



IPC Comments on the Draft New gTLD Program Implementation Review

The Intellectual Property Constituency (IPC) appreciates the opportunity to comment on the Draft Program Implementation Review (Review), providing a high-level overview of the experiences of ICANN staff charged with implementing the New gTLD Program. See <https://www.icann.org/public-comments/new-gtld-draft-review-2015-09-23-en>.

The IPC understands that the Review is not intended to provide a full and complete recitation of all facts and events associated with the New gTLD Program, nor to serve as a policy document. However, in the interest of providing a broader picture of stakeholder experiences with the New gTLD Program to date, the IPC provides some additional commentary on the experiences of the IPC and its constituents with the Program, with a particular focus on issues of intellectual property protection, consumer protection, and competition and consumer trust. The IPC hopes these comments will help inform further discussions surrounding the New gTLD Program, including the impending Policy Development Process (PDP) on New gTLD Subsequent Procedures. However, given the limited nature of the Review, IPC stresses that the following comments are not intended as an exhaustive critique of how the new gTLD program functioned during the period covered by the Review. Furthermore, IPC reserves the right, as ICANN review of the new gTLD program moves forward, to provide further comments on this history and the lessons to be learned from it.

One overarching observation is that ICANN's insistence on treating nearly all applications virtually identically, and its refusal to recognize that "one size does not fit all," inflicted unnecessary burdens and delays on all participants in the process. The Review notes that there would have been value at several stages of the process (ranging from prioritization of application processing all the way through to execution of registry agreements) in "grouping applications by common characteristics" or "defining different applicant types." It seem to avoid drawing the conclusion, however, that ICANN's consistent allergy to classifying different types of applications and treating different types differently undermined the entire process.

1. Application Processing

The IPC agrees with the staff experience that ICANN should explore a more structured way of capturing application responses, as well as associating multiple applications to a single user account. These lessons, if addressed for future rounds of new gTLDs, would significantly streamline the application and application amendment processes, as well as publication and ease of review by interested third parties, including but by no means limited to intellectual property rights holders. For instance, the requirement to submit individual comments on each of 100, 300 or 500 substantively similar or even virtually identical applications was a huge and unnecessary

burden that undermined any utility of the public comment process. Although of course large portfolio applicants would have benefited greatly from being able to group multiple similar applications under a single user account, .brand applicants would also have benefited from a more efficient application processing and publishing system.

The IPC also agrees with the staff experience that applications should be grouped by common characteristics—such as closed .Brand applications—in the prioritization process, to increase processing and evaluation efficiency. The IPC called for the creation of different “tracks” of applications based on type—such as .Brand, geographic, or community—for purposes of processing, evaluation, contention resolution, and registry agreement terms, among other issues, and looks forward to exploring this possibility further during the New gTLD Subsequent Procedures PDP. In addition, although the Review acknowledges the unsuccessful, and ultimately suspended “Digital Archery” method of prioritizing application processing, the IPC wishes to highlight the *ad hoc* nature of the prioritization processes in general, which led to confusion, delay, and unnecessary burden on the Program—particularly where many .Brand applicants preferred to receive much later priority numbers. The IPC recognizes that the unexpectedly high number of applications contributed to this issue, although a more reliable, pre-determined prioritization mechanism should be expected for future application rounds, as opposed to the Program’s hallmark *ad hoc* processes and mechanisms.

Although not specifically addressed in the Review, the IPC has raised questions regarding the enforceability and utility of the new gTLD application, and potential post-submission changes thereto. The IPC has previously posited¹ that some in the community may come to have a reliance interest on certain commitments made in new gTLD applications, although there is no clear guidance from ICANN as to whether ICANN views these commitments as legally binding, or whether they are subsumed or superseded by the registry agreement and public interest commitments ultimately executed between the applicant (then registry operator) and ICANN. Some additional consideration of this issue would be worth exploring, either in the context of the New gTLD Program Reviews or the PDP on Subsequent Rounds. In short, the community needs to consider the fluidity of new gTLD applications, reliance placed on commitments in those applications during the evaluation and approval process, and the enforceability of commitments made therein upon execution of a registry agreement.

2. Application Evaluation

The IPC strongly supports the need to review several aspects of new gTLD application evaluation, as demonstrated by shortcomings in the 2012 round. At a process level, the IPC highlights the inefficiency created by the somewhat *ad hoc* evaluation prioritization process, which, although it led to somewhat predictable releases of evaluation results, created internal inefficiencies. We agree with staff’s assessment that a more logical means of batching and

¹ See, e.g., [IPC Comments on the Preliminary Issue Report on New gTLD Subsequent Procedures](#), 4 (Oct. 30, 2015).

prioritizing applications would lead to improved efficiency and predictability for applicants, and that this subject should be explored in the PDP on Subsequent Procedures.

String Similarity

At a substantive level the IPC highlights, in particular, evaluations of string similarity. ICANN concluded, with very few exceptions, that singular and plural strings were not confusingly similar, and therefore TLDs consisting of singular and plural variations of the same word were not placed into direct contention as a result of the string similarity review. This conclusion has been widely criticized and IPC continues to believe it was unsupported by common sense. The Review tells us that no “blind content inspection” was performed on string similarity panels; their conclusions were never independently reviewed in ICANN’s internal quality control process, only their compliance criteria. Although the Review discusses the Quality Program positively, it clearly fell short in this area. Thus, the IPC would add this to the “lessons learned” regarding string similarity review during the 2012 round, and we expect the development of more robust criteria to guide string similarity reviews in order to prevent similar inconsistencies in subsequent rounds. Improved string similarity review would reduce the need for costly and time-consuming String Confusion Objection proceedings, which themselves led in a number of cases to inconsistent or otherwise unexpected results. And, as the Review notes, the timing of string similarity results just two weeks prior to the String Confusion Objection deadline led to additional burdens on the community that should have been avoided. String Confusion Objections are discussed in greater detail below.

Background Screening

With respect to background screening of applicants, the IPC supports the timing used during the 2012 round, namely screening at the time of Initial Evaluation, in order to prevent unqualified applicants from proceeding to contention or objection mechanisms unnecessarily, even though this may have created some inefficiencies for ICANN given later changes in applicant personnel between the application and registry agreement execution milestones.

Nevertheless, the IPC continues to question the overall effectiveness of the background screening employed by ICANN, particularly given the apparent ability for serial cybersquatters to circumvent the process through loopholes for shell corporations.² Accordingly, the PDP on Subsequent Procedures should also explore whether any applicants were actually deemed ineligible for further review based on background screening results.

IPC was also surprised to learn that applicants whose affiliates had incurred large debts to ICANN were not screened out and were not required to satisfy their previous obligations before

² See e.g. Domain Incite, *ICANN Won't Say How Demand Media Passed Its New gTLD Background Check* (May 31, 2013); Domain Name Wire, *ICANN's Three Strikes Loophole On Purpose?* (November 16, 2010).

their applications passed initial evaluation.³ This is another loophole that must be closed in any subsequent round.

Application Comment Forum

The IPC also highlights the discussion regarding Application Comment Forum. The IPC agrees that the functionality of this tool could be improved, and that it would be useful to enhance the ability of community members to be notified of certain kinds of application change requests, especially those involving Public Interest Commitments, as these changes could impact consumer protection and competition matters of importance to the intellectual property and broader Internet community. The relatively short time frame in which comments could be filed for consideration by the evaluators – in some cases, the deadline fell many months before evaluations were actually completed – also undermined the value of the public comment process.

In particular, with respect to Application Update History Comments, it is illogical that the comment forum lacks any redline changes to new gTLD applications. Rather, it still simply provides an original and an amended copy of each application for the community to somehow compare and contrast.

Geographic Names

The IPC continues to support reconsideration of the criteria for evaluating applications for TLDs corresponding to geographic names, particularly where the TLD also corresponds to a non-geographic term or has other non-geographic meaning (such as a generic or descriptive meaning, or a trademark meaning). Although the Review highlights the success of the evaluation of TLDs identified as “geographic TLDs,” the IPC notes a number of contentious issues caused by the process, such as in the case of .SPA, .PATAGONIA and .AMAZON. Therefore, the IPC supports the lessons identified by staff, namely that ICANN should further consider the purpose and implications of geographic names criteria and evaluation, and consider additional community work around geographic names (such as the Cross-Community Working Group on Use of Country and Territory Names as TLDs, as well as near unanimous community feedback opposing the Proposal by the GAC Working Group on Geographic Names).

Other Evaluation Issues

Although the Review provides substantial factual information regarding the evaluation process, the IPC would be curious to receive qualitative feedback from ICANN regarding the ultimate question the evaluation process is ostensibly designed to answer, which is, “What makes a good steward for a gTLD?” The answer to that question, with input from both ICANN and community stakeholders, should guide efforts to improve evaluation criteria and processes for subsequent new gTLD rounds. The answer should also consider the myriad “one-size-fits-all”

³Domain Incite, *That mystery \$1 million .sucks fee explained, and it's probably not what you thought* (April 1, 2015).

evaluation criteria that were forced upon unique TLD applicants, such as .Brand TLDs, resulting in significant costs, confusion and delays throughout the Program.

3. Objection Procedures

GAC Advice and Early Warnings

Although the Review appears to accurately capture relevant principles and mechanisms relating to GAC Advice, the IPC notes that some of these principles and mechanisms may change in view of the ongoing work of the Cross-Community Working Group on Enhancing ICANN Accountability.

In addition, the IPC remains concerned by some aspects of the GAC Early Warning mechanism, which essentially allowed individual governments to object to specific applications. The warnings could be raised by any GAC member for any reason and did not require the support of other GAC members. Some applicants withdrew their applications as a result of GAC Early Warnings, even where there was no certainty that they would become the subject of consensus GAC Advice. While there are positive elements of the GAC Early Warning mechanism, such as identifying applications that may run afoul of national or international legal principles, the mechanism gave substantial weight to concerns without any determination of their basis in law. It may be worthwhile to consider narrowing the grounds for GAC Early Warnings and increasing requirements for a legal basis (or decreasing the practical effect of such warnings).

The IPC would also highlight the need to further consider the timing of GAC Advice on new gTLD applications, as late advice has had, and could continue to have, an adverse impact on new gTLD applicants. It can also undermine program predictability, and create inefficiencies for both applicants and ICANN.

Objections and Dispute Resolution

Although the Review provides some basic statistics and information about the various Objections and Dispute Resolution mechanisms and providers, it glosses over any qualitative analysis of the effectiveness of these processes and participants. The IPC wishes to highlight certain points raised briefly in the Review that provider fees were too high and that Dispute Resolution providers lacked sufficient training on the objection standards. Although the Review notes that “in regards to the feedback received about high fees, it should be noted that quality and expertise of the expert panelists were major factors in the selection of the DRSPs, which correlated to the amount of fees charged by the DRSPs,” a quick comparison of average anecdotal fees between providers of various Objections shows some fees to be significantly higher (in particular, the ICC, which handled Limited Public Interest Objections averaged € 86,000 EU, while WIPO fees were fixed at \$ 10,000 USD and ICDR fees were fixed at \$ 8,750 USD.). In short, the failure to fix fees proved exceedingly problematic, as it incentivized providers and panelists in many instances to unreasonably extend proceedings and generate unnecessary supplemental pleadings.

Although the Review briefly acknowledges inconsistent panel determinations, as well as the lack of an appropriate appeal mechanism for panel determinations, the IPC wishes to further highlight these issues, as they have been flagged as serious concerns within the community, particularly with respect to inconsistent String Confusion Objection decisions. In addition, although the Review suggests whether consideration be given to whether the Final Review Mechanism adopted for reviewing a very limited set of inconsistent String Confusion Objection decisions be utilized in future rounds, the IPC strongly encourages the community to consider creating a different mechanism, given the *ad hoc*, limited, and top-down ICANN is already well aware of these issues, and the IPC looks forward to seeking to improve the Objection mechanisms and appeal process for future rounds in light of the lessons from the 2012 round.

4. Contention Resolution

Although the Review discusses contention resolution mechanisms at some length, the IPC did not find any comments regarding community feedback on direct versus indirect auctions. The IPC holds the logical view that a contention set should consist of all applications linked by string contention to one another, either directly or indirectly, and that a single contention set should necessitate a single auction. This view was not carried forward by ICANN, which moved ahead with both direct and indirect auctions. The IPC hopes to further address this issue in the Subsequent Procedures PDP.

5. Transition to Delegation

Contracting

The IPC highlights staff's recognition that the anticipated quick execution of registry agreements never materialized. Rather, many applicants did not quickly execute their registry agreements. The Review does not mention, however, that these delays were often the result of applicants seeking to negotiate necessary amendments to their individual agreements with ICANN. The Review also does not capture the level of disappointment by many applicants, and in particular .Brand applicants, who discovered that ICANN was generally unwilling to negotiate good faith changes to individual registry agreements, despite robust legal and policy rationale provided to ICANN. Although the Review recognizes various iterations of the Base Registry Agreement to capture various stakeholder concerns, many individual applicants were not party to those negotiations with ICANN.

In addition, while the Review cites various "interim deadlines" imposed by ICANN upon applicants who received contracting extensions (including a significant portion of .Brand applicants), the IPC notes that these deadlines were *ad hoc*, without basis in the Applicant Guidebook or any other ICANN policy, and imposed an undue burden on applicants.

The IPC encourages the community and ICANN to consider improvements to the contracting process to enhance the negotiation process, to avoid undue time constraints and other burdens,

and to anticipate any potential legal vulnerabilities to the enforceability of such contracts due to procedural flaws in the contracting process.

6. Program Management

The IPC recognizes the incredible operational challenges posed by the New gTLD Program, particularly in view of the significant number of applications, which went well beyond expected numbers. That said, the Review makes clear—and the IPC agrees—that the Program was rushed, placing an undue burden on staff and the community to develop and implement operational, yet flawed, systems. The IPC, like other stakeholders, remains concerned by the number of reported security issues involved in relation to several Program resources, such as the TLD Application System (TAS) and Customer Portal. The IPC therefore strongly supports the staff recommendation that in future applications, the timeline should permit appropriate time and resources for system development and testing.

In addition, with respect to fees, the IPC strongly supports financial evaluation vis-à-vis the cost recovery model expected for the New gTLD Program. Consideration should be given toward reducing fees in future rounds, in particular for certain categories of applicants, including those whose applications may require a less extensive evaluation process, such as applicants for closed .Brand TLDs.

IPC was surprised to see that Section 8.3 of the Review, dealing with financial management, is the only section of the entire Review for which no key “lessons learned” are provided either in the conclusion of the section or in the executive summary of the Review. At the same time we are surprised that there seems to be no discussion anywhere in the Review of the decision made in 2010 to build into the application fee a \$60,000 “contingency reserve”⁴ for the purposes of risk management, and whether this sum proved to be too small, too large, or just right. IPC hopes that this question, with its obvious implications for the purported cost recovery nature of the current new gTLD application fee, will be fully and publicly analyzed at some point before further steps are undertaken toward a subsequent round.

Conclusion

The IPC appreciates this opportunity to comment on the draft Program Implementation Review of the New gTLD Program. The IPC recognizes the tremendous amount of work involved in launching and rolling out the 2012 round new gTLDs, and also recognizes ICANN’s efforts in shepherding the process from policy-development through TLD launch. As expected, the process was not without its growing pains, which we believe the Review summarizes well, identifying a number of key lessons learned and areas for improvement. The IPC hopes its comments add to the community dialogue surrounding review of the 2012 round of new gTLDs,

⁴ See <https://archive.icann.org/en/topics/new-gtlds/new-gtld-budget-28may10-en.pdf>, at 7.

and looks forward to participating actively in the necessarily measured approach taken by the community towards preparing for a subsequent round of new gTLDs.

Respectfully submitted,

Intellectual Property Constituency