Work Track 3
New GTLD Subsequent Procedures Working Group

WT3: String Contention, Objections, and Disputes in the New GTLD Application Process

Initial Report: Summary of Preliminary Recommendations and Community Feedback Sought

Presentation By Work Team 3 Co-Leader Robin Gross

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ICANN

Work Team 3 Issues: Contention, Objection, Disputes

1 Community Applications

2 String Similarity and String Confusion

3 Accountability Mechanisms

4 Objections

5 Applicant Freedom of Expression

Community Applications

(Initial) New GTLD Policy Recommendations Regarding
Community Applications

Community Applications

2012 Policy Recommendations on Community Applications:

Implementation Guideline F: "If there is contention for strings, applicants may:
    i) resolve contention between them within a pre-established timeframe
    ii) if there is no mutual agreement, ***a claim to support a community by one party will be a reason to award priority to that application.*** If there is no such claim, and no mutual agreement, a process will be put in place to enable efficient resolution of contention and;
    iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels."

Implementation Guideline H: "External dispute providers will give decisions on complaints."

Community Applications

Preliminary Recommendations on CPE Implementation Guidance:

- Increase the **transparency and predictability** in the application process.

- Applications should be evaluated in a **shorter time** period.

- Evaluation procedures should be **developed BEFORE** the application process opens.

- Need opportunity for **dialogue and clarifying** questions in CPE process.

- **Less restrictive word** count for communities to engage in clarifying and providing information.

Community Applications

Work Team 3 Seeks Feedback on:

- How would you **define "community**" for the purposes of community-based applications in the New gTLD Program? What attributes are appropriate? Do you have specific examples where demonstrable community support should or should not award priority for a string? Do you believe examples are useful in developing an understanding of the purpose and goals of any community-based application treatment?

- Should community-based applications receive any **differential treatment** beyond the chance to participate in CPE, in the event of string contention?

- Should **additional outcomes** beyond awarding the TLD be considered for CPE?

- What specific **changes to the CPE criteria** should be considered, if the mechanism is maintained?

- Should the New gTLD Program continue to incorporate the general concept of **preferential treatment for "community applications" going forward?** Is the concept of awarding priority for community-based applications feasible, given that winners and losers are created?

String Similarity

(Initial) New GTLD Policy Recommendations Regarding
String Similarity and String Confusion

String Similarity

2012 Policy Recommendation 2:

"Strings must not be confusingly similar to an existing top-level domain or Reserved Name."

Note:

* Limited to Visual Similarity in 2012 round

* Standard of "probable" not just "possible" confusion
  AGB Section 2.2.1.2 defined "similar" as meaning "strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone."

String Similarity

Work Team 3 Recommends:

- **Prohibiting plurals and singulars** of the same word within the same language/script in order to reduce the risk of consumer confusion.

- **Expanding the scope of the String Similarity Review to encompass singulars/plurals of TLDs on a per-language basis and using a dictionary** to determine the singular and plural version of the string for the specific language. Applications for singular/plural variations of each string will be placed in a contention set. Applications should not be automatically disqualified because of a single letter difference with an existing TLD (Ex: .New and .News)

- **Eliminating the SWORD Tool** in subsequent procedures.

Accountability Mechanisms

(Initial) New GTLD Policy Recommendations Regarding
Accountability Mechanisms

Accountability Mechanisms

2012 New GTLD Policy Recommendations:

Recommendation 12: Dispute resolution and challenge processes must be established prior to the start of the process.

Implementation Guideline R: Once formal objections or disputes are accepted for review there will be a "cooling off" period to allow parties to resolve the dispute or objection before review by the panel is initiated.

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General Accountability Mechanisms Available to All:
   Reconsideration Process, the Independent Review Process, and the Ombudsman

Accountability Mechanisms

Work Track 3 has preliminarily agreed to very high level recommendations for a **limited appeals mechanism**, to supplement existing challenge mechanisms available in the ICANN Bylaws.

- ICANN should create a new appeal mechanism specific to the new gTLD Program.

- The process should be transparent and ensure that panelists, evaluators, and independent objectors are free from conflicts of interest.

With Respect to the **Post-Delegation Dispute Resolution Procedures**:

- The parties to a proceeding should be given the opportunity to agree upon a single panelist or a three person panel - bearing the costs accordingly.

- Clearer, more detailed, & better defined guidance on scope and adjudication process of proceedings and the role of all parties, must be available to participants and panelists prior to the initiation of any PDDRP.

Accountability Mechanisms

Work Team 3 Seeks Specific Feedback On:

Limited Appeal Process

- Should the process make a distinction between appeals relating to substantive and procedural issues?

- Who is an appropriate final arbiter?

- Do you have any additional input regarding the details of such a mechanism?

Objections

(Initial) New GTLD Policy Recommendations Regarding
Objection Process

Objections

2012 Policy Recommendations on Objections:

Recommendation 2: "Strings must not be confusingly similar to an existing top-level domain."

Recommendation 3: "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industrial Property (in particular trademark rights), the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (in particular freedom of speech rights)."

Recommendation 6: "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law. Examples of such limitations that are internationally recognized include, but are not limited to, restrictions defined in the Paris Convention for the Protection of Industrial Property (in particular restrictions on the use of some strings as trademarks), and the Universal Declaration of Human Rights (in particular, limitations to freedom of speech rights)."

Recommendation 12: "Dispute resolution and challenge processes must be established prior to the start of the process."

Recommendation 20: "An application will be rejected if it is determined, based on public comments or otherwise, that there is substantial opposition to it from among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support."

Objections

Types of Objections:

1. "Community" Objections

2. String Confusion Objections

3. Legal Rights Objections

4. Limited Public Interest Objections

5. The Independent Objector

6. GAC Early Warnings & GAC Advice

Objections

Preliminary Recommendations:

- Develop a **transparent** process for ensuring that panelists, evaluators, and independent objectors are **free from conflicts of interest**.

- For all types of objections, the parties to a proceeding should be given the opportunity to agree upon a **single panelist or a three person** panel - bearing the costs accordingly.

- **Guidance for decision making by panelists** must be more detailed and clearly written in all objection and dispute resolution proceedings than was available in the 2012 round.

- **Extend the "quick look"** mechanism, which currently applies to only the Limited Public Interest Objection, to all objection types. The "quick look" is designed to identify and eliminate frivolous and/or abusive objections.

Objections

Work Team 3 Seeks Feedback on:

- Should a panel of Independent Objectors be created rather than having a single IO? Should these be various subject matter experts?

- Can the fees be restructured to reduce "gaming"?

- How can the "quick look" mechanism be improved to eliminate frivolous objections?

- Should ICANN continue to fund the ALAC or any party to file objections on behalf of others?

- Should the same entity be able to be both apply for CPE and file a Community based objection for the same string?

Objections

Work Team 3 Seeks Feedback on Preliminary Recommendations on GAC Advice & GAC Early Warning:

- GAC Advice must include clearly articulated rationale, including the national or international law upon which it is based.
- Future GAC Advice, and Board action thereupon, for categories of gTLDs should be issued prior to the finalization of the next Applicant Guidebook. Any GAC Advice issued after the application period has begun must apply to individual strings only, based on the merits and details of the application, not on groups or classes of applications.
- Individual governments should not be allowed to use the GAC Advice mechanism absent full consensus support by the GAC. The objecting government should instead file a string objection utilizing the existing ICANN procedures (Community Objections/String Confusion Objections/Legal Rights Objections/Limited Public Interest Objections).
- The application process should define a specific time period during which GAC Early Warnings can be issued and require that the government(s) issuing such warning(s) include both a rationale/basis and specific action requested of the applicant. The applicant should have an opportunity to engage in direct dialogue in response to such warning and amend the application during a specified time period. Another option might be the inclusion of PICs to address any outstanding concerns about the application.

Freedom of Expression

(Initial) New GTLD Policy Recommendations Regarding
Applicant Freedom of Expression

Freedom of Expression

2012 Policy Recommendations:

Principle G: "The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law."

Recommendation 3: "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industrial Property (in particular trademark rights), the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (*in particular freedom of speech rights*)."

Freedom of Expression

Preliminary Recommendations:

- The **implementation guidelines should be clarified** such that dispute resolution panelists and other evaluators are informed and aware that **freedom of expression rights are to be included in the balancing test** when different policy goals seem in conflict.

- Each policy principle should not be evaluated in isolation from the other policy principles, but rather a **balancing of legitimate interests** must be reached in such cases where approved policy goals are not completely congruent or otherwise seem in conflict.

- Applicant freedom of expression is an important policy goal in the new gTLD process and **should be fully implemented** in accordance with the applicant's freedom of expression rights that exist under law.

Questions, Comments, Concerns?

- Submit a Public Comment in Forum

- Discussion at ICANN #62 in Panama

- Email: Robin@ipjustice.org (WT3 Co-Leader)

Thank You