within the draft Issue Report, and thus whether it is satisfactorily addressed or not. This has been due to the concerns referred to above and particularly due to the manner in which aspects of a subject are frequently touched on across a number of different numbered sections, sometimes within the same Group and at times even across the Groups. This raises the concern that, should any future PDP seek to address issues in batches based on the Group structure, there could be substantial overlap and duplication of effort or, equally problematic, issues which are inadvertently overlooked.

It could be an initial task of any PDP-WG to review all issues and restructure the groupings, before commencing work on them. We would respectfully suggest, however, that it would be extremely helpful for the GNSO Councillors, who must decide on whether to commence a PDP, and for the members of any subsequent PDP-WG, to conduct this exercise and to re-order the presentation of the issues for discussion, or at least to specify which issues have dependencies, when finalising the Issue Report. It may also be of assistance to specifically incorporate the mind map produced by the Discussion Group.

POLICY & IMPLEMENTATION DISTINCTIONS

In carrying out its review of the 2012 New gTLD program and developing policies for Subsequent Rounds, IPC believes that the PDP group should be instructed to apply the principles

set forth in the GNSO Policy & Implementation Working Group Final Recommendations Report at Section 4, page 12 of the report. These principles derive from and should govern the development of policy by this working group in order to adhere to the overarching principles of a robust multistakeholder model.

In addition, the IPC notes that some of the tasks and questions identified as being appropriate for a PDP might themselves be better developed through the use of one or more of the new procedures developed by the Policy & Implementation working group – i.e., the Fast Track PDP Process, the GNSO Guidance Process and the GNSO Input Process. We believe that the Fast Track PDP Process may be especially useful in reviewing and developing certain specific proposals for changes in the New gTLD process. This would be particularly useful for those subjects for which Policy Development has not been declared to be required.

We also strongly believe that the PDP Working Group should require establishment of an Implementation Review Team pursuant to Annexes K and L of the GNSO Policy & Implementation Working Group Final Recommendations Report, adhering to the principles and the procedures set forth therein.

PDP CHUNKING

The IPC supports the idea of PDP “chunking” or grouping issues with similar themes together for efficient examination. We believe that this is important to ensure that community members can concentrate on those issues most relevant to them during the PDP stage, and will help avoid volunteer burnout. However, ICANN must reorganize the issues first, as suggested above. Currently the organization of the issues don’t have a clear enough rhyme or reason for efficient and effective “chunking.”

CONCLUSION

There is an enormous amount of work that needs to be accomplished before ICANN can contemplate subsequent rounds of the New gTLD Program. While some of this work can be undertaken concurrently with other work streams, the community has quite a task ahead for itself to determine what can move forward (remedial rounds? restricted rounds?) and what should be deferred depending on the outcome of reviews. The IPC looks forward to working with ICANN and the entire community in fostering a new gTLD program that thrives and serves its mission in promoting consumer trust, competition and choice.

Respectfully Submitted,

Intellectual Property Constituency