

Reproduced with permission from Electronic Commerce & Law Report, 16 ECLR 1950, 12/7/11, 12/07/2011. Copy-right © 2011 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Domain Names

New gTLDs Program Gives Governments Input Options, but Relatively Little Time to Weigh In

Once the Internet Corporation for Assigned Names and Numbers begins accepting applications from prospective operators of new top-level domains, on Jan. 12, 2012, the world's governments will have multiple opportunities for expressing their views on problematic domains.

Governments may express their views on a particular domain through ICANN's Government Advisory Committee (GAC) or they may operate on their own as sovereign entities. They may express objections on moral, cultural, consumer protection, or intellectual property grounds, or based on a lack of support within the community supposedly represented by the domain name applicant. Or for any other reason. The grounds on which a government may object to a proposed domain are limitless.

Governments, either on their own or through the GAC, may issue an "early warning" about a proposed domain, they can offer "advice" about a proposed domain, and they can formally "object" to a proposed domain application.

"ICANN and the GAC are still trying to figure out how best to work together. The new gTLD process ... is a great opportunity to make the relationship work."

KONSTANTINOS KOMAITIS, CHAIR OF ICANN'S
NONCOMMERCIAL USERS' CONSTITUENCY

Governments, being governments, can do whatever they want.

ICANN itself is a unique and sometimes inscrutable entity, and the new top-level domain process approval process it has created is similarly unprecedented. ICANN may—but need not—follow the advice, warnings, and objections lodged by the governments of the world.

When it comes to new top-level domains, everything is up for grabs.

Nobody knows how many applications for new top-level domains will be submitted. ICANN is preparing to

process as many as 500 applications initially. Domain name industry sources put the number in the 1,000-1,500 range, or even as high as 3,500.

Rumors that the next application period may not occur for several years, and concerns about missing out on new outreach trends that might emerge out of the program as companies and other groups begin using their new TLDs, could drive those numbers even higher.

There is a real possibility that governments will be overwhelmed with the task of reviewing applications—and meaningfully participating in the approval process—for so many new domains.

Lawmakers to Explore New gTLDs

The Senate Commerce, Science, and Transportation Committee will hold a hearing Dec. 8 on the Internet Corporation for Assigned Names and Numbers' new gTLDs program, which launches Jan. 12, 2012.

The committee announcement contained little of substance about the hearing beyond the relative merits and implications of the new gTLDs.

The scheduled witnesses are:

- Kurt Pritz, ICANN senior vice president of stakeholder relations;
 - Fiona Alexander, NTIA;
 - Dan Jaffe, Association of National Advertisers;
 - Esther Dyson, founding chairman of ICANN; and
 - Angela F. Williams, general counsel, YMCA.
- It seems likely that the committee will explore the program's implications for intellectual property interests.

IP-focused groups, including the Association of National Advertisers and a long list of major retailers, have ramped up their opposition to the program in recent months, complaining that the benefits of the program have yet to be demonstrated and that it will place an undue burden on brand owners (16 ECLR 1895, 11/16/11).

The groups have urged the Department of Commerce to leverage its oversight role to persuade ICANN to delay the program (16 ECLR 1779, 10/26/11).

'Batching' Domain Applications. At ICANN's most recent meeting in Dakar, Senegal, the GAC called on the ICANN board to divide applications into more manageable batches that can be reviewed for potential sensitivities.

If those applications are not batched, sorting through those applications after they are posted on the ICANN website—during the 60 days allocated for the GAC early warning process—could prove to be a daunting task.

Even 500 applications may be difficult to process, Steve DelBianco, NetChoice, told BNA.

It remains to be seen how governments will participate in and react to specially created GAC advice processes for the new gTLDs program, or what will happen if the board does not yield to GAC opposition to a given gTLD application.

ICANN staff have said they will develop plans for batching, but they have not published the details yet. It seems likely that the details will come soon. ICANN Registry Liaison Manager Karen Lentz told BNA that, in any event, the details should be published before the application period opens.

Board Must Listen to GAC, but Doesn't Have to Agree. Pursuant to ICANN's bylaws, the ICANN board shall take advice from the GAC "duly . . . into account." If the board decides not to follow the GAC's advice it must tell the GAC its rationale. The board and the GAC must then try, in good faith, to find a mutually acceptable solution.

If they do not, the board must state its reasons why it declined to follow the GAC's advice. "[S]uch statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities[.]" the bylaws add.

The board does not always follow the advice of the GAC, as its approval of the contentious adults-only .XXX top-level domain demonstrated (16 ECLR 458, 3/23/11).

Many Opportunities for GAC Input on New gTLDs. The new gTLD application period opens January 12. It will run through April 12, but the last day that applicants can reserve a slot—by paying a deposit—is March 29. Immediately following the close of the application period, ICANN staff will review the applications to ensure they are complete.

ICANN will post the public portions of complete applications within two weeks, likely around May 1.

At that point, ICANN will open a public comment period on the applications. The period will remain open for 60 days. The time period could be extended, depending on how many applications are received. Comments will be presented to the evaluation panels, but are different from formal objections.

Governments can submit comments through the process, but they are also encouraged to contact applicants directly or participate in one of two GAC-specific procedures.

Concurrent with the 60-day comment period, the GAC has an "Early Warning" procedure, through which the GAC can indicate that an application raises potential issues for one or more governments. The notice is not a formal objection, and processing of the application will proceed, but the notice triggers a right for an applicant to withdraw the application and receive a partial refund.

GAC Input Options for New gTLDs

Members of ICANN's government advisory committee will have many opportunities to weigh in on new gTLD applications, and have very broad discretion to do so.

The process for GAC advice on new gTLDs is meant to address applications identified by governments as "problematic," those potentially violating national law, or those raising sensitivities.

In the applicant guidebook, ICANN gave the GAC three ways to weigh in on new gTLD applications.

Public Comment Process. ICANN will have a 60-day public comment period for new gTLD applications, which will begin approximately two weeks after the application deadline (in mid-April).

Members of the GAC, like anyone else, can comment through the online system. The comments will be considered by the evaluation panels, but are not formal objections and evaluators have no obligation to reject an application because of a negative comment.

GAC Early Warning. During that same time period, members of the GAC also can submit an "Early Warning" notice that an application raises potential sensitivities. Application processing will proceed, but an applicant will be given the option to withdraw the application and receive a partial refund. GAC consensus is not required for this notice.

GAC Advice. Beginning when applications are posted, a seven-month formal objection period will also open. During that time, the GAC can submit "advice" directly to the ICANN board on any application, for any reason.

If the advice is a consensus statement, ICANN policies require a strong presumption that the board follow the GAC's advice. If it doesn't, the board must explain why and work with the GAC to find a mutually acceptable solution. If the advice is not a consensus statement, then the presumption does not apply.

The possibility of batching will come into play here, because if more than 500 applications are received, ICANN plans to divide the applications into more manageable groups.

"GAC consensus is not required for a GAC Early Warning to be issued. Minimally, the GAC Early Warning must be provided in writing to the ICANN board, and be clearly labeled as a GAC Early Warning," ICANN staff noted in the applicant guidebook.

Early warnings will originate with individual governments, DelBianco said. The GAC will forward those to the board. The full GAC would consider formal advice only if governments and applicants are unable to resolve concerns by the time formal objections are due, DelBianco added.

The "initial evaluation" period also opens when the completed applications are posted. In the guidebook, ICANN predicted that the process would take approximately five months. However, if more than 500 applica-

tions are received, ICANN may process applications in batches, and the five-month timeline would not be kept.

A formal objection period will also open when ICANN posts the completed applications in mid-April. It will last approximately seven months. During that time, pursuant to a specially created procedure in the guidebook, the GAC can advise the ICANN board directly on any application.

“GAC Advice on New gTLDs that includes a consensus statement from the GAC that an application should not proceed as submitted (or other terms created by the GAC to express that intent), and that includes a thorough explanation of the public policy basis for such advice, will create a strong presumption for the board that the application should not be approved,” the guidebook states. “If the board does not act in accordance with this type of advice, it must provide rationale for doing so.”

If the GAC advice comes in the form of a consensus statement, then a recommendation against approval carries heavy weight under ICANN’s bylaws. If the board moves forward, it must try to consult in good faith with the GAC to find a mutually acceptable solution.

If GAC advice indicates that some governments oppose an application, but it is not the consensus of the GAC, then the advice will receive somewhat less deference. That advice will not create a presumption that an application should be denied or require the board and GAC to work to find a mutually agreeable solution.

GAC to See Applications With Everyone Else. The GAC’s early warning and advice procedures for the new gTLDs, approved by the board at their June meeting in Singapore, were a significant victory for the GAC, DelBianco remarked.

“But as they say, be careful what you wish for[.]” DelBianco added. “Government reps in Dakar questioned how their ministers and regulators could evaluate and comment on hundreds of applications within the 60-day window for ‘Early Warnings.’”

Even if ICANN does batch applications in groups of 500, it is going to be difficult for smaller governments to process them all, DelBianco predicted.

Members of the GAC will learn about new gTLD applications at the same time as everyone else, Lentz said. Although members of the GAC have the opportunity to comment early and often on new gTLD applications, they will have to wait to review those applications until they are posted, unless an applicant consults with the GAC or an individual government beforehand.

“We have discussed with the GAC the creation of procedures for providing and processing the Early Warnings and GAC advice on new gTLDs,” she said. For example, there were discussions about ICANN giving the GAC a report or a means to sort application data to make them easier to review, she added.

ICANN Registry Liaison: Batching Details Coming. In a recent interview with BNA, ICANN’s registry liaison manager said that ICANN expects to publish plans for how it would batch applications if the need arises before the application period opens.

At ICANN’s most recent meeting in Dakar, ICANN staff discussed how a batching program might work, among other new gTLD program details. “We are exploring the options, and expect to publish the information on the batching mechanism before the application

submission period opens,” ICANN Registry Liaison Manager Karen Lentz, said.

ICANN has used a benchmark of 500 for planning purposes, so batching is unlikely to happen unless ICANN gets at least 500 new gTLD applications. “We are now in the process of defining the details of a batching mechanism that would be used if necessary.”

GAC Members Finding Their Voices at ICANN. The ICANN model, which puts all stakeholders on equal footing, is a somewhat unfamiliar position for government actors, Konstantinos Komaitis, chair of ICANN’s noncommercial users’ constituency, speaking in his personal capacity rather than on behalf of any group, told BNA.

Members of the GAC, along with all other ICANN stakeholders, have since the group’s inception been trying to settle into their roles within ICANN. DelBianco told BNA that government representatives on the GAC “are clearly finding their voice and learning how to work the ICANN machinery.”

“ICANN and the GAC are still trying to figure out how best to work together and I think that the new gTLD process, despite the various problems so far, is a great opportunity to make this relationship work,” Komaitis added.

The GAC’s involvement in the new gTLDs policymaking process, motivated largely by intellectual property concerns, came long after the new gTLDs program had been in development. “Irrespective of whether one agrees with the way the GAC decided to get involved, an involvement which mainly was due to the intense lobbying that took place by the IP community, the truth is that the GAC should have been involved in the process from the beginning, just like the rest of the community,” Komaitis added.

ICANN staff are developing plans for batching applications into smaller groups if more than 500 applications are submitted. Details should be published before Jan. 12.

Potential Challenges if GAC Wades Into .Brand Disputes. With respect to contested .brand gTLD applications, it may be best for members of the GAC to stay out of the fray, Komaitis observed.

While discussions surrounding GAC input have been focused primarily on cultural matters. “The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities,” the Guidebook states.

But that broad description could, at least theoretically, encompass opposition to applications that potentially offend a given country’s intellectual property protections.

“If they end up getting involved, I can see many problems—if there is more than one similar .brand application, for instance, and the applicants hold valid trademark registrations in their respective jurisdictions, how will the GAC resolve this?” he asked.

“In this instance, I feel the involvement of the GAC can potentially create more problems than provide actual solutions[.]” Komaitis added.

Batching Options. There are several possibilities for how ICANN could sort new gTLD applications into smaller groups, or batches of applications, that can be more quickly reviewed both by ICANN staff and the broader ICANN community.

The final process has not yet been set, Lentz said: ICANN staff are considering several issues.

First, the need for developing a method to divide applications might be reduced by allowing applicants to opt in or out, Lentz observed. Some may be more concerned about timing than others, so those who want their applications processed more quickly could opt-in, or those whose business plans allow a later launch could opt out of batching and participate in a later group of application processing.

Another possibility, Lentz said, would be to extend the initial evaluation period to allow all of the applications to be processed in one batch.

“Where the volume is such that batching is necessary, the desired process would be one that is fair, logical, compliant with applicable laws, and not vulnerable to abusive use[.]” Lentz said.

Options for dividing applications into groups might include random selection, or a secondary time stamp, Lentz said. Others have proposed allowing community-based applications and uncontested applications to be processed first.

“I would think (and hope) that they prioritize the applications and deal with the .category/.community gTLDs, considering that we have been hearing from the GAC, their concerns over public policy issues[.]” Komaitis remarked.

Added U.S. Policy Leverage Under NTIA Contracts. Notwithstanding the opportunities for GAC input built into the new gTLDs program, the Senate Commerce Science & Transportation Committee will hold a hearing Jan. 12 on the potential implications of the new gTLDs program.

The committee has yet to announce a witness list or what the specific focus of the hearing will be, but it seems likely that it will explore continued concerns from intellectual property groups about the program, given increasingly vocal complaints from marketing groups and a long list of retailers and brands as the launch date nears.

The U.S. government has added leverage over ICANN that other members of the GAC lack: the Internet Assigned Numbers Authority Functions contract and Affirmation of Commitments with NTIA.

The IANA contract expires March 31, 2012 (16 ECLR 1779, 10/26/11). The AOC is designed to be long-standing, but can be terminated by NTIA or ICANN with 120 days’ notice.

BY AMY E. BIVINS

Information about the Senate Commerce Dec. 8 hearing on new gTLDs at <http://commerce.senate.gov>

The GAC’s Dakar communique at <http://pub.bna.com/eclr/dakarcommunique.pdf>.

New gTLDs applicant guidebook at <http://www.icann.org/en/topics/new-gtlds/rfp-clean-19sep11-en.pdf>.

Transcript from new gTLDs session in Dakar at <http://dakar42.icann.org/meetings/dakar2011/transcript-new-gtld-update-26oct11-en.pdf>.