

Terri Agnew:Welcome to the New gTLD Subsequent Procedures Sub Team – Track 2 – Legal/Regulatory Issues on Thursday, 16 February 2017 at 21:00 UTC

Terri Agnew:agenda wiki page: https://urldefense.proofpoint.com/v2/url?u=https-3A_community.icann.org_x_qbPDAw&d=DwIFaQ&c=FmY1u3PJp6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmKXhFzL7ar9Qfqa0Algn-H4xR2EBk&m=WM0d8ulWZC0TuPqSgB7jchPcrOgKmMQ-EY5HEGe4_00&s=CbEFokLhGUykcmR11WlYaAcuXXmYo203oOQPftznlqA&e=

Steve Chan:I'll work on that...

Steve Chan:@Michael, all set to be able to display Module 6

Steve Chan:Available here: https://urldefense.proofpoint.com/v2/url?u=https-3A_newgtlds.icann.org_en_applicants_agb_terms-2D04jun12-2Den.pdf&d=DwIFaQ&c=FmY1u3PJp6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmKXhFzL7ar9Qfqa0Algn-H4xR2EBk&m=WM0d8ulWZC0TuPqSgB7jchPcrOgKmMQ-EY5HEGe4_00&s=RgHTmU8ApAMiQEQnwHAvomYTRrLhRZOf8-vQEQ7yDAs&e=

Jeff Neuman:If I remember correctly, ICANN displayed this and required express agreement with these when submitting an application

Steve Chan:@Jeff, if I recall, it was built into TAS.

Jeff Neuman:Right. So before you could hit "Submit", you had to agree to the Ts and Cs.

Rubens Kuhl:So an applicant can challenge a decision in court before it's final ? ; -)

Jon Nevett:on 14, should be material hardship to applicant

Rubens Kuhl:"May not assign applicant rights" is an interesting reading considering .web and .blog.

Mike Rodenbaugh:typo in 14 near end, should be "hardship to Applicant"?

Rubens Kuhl:Mike, Michael mentioned it. You and Jon are on point.

Jon Nevett>Last sentence is ok

Rubens Kuhl:"Any fees submitted" implies some sort of 100% refund. Did it happen ?

Susan Payne:@rubens I don't think so

Mike Rodenbaugh:First two sentences, if taken literally, makes the entire contract illusory... ICANN has no obligation unless it chooses.

Jon Nevett:I don't often say this, but Alan +1!!

Mike Rodenbaugh:+1 Alan. More than unusual... illusory, unfair.

Rubens Kuhl:But if we specify it, it might generate a situation where something arises that justifies not approving, but was not foreseen.

Mike Rodenbaugh:ICANN has relied on this language (though from Module 3) in IRP proceedings against my client

Alan Greenberg:Ah com'on Jon, we have agreed on occasional things in the past.

Jon Nevett:absolutely -- just kidding!

Jeff Neuman:How so Mike?

Mike Rodenbaugh:"Unfettered discretion" destroys the whole point of the Guidebook, which was to take that discretion away from the Board (after the .XXX debacle)

Alan Greenberg:Admittedly less often nowadays...

Cheryl Langdon-Orr (CLO):different circumstances exist in future 'rounds' from the one that this part of the module covers for the earlier one

Jeff Neuman:this is not based on policy recommendations

Mike Rodenbaugh:@Jeff they have relied on Sec. 5.1 (not Module 3) in Islam/halal matter

Mike Rodenbaugh:see their latest brief, p.20

Susan Payne:Name collision? home etc?

Rubens Kuhl:There is also GAC Advice, which is also a different module.

Jim Prendergast:wonder where mail, corp and home fit in.

Jeff Neuman: Agree with Susan that if there were a challenge by .home and .corp, this clause would be invoked

Susan Payne: also what about any closed generics who have not agreed to open up?

Steve Chan: For context it might be useful to review the T&Cs from the very first Applicant Guidebook in 2008. The language is not dramatically different: https://urldefense.proofpoint.com/v2/url?u=http-3A_archive.icann.org_en_topics_new-2Dgtlds_terms-2D24oct08-2Den.pdf&d=DwIFaQ&c=FmY1u3PJP6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmKXhFzL7ar9Qfqa0A!gn-H4xR2EBk&m=Wm0d8ulWZC0TuPqSgB7jchPcrOgKmMQ-EY5HEGe4_00&s=0_BXkKKozVxdQf8RUi1aNP1e7SFK3xeulSXcqXEPWsk&e=

Jeff Neuman: @Susan, that is more clause 14

Rubens Kuhl: Covenant not to sue should actually be strengthened instead of removed.

Steve Chan: And there was a Board resolution from Trondheim in 2010 that relates to this subject.

Steve Chan: "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions." - https://urldefense.proofpoint.com/v2/url?u=https-3A_www.icann.org_resources_board-2Dmaterial_minutes-2D2010-2D09-2D25-2Den&d=DwIFaQ&c=FmY1u3PJP6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmKXhFzL7ar9Qfqa0A!gn-H4xR2EBk&m=Wm0d8ulWZC0TuPqSgB7jchPcrOgKmMQ-EY5HEGe4_00&s=i3clxGkQDeJfsUxKHvWAHLqNRp90GUrRLmUAwo9Aqgl&e=

Mike Rodenbaugh: @Jim I believe .home etc. are also in this netherworld of 'unfettered Board discretion'

Mike Rodenbaugh: @Rubens I think I disagree strongly

Susan Payne: @Jeff, sort of. that accounts for the changed position, but if the applicant has refused to open up they cannot proceed

Jon Nevett: if ICANN had a fair dispute process, then I wouldn't disagree with Rubens as much

Rubens Kuhl: @Mike, I understand why an US lawyer would prefer, so I think you might get why non-US applicants are not fond of it.

Mike Rodenbaugh: please explain

Rubens Kuhl: Home court advantage, using another meaning of the word "court".

Mike Rodenbaugh: sorry but I don't understand. the covenant applies in any court.

Rubens Kuhl: Jon, that's what WS2 is all about, I believe... and what WS2 fails to deliver, to possible activations of the Empowered Community.

Jon Nevett: more than that Rubens

Mike Rodenbaugh: It makes ICANN entirely unaccountable

Rubens Kuhl: Which created a problem because then current accountability mechanisms only allowed procedural grounds.

Alexander Schubert 2: we might add that speculator can't sue for private auction revenues either!

Rubens Kuhl: And there might be substantive, not procedural issues, that might need to be challenged.

Alexander Schubert 2: Rather applicant speculators can't sue ICANN for loss of private auction proceeds.....

Trang Nguyen: @Mike: under the new Bylaws, IRP decisions are binding and enforceable in any court with proper jurisdiction (4.3.a.viii)

Mike Rodenbaugh: resources are not an issue for ICANN wrt defending its actions in the New TLD Program. 1/3 of application fees set aside for that purpose... at least a hundred million dollars

Rubens Kuhl: Fraud, negligence and grossful misconduct are likely already excluded by California law anyways... but mentioning it in writing is a good thing.

Cheryl Langdon-Orr (CLO): exactly Jeff., yes Trangie, thx for pointing that out

Kevin Kreuser: I like Trangie - let's make that stick

Mike Rodenbaugh:@Trang that refers to the procedure, not to the permissible content of such a decision...

Susan Payne:agree Jon

Mike Rodenbaugh:ICANN still argues that an IRP panel can't recommend any affirmative relief, but can only decide whether the Board violated Bylaws...

Rubens Kuhl:Perhaps binding 3rd parties to ICANN Bylaws for those willing to become contractors to the program ?

Rubens Kuhl:@Mike, most IRP panels disregarded that affirmative relief can't be awarded. But I believe one or two bought into JD standard argument to that.

Mike Rodenbaugh:@Susan I think it's about half and half...

Trang Nguyen:Ultimately, that's why the community asked the Board removal right, as the ultimate path of recourse.

Mike Rodenbaugh:that is ridiculous

Trang Nguyen:*for the Board....

Rubens Kuhl:@Trang the board removal is too much of a nuclear option to be considered in dealing with one single decision. The community might do that for a consistent pattern of misconduct.

Trang Nguyen:The bylaws do provide for other paths...reconsideration, community IRP, the EC can take ICANN to court...these are the actions available to the EC under the new Bylaws.

Jon Nevett:so they could double the application fee after receiving applications and not provide a refund?

Jeff Neuman:Policy Statement: ICANN must strengthen its appeals mechanisms to include the ability for applicants to challenge the decisions of the ICANN staff, the ICANN Board, and/or any entities delegated decision making authority over the assignment, contracting and delegation of new gTLDs. Such appeals mechanism must include the ability to review those decisions on the merits and not only with respect to whether ICANN violated the Bylaws . Only with such an appeals process performed by an independent entity could ICANN then include a covenant not to sue in the Applicant Terms and Conditions.

Rubens Kuhl:@Trang: is reconsideration still limited to procedural issues ?

Jon Nevett:i don't think that recon is limited to procedural issues

Trang Nguyen:@Rubens, the scope of the reconsideration process under the new bylaws has been expanded.

Mike Rodenbaugh:yet remains untested

Steve Chan:All, re: the drafting team Jeff is describing right now, there is only one volunteer at the moment.

Trang Nguyen:...to include actions/inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy

Rubens Kuhl:@Mike, all AGB changes will be definition be untested until the next procedure.

Steve Chan:https://urldefense.proofpoint.com/v2/url?u=https-3A__docs.google.com_document_d_1g-2DOoBec-5FQ6nnBofBvcTnfAotFh7yq07HUM7kxh62SYo_edit-23&d=DwIFaQ&c=FmY1u3PjP6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmkXhFzL7ar9Qfqa0Algn-H4xR2EBk&m=Wm0d8ulWZCOTuPqSgB7jchPcrOgKmMQ-EY5HEGe4_00&s=kFy_jxgalgS7oYJ-XuKGAo_CoqsORcstDGWIqMU2sQY&e=

Rubens Kuhl:(by definition)

Jeff Neuman:I will also review again as a proofreading exercise

Rubens Kuhl:@Trang, so the only difference from what Jeff suggested is Board Governance Committee x Independent 3rd party making a call.

Jon Nevett:could we table that?

Jeff Neuman:I think the rest of the Ts and Cs are mostly legal boilerplate

Jon Nevett:i'd like to take a closer look
Mike Rodenbaugh:me too
Jim Prendergast:and give people not on call chance to respond
Jeff Neuman:of course....we are not making final decisions here....just trying to have a discussion and trying to elicit known issues now
Trang Nguyen:@Jeff, could you please clarify the reference to "strengthen its appeals mechanisms" in your proposed policy language?
Mike Rodenbaugh:Indemnity deserves a closer look, at least should be consistent with narrower release of claims and covenant not to sue
Jeff Neuman:@Trang, I am talking about appeals of decisions under the guidebook...NOT accountability mechanisms
Rubens Kuhl:@Jeff, in the part where there is a covenant not to sue, we could suggest reinforcing it so it really stands if/when someone actually files a lawsuit.
Trang Nguyen:Got it....thanks, Jeff!
Jeff Neuman:SO I can reword that part
Mike Rodenbaugh:Sec. 10 obviously needs some clarification
Jon Nevett:what if ICANN breaches the terms of the AGB?
Jon Nevett:what if ICANN deliberately reveals applicants proprietary financial information?
Jon Nevett:or negligently?
Jeff Neuman:Revised Statement: ICANN must build into the new gTLD Program appeals mechanisms to include the ability for applicants to challenge the decisions of the ICANN staff, the ICANN Board, and/or any entities delegated decision making authority over the assignment, contracting and delegation of new gTLDs. Such appeals mechanism must include the ability to review those decisions on the merits and not only with respect to whether ICANN violated the Bylaws . Only with such an appeals process performed by an independent entity could ICANN then include a covenant not to sue in the Applicant Terms and Conditions. However, the covenant not to sue shall not apply to cases alleging fraud, negligence or misconduct.
Rubens Kuhl:"Applicant may not assign applicant rights" could even be read as preventing applicants from getting some types of risk capital.
Mike Rodenbaugh:More thinking needs to happen about the CNTS
Jon Nevett:Section 10 was a big part of the .web issue
Mike Rodenbaugh:'negligence' and 'misconduct' are really vague
Jeff Neuman:I had originally gross negligence and wilful misconduct but Jon said that was too narrow
Mike Rodenbaugh:I agree with Jon, but 'misconduct' can mean literally anything
Susan Payne:no
Rubens Kuhl:Doesn't that limit ICANN's options on legal firms ?
Jeff Neuman:ok....I will revise the statement again...stay tuned
Jon Nevett:if ICANN is negligent in doing the evaluation, shouldn't there be some recourse?
Rubens Kuhl:(Sec. 13)
Susan Payne:@Rubens I don't think it does, it just means you cannot prevent them using JD by citing conflict
Rubens Kuhl:Ok, then it's not a problem.
Steve Chan:As a reminder, the language on screen is in summary.
Mike Rodenbaugh:@Jon, it is pretty easy to allege negligence as to just about any action or inaction whatsoever
Jeff Neuman:Further Revised: Revised Statement: ICANN must build into the new gTLD Program appeals mechanisms to include the ability for applicants to challenge the decisions of the ICANN staff, the ICANN Board, and/or any entities delegated decision making authority over the assignment,

contracting and delegation of new gTLDs. Such appeals mechanism must include the ability to review those decisions on the merits and not only with respect to whether ICANN violated the Bylaws . Only with such an appeals process performed by an independent entity could ICANN then include a covenant not to sue in the Applicant Terms and Conditions. However, the covenant not to sue shall not apply to cases alleging fraud, negligence or wilful misconduct.

Steve Chan:Here again is the link to the complete language:

https://urldefense.proofpoint.com/v2/url?u=https-3A_newgtlds.icann.org_en_applicants_agb_terms-2D04jun12-2Den.pdf&d=DwlFaQ&c=FmY1u3PJP6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmkXhFzL7ar9Qfqa0A1gn-H4xR2EBk&m=WM0d8ulWZC0TuPqSgB7jchPcrOgKmMQ-EY5HEGe4_00&s=RgHTmU8ApAMiQEQnwHAVomYTRrIhRZOf8-vQEQ7yDAs&e=

Jeff Neuman:Everyone please go to the CC2 Questions ASAP

Rubens Kuhl:Jeff, on fraud/negligence, perhaps California law could be the basis for the phrase ?

Jeff Neuman:and look at them to ake sure we have asked everything you wanted it to ask

Jeff Neuman:@Rubens.....Under California law, technically you can waive those rights...that is why i included them herer

Steve Chan:@Michael, I think I'd prefer to send a reminder to the full WG, along with some explanation of timeline. Hope you don't mind?

Terri Agnew:next call: New gTLD Subsequent Procedures Sub Team – Track 2 – Legal/Regulatory Issues will take place on Thursday, 02 March 2017 at 21:00 UTC for 60 minutes.

Jeff Neuman:Agree this is a good stopping point. PLEASE Review the notes and let us know any other issues!

Jeff Neuman:This was a great call. Lets not lose momentum

Robert Burlingame:Thank you. Good discussions today.

Jon Nevett:thanks all!

Cheryl Langdon-Orr (CLO):good progress today... thanks all, bye for now

Jeff Neuman:Thanks Michael.

Susan Payne:thanks all

Rubens Kuhl:Thanks all, bye!