

AGENDA – 29 OCTOBER 2017 REGULAR BOARD MEETING

Time, etc.	Agenda Item	Shepherd
Discussion & Decision	1. Consent Agenda	
	1.a. Consideration of Reconsideration Request 17-4	Chris Disspain
	2. Main Agenda	
	2.a. Request for New or Additional Information from the Governmental Advisory Committee re: Advice on Amazon Applications	Chris Disspain
	2.b. Request to Defer Compliance Enforcement of Thick WHOIS Consensus Policy for 180 Days	Becky Burr
	2.c. Refinement of string similarity review in IDN ccTLD Fast Track Process	Chris Disspain Ram Mohan
	2.d. AOB	

ICANN BOARD SUBMISSION NO. 2017.10.29.1a

TITLE: **Consideration of Reconsideration Request 17-4**

PROPOSED ACTION: **For Consideration and Approval**

EXECUTIVE SUMMARY:

The Requestors, dotguy LLC and DotMusic Ltd. (DotMusic), seek reconsideration of ICANN organization's response to the Requestors' request for documents (Joint DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review). The Requestors suggest that reconsideration is warranted because ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency by declining to produce certain requested documents.

The Board Accountability Mechanisms Committee (BAMC) evaluated Request 17-4 and found that the Request does not set forth a proper basis for reconsideration because ICANN organization adhered to established policies and procedures in its response to the Joint DIDP Request. The BAMC concluded that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the Joint DIDP Request. Accordingly, the BAMC has recommended that the Board deny Request 17-4 and that no further action be taken in response to the Request.

Following the issuance of the BAMC's recommendation, the Requestors submitted a rebuttal¹ to the recommendation in accordance with Article 4, Section 4.2(q) of the Bylaws. As discussed in below, the rebuttal does not raise arguments or facts that support reconsideration.

BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)

RECOMMENDATION:

¹Article 4, Section 4.2(q) of the ICANN Bylaws permits the requestor to file a rebuttal to the BAMC's recommendation, provided that the rebuttal is: (i) "limited to rebutting or contradicting the issues raised in the BGC's recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request." (Bylaws, [Art. 4, § 4.2\(g\).](#))

The BAMC recommended that Request 17-4 be denied and that no further action be taken in response to the Request. As detailed in the Recommendation attached to as Attachment D to the Reference Materials in support of this submission, the BAMC determined that the Requestors' claims are unsupported because ICANN organization adhered to established policies and procedures in its response to the Joint DIDP Request.

PROPOSED RESOLUTION:

Whereas, dotgay LLC and DotMusic Limited (the Requestors) filed Reconsideration Request 17-4 (Request 17-4) challenging ICANN organization's response to the Requestors' request for documents pursuant to ICANN's Documentary Information Disclosure Policy relating to the Community Priority Evaluation (CPE) process review.

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 17-4 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC has carefully considered the merits of Request 17-4 and all relevant materials and recommended that Request 17-4 be denied on the basis that Request 17-4 does not set forth a proper basis for reconsideration, and the Board agrees.

Whereas, the Board has considered the Requestors' rebuttal to the BAMC's Recommendation on Request 17-4 and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2017.10.29.XX), the Board adopts the [BAMC Recommendation on Request 17-4](#).

PROPOSED RATIONALE:

1. Brief Summary

The Requestors submitted community-based applications for .GAY and .MUSIC, respectively; both applications participated in CPE and neither prevailed. In October 2015, dotgay sought

reconsideration of the CPE outcome (Request 15-21),² which the Board Governance Committee (BGC)³ denied.⁴ In February 2016, dotgay sought reconsideration of the BGC's denial of Request 15-21 (see Request 16-3).⁵ In February 2016, DotMusic sought reconsideration of the CPE determination and approval of DotMusic's application (Request 16-5).⁶

Subsequently, the ICANN Board directed the President and CEO, or his designee(s), to undertake a review of the process by which ICANN organization interacted with the CPE provider (CPE Process Review). The BGC later decided that the CPE Process Review should also include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation of the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE. The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Requests 16-3 and 16-5, pending completion of the CPE Process Review.

On 10 June 2017, the Requestors submitted the Joint DIDP Request seeking documents and information relating to the CPE Process Review, some of which the Requestors had sought in prior DIDP requests. (*See* Joint DIDP Request, attached as Attachment E to the Reference Materials.) ICANN organization's response (Response to Joint DIDP Request) explained that, except for certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all other responsive documents had been published and identified in

² BGC Determination on Request 15-21, at Pg. 1,

<https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

³ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

⁴ BGC Determination on Request 15-21, at Pg. 1.

⁵ Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

⁶ Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

response to the Requestors' prior DIDP requests.⁷ (*See* Response to Joint DIDP Request, attached as Attachment F to the Reference Materials.) The Response to Joint DIDP Request provided hyperlinks to the responses to the prior DIDP requests, which in turn identified and provided hyperlinks to publicly available responsive documents. (*See* Response to Joint DIDP Request, at Pg. 2.) The Response to Joint DIDP Request further explained that two items (Item Nos. 2 and 4) did not seek documentary information in existence within ICANN. (*See id.*) Additionally, the Response to Joint DIDP Request explained that ICANN organization evaluated responsive documents subject to Nondisclosure Conditions to determine if the public interest in disclosing them outweighed the harm of disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents. (*See id.* at Pg. 3.)

The Requestors then filed Reconsideration Request 17-4 (Request 17-4) challenging the Response to Joint DIDP Request. (*See* Request 17-4, attached as Attachment A to the Reference Materials.) The Requestors suggest that reconsideration of the Response to Joint DIDP Request is warranted because ICANN organization violated ICANN's Core Values, established DIDP policies and the Bylaws concerning non-discriminatory treatment, transparency, and accountability. (*See id.* at §8, Pg. 21.)

The BAMC considered Request 17-4 and all relevant materials and recommended that the Board deny Request 17-4 because it does not set forth a proper basis for reconsideration for the reasons set forth in the BAMC Recommendation on Reconsideration Request 17-4 (the BAMC Recommendation), which Recommendation has been considered and is incorporated here. (*See* [BAMC Recommendation](#), attached as Attachment D to the Reference Materials.)

On 26 October 2017, the Requestors submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (*See* Rebuttal, attached as Attachment G to the Reference Materials.) The Requestors suggest that: (1) Request 17-4 was within the scope of the reconsideration process because "[t]he reconsideration process permits

⁷ ICANN Responses to DIDP Requests No. 20170505-1 (DotMusic Ltd.), and 20170518-1 (dotgay LLC), incorporated by reference in ICANN's Response to DIDP Request No. 20170610-1 at Pg. 2.

review of an action or inaction—not just the process used to take the action”; (2) “[t]he DIDP relates to ICANN [organization’s] Commitments and Core Values, which require transparency”; and (3) ICANN organization violated its commitments to transparency, accountability, and fairness in the Response to Joint DIDP Request. (*See id.*)

2. Facts and Recommendation

The full factual background is set forth in the [BAMC Recommendation](#), which the Board has reviewed and considered, and which is incorporated here.

On 11 October 2017, the BAMC recommended that Request 17-4 be denied on the basis that Request 17-4 does not set forth a proper basis for reconsideration for the reasons set forth in the [BAMC Recommendation](#), which are incorporated here.

On 26 October 2017, the Requestors submitted a rebuttal to the BAMC’s Recommendation, pursuant to Article 4, Section 4.2(q) of ICANN organization’s Bylaws, which the Board has also considered.

3. Issues

The issues for reconsideration are⁸:

- Whether ICANN organization complied with established ICANN policies in responding to the Joint DIDP Request.
- Whether ICANN organization complied with its Core Values, Mission, and Commitments in responding to the Joint DIDP Request.

⁸ As the BAMC noted, the Requestors indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-4 seeks reconsideration of staff and Board action or inaction. However, but for a passing reference to Article 4, Section 4.2(o) of ICANN’s Bylaws, which states that the BAMC “shall . . . provide[] to the Requestor” any information “collected by ICANN from third parties” that is relevant to the Reconsideration Request”, the Requestors make no further arguments concerning the BAMC’s actions or inactions. The Requestors also do not ask ICANN organization to take any action concerning this issue. Rather, the Requestors focus on ICANN organization’s Response to Joint DIDP Request. Accordingly, the BAMC interpreted Request 17-4 to seek reconsideration of ICANN organization’s response to the Joint DIDP Request, and not reconsideration of BAMC action or inaction, and the Board agrees. (*See* [BAMC Recommendation](#), Pgs. 12-13.)

4. The Relevant Standards for Evaluating Reconsideration Requests

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.

(ICANN Bylaws, 22 July 2017, [Art. 4, §§ 4.2\(a\), \(c\)](#).) Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration. (*See id.* at § 4.2(l).) If the Ombudsman recuses himself from the matter, the BAMC reviews the Request without involvement by the Ombudsman, and provides a recommendation to the Board. (*See id.* at § 4.2(l)(iii).) The Requestor may file a rebuttal to the BAMC’s recommendation, provided that the rebuttal is: (i) “limited to rebutting or contradicting the issues raised in the BAMC’s recommendation; and (ii) not offer new evidence to support an argument made in the Requestor’s original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.” (*See id.* at § 4.2(q).) Denial of a request for reconsideration of ICANN action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws. (*See id.* at § 4.2(e)(vi), (q), (r).)

5. Analysis and Rationale

The Board has reviewed and thoroughly considered Request 17-4 and all relevant materials, including the BAMC Recommendation. The Board finds the analysis set forth in the [BAMC Recommendation](#), which is incorporated here, to be sound. The Board has also considered the

Requestors' Rebuttal to the BAMC Recommendation. The Board finds that the Rebuttal does not raise arguments or facts that support reconsideration.

A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The Joint DIDP Request.

The BAMC concluded and the Board agrees that the Response to Joint DIDP Request complied with applicable policies and procedures. ([BAMC Recommendation](#), Pgs. 16-27.) In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the "Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests" (DIDP Response Process). (*See* [DIDP Response Process](#).) The DIDP Response Process provides that "[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request." (*Id.*) Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions set forth on the DIDP web page at <https://www.icann.org/resources/pages/didp-2012-02-25-en>. If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure. (*See* [DIDP Response Process](#).)

Consistent with the DIDP Response Process, the Response to Joint DIDP Request explained that, except for certain documents that were subject to Nondisclosure Conditions, all other responsive documents had been published and identified in response to the Requestors' prior DIDP requests. (*See* [Response to Joint DIDP Request](#), Pg. 2.) For Item Nos. 1 and 3, ICANN organization determined that all of the responsive documentary information already had been published on ICANN's website, and provided to the Requestors in response to prior DIDP requests. (*See id.* at 2.) The DIDP responses to those requests identified and provided the hyperlinks to 21 publicly available documents and websites compiling documents that contain information responsive to Item Nos. 1 and 3. (*See id.*) The Response to Joint DIDP Request further explained that two Items (Items No. 2 and 4) did not seek documentary information in existence within ICANN. (*See id.*) Notwithstanding this requirement, ICANN organization provided significant

information responsive to Item Nos. 2 and 4 in the Status Update and in an earlier CPE Process Review update, and provided hyperlinks to those updates. (*See id.* at 2-3.) Additionally, the Response to Joint DIDP Request explained that some of the documents responsive to Item Nos. 2 and 4 were subject to certain identified Nondisclosure Conditions. (*See id.*) The Response to Joint DIDP Request further explained that ICANN organization evaluated responsive documents subject to Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents. (*See id.* at 3.)

The Requestors suggest that reconsideration is warranted because ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws concerning non-discriminatory treatment, transparency, and accountability in its response to Items No. 1 through 4. (*See* Request 17-4, § 8, Pg. 21.) Additionally, the Requestors suggest that the ICANN organization's determinations as to the applicability of the specified Nondisclosure Conditions in response to Items No. 2 and 4 warrant reconsideration because it "is in the public's interest to disclose" those documents. (*Id.* at § 8, Pg. 22.)

The BAMC determined, and the Board agrees, that Requestors' position is not supported because ICANN organization did adhere to established policies and procedures in responding to the DIDP Request. (*See* [BAMC Recommendation](#), Pgs. 16-27.) The Requestors do not claim that the Response to Joint DIDP Request is contrary to the DIDP Response Process, nor do the Requestors provide any information to show how ICANN organization's Response to Joint DIDP Request violates ICANN's Mission, Commitments, or Core Values. (*See id.*) The BAMC further concluded, and the Board agrees, that ICANN organization complied with the DIDP Process in evaluating the responsive documents subject to Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents. (*See id.* at 21-26.) While the Requestors might believe that ICANN organization should have exercised its discretion differently, that is not a basis for reconsideration.

B. The Requestors’ Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the Response to Joint DIDP Request.

The Requestors suggest that ICANN organization violated the following Commitments and Core Values in the Response to Joint DIDP Request: Article 1, Sections 1.2(a), 1.2(a)(v), 1.2(a)(vi) and Article 3, Section 3.1 of the ICANN Bylaws. (See Request 17-4, § 6, Pgs. 5-7.) However, as the BAMC concluded, and the Board agrees, the Requestors provide no explanation for how these Commitments and Core Values relate to the Response to Joint DIDP Request at issue in Request 17-4 or how ICANN organization might have violated these Commitments and Core Values. (See [BAMC Recommendation](#), Pgs. 26-27.) As such, the Requestors have not established grounds for reconsideration through its list of Commitments and Core Values.

C. The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.

The Board has considered the Requestors’ Rebuttal and finds that the Requestors have not provided any additional arguments or facts supporting reconsideration.

The Rebuttal claims that: (1) Request 17-4 was within the scope of the reconsideration process because “[t]he reconsideration process permits review of an action or inaction—not just the process used to take the action”; (2) “[t]he DIDP relates to ICANN [organization’s] Commitments and Core Values, which require transparency”; and (3) ICANN organization violated its commitments to transparency, accountability, and fairness in the Response to Joint DIDP Request. (See Rebuttal.)

With respect to the first claim, the Board has considered Request 17-4 and all relevant materials, the BAMC’s Recommendation, and the Rebuttal, and finds that reconsideration is not warranted. The Reconsideration Request process provides a vehicle for requestors to seek reconsideration of ICANN organization’s “action or inaction to the extent that the requestor has been adversely affected by ... [o]ne of more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values, and/or established ICANN policy(ies).” (ICANN Bylaws, Art. 4, Section 4.2(c)(i).) Reconsideration is appropriate *if* the Requestor demonstrates that the action or inaction contradicts “ICANN’s Mission, Commitments, Core Values and/or established

ICANN policy(ies).” (*Id.*; *see also, e.g.*, Board Determination on Request 17-3, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.b>; Board Determination on Request 17-1, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.d>.)⁹ A Reconsideration Request that challenges the outcome of ICANN organization’s action or inaction without any supporting evidence beyond the requestor’s dissatisfaction with that outcome does not meet the standard for reconsideration. Similarly, a Reconsideration Request that does not explain how the challenged action or inaction contradicted ICANN organization’s Mission, Commitments, Core Values, and/or established ICANN policy(ies), without more, cannot justify reconsideration.

The Requestors state that “reconsideration requests provide an opportunity to re-examine an action or inaction.” (Rebuttal, Pg. 3.) That is precisely what occurred here. Indeed, notwithstanding the Requestors’ failure to demonstrate that ICANN organization’s actions or inaction violated its Mission, Commitments, Core Values, and/or established ICANN policy(ies), the BAMC evaluated the Response to Joint DIDP Request to determine if such a violation did occur. The BAMC concluded, and the Board agrees, that ICANN organization’s action in the Response was consistent with its Mission, Commitments, Core Values, and established policies. (BAMC Recommendation, Pgs. 16-27.)

Second, the Requestors argue that “ICANN must comply with its Commitments and Core Values during the DIDP,” because “[t]he DIDP is clearly related to these Commitments and Core Values.” (Rebuttal, Pgs. 4-5.) However, the Response to Joint DIDP Request did comply with ICANN organization’s Commitments and Core Values. The DIDP implements ICANN’s Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization’s operations and within ICANN’s organization’s possession, custody, or control are made available to the public unless there is a compelling reason for confidentiality. (*See* DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) But neither the DIDP nor ICANN organization’s Commitments and Core Values supporting transparency and accountability

⁹ Reconsideration also is appropriate if the requestor shows that it was adversely affected by Board or Staff action or inaction taken without consideration of material information, or taken as a result of reliance on false or inaccurate relevant information. (ICANN Bylaws, Art. 4, Section 4.2(c)(ii), (iii).)

obligates ICANN organization to make public every document in ICANN organization's possession. As the Panel in the *Amazon v. ICANN* Independent Review Process Panel noted earlier this year:

[N]otwithstanding ICANN's transparency commitment, both ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

(*Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3.) ICANN organization's Bylaws address the need to balance competing interests such as transparency and privacy, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." (ICANN Bylaws, Art. I, Section 1.2(c).) The DIDP sets forth a test for balancing privacy concerns, such as privilege and protecting the deliberative process, which support ICANN organization's Core Values of operating with efficiency and excellence and "striving to achieve a reasonable balance between the interests of different stakeholders while also avoiding capture", against the Core Value of transparency. (*Id.* at Sections 1.2(b)(v) and 1.2(b)(vii).) Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure without contravening its commitment to transparency.

Third, the Requestors claim that the Response to Joint DIDP Request contradicted ICANN's Commitments and Core Values supporting transparency, fairness, and accountability. (*See* Rebuttal, Pgs. 9-10.) The Board finds that these arguments are not supported.

With respect to ICANN's commitment to transparency, the Requestors suggest that ICANN organization should have disclosed all requested documents, or at least "identif[ie]d the documents subject to [Nondisclosure] Conditions and explain[ed] how the Nondisclosure Conditions apply." (*Id.* at Pg. 6.) As discussed above, ICANN organization adhered to established policies and procedures, including ICANN's commitment to transparency, in finding certain of the requested documents subject to DIDP Nondisclosure Conditions. Further, the Board finds that the Response to Joint DIDP Request Process does not require ICANN

organization to identify the Nondisclosure Condition applicable to each individual document withheld; indeed, such a requirement could place an undue burden on ICANN. Here, the BAMC sufficiently explained how the Nondisclosure Conditions applied to the documents that ICANN organization determined were not appropriate for disclosure. Specifically, consistent with the Response to Joint DIDP Request Process, the BAMC explained that the requested materials contained internal drafts, materials that could compromise the integrity of the deliberative and decision-making process with respect to the CPE Process Review, and materials subject to the attorney-client or other privileges. (BAMC Recommendation, Pgs. 23-24.) Ultimately, the Requestors have not shown that ICANN organization failed to follow the DIDP or that the Response to Joint DIDP Request contradicted ICANN's Commitments and Core Values supporting transparency, fairness, and accountability.

The Requestors also suggest that ICANN's Commitments and Core Values supporting transparency and fairness required ICANN organization to disclose the requested materials even if certain Nondisclosure Conditions apply, because the CPE Review Process is "significant to Requestors" and others, because "[t]he public is clearly interested" in the requested documents, and because the Requestors suspect "there is little harm in disclosure of [the] documents." (Rebuttal, Pgs. 6-8.) "Public interest" is not determined by whether any entity is "interested" in a matter, but whether an action was in the overall "public interest." Further, the DIDP gives ICANN organization the discretion to decide if, "under the particular circumstances, . . . the public interest in disclosing the information outweighs the harm that may be caused by such disclosure." (DIDP webpage, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.)

As explained in the Response to Joint DIDP Request, ICANN organization evaluated the documents that were subject to Nondisclosure Conditions to determine if the public interest (including transparency and fairness concerns) in disclosing them outweighed the harm that may be caused by such disclosure, and concluded that the public interest did not warrant the harm that would be caused by disclosure under these circumstances. (See Response to Joint DIDP Request, Pg. 2-3.) As noted above, the Requestors believe that ICANN organization should have exercised its discretion differently, but that is not a basis for reconsideration because the Requestors have not shown that ICANN organization contravened the DIDP in any way.

The Requestors also suggest that ICANN “has closed-off the possibility of obtaining additional information [about the CPE Process Review] in clear contradiction of its own stated Commitment to and Core Value of transparency. (Rebuttal, Pg. 7.) Similarly, the Requestors suggest that ICANN organization “has restricted . . . access to information regarding the [CPE Process Review] in a blatantly unfair decision that keeps affected uninformed and raises several red flags regarding the integrity of the independent review itself,” and that “ICANN has prohibited informed participation in the [CPE Process Review] by the Internet Community.” (*Id.* at Pgs. 9-10.) The Board notes that the BGC and ICANN organization have provided several updates concerning the CPE Process Review, including one on 1 September 2017. (<https://www.icann.org/news/announcement-2017-09-01-en>.) Additionally, and as noted in the 1 September 2017 update, the CPE Process Review is still ongoing. When FTI completes the review, additional information will be made available to the ICANN community, including to the Requestors.

This action is within ICANN’s Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Date Noted: 27 October 2017
Email: amy.stathos@icann.org

ICANN BOARD PAPER NO. 2017.10.29.1c

TITLE: Request to Defer Compliance Enforcement of Thick WHOIS Consensus Policy

PROPOSED ACTION: For Board Consideration and Approval

EXECUTIVE SUMMARY:

The Board is being asked to authorize the President and CEO to defer compliance enforcement of the [Thick Whois Consensus Policy](#) for 180 days to allow additional time for the registrars and Verisign to reach agreement on amendments needed to registry-registrar agreements to implement the Policy.

The Thick Whois Policy requires registrars to submit “thick” registration data to registries for all new domain name registrations starting on 1 May 2018 at the latest. The Policy also requires migration of all existing domain registration data from “thin” to “thick” by 1 February 2019. Verisign and the registrars are in the process of implementing the Thick Whois Policy, but reached an impasse when they could not agree on amendments to relevant registry-registrar agreements.

ICANN organization has been following the established [process](#) for considering proposed amendments to gTLD registry-registrar agreements where the registry is required to obtain ICANN approval of such amendments. This process is designed to ensure registrar input (and public input where appropriate) before ICANN organization [or Board] approves changes to a registry-registrar agreement. Verisign has [stated](#) that changes to the .COM and .NET registry-registrar agreements are required “for live thick whois data to be transferred and displayed in a legally compliant manner.” The Registrar Stakeholder Group expressed concerns about agreeing to Verisign’s proposed amendments based on issues relating to the European Union’s General Data Protection Regulation (GDPR), which takes effect on 25 May 2018. As such, the next step outlined in the procedure is for the ICANN organization to consult with the registry operator and the Registrar Stakeholder Group to resolve these concerns.

Since April 2017, ICANN organization has facilitated multiple in person and telephonic meetings with Verisign and the Registrar Stakeholder Group leadership, but no significant progress has been made by either party. Recently, the Registrar Stakeholder Group [wrote](#) to ICANN organization requesting an extension to the Thick Whois Policy effective dates. ICANN organization previously approved Verisign’s request for an extension to an optional milestone date in the Policy for registrars to begin voluntarily submitting Thick data to the registry. This extension was granted to provide Verisign, ICANN, and the Registrar Stakeholder Group with more time to continue discussions in hopes of achieving a resolution, while still taking reasonable steps to comply with the Policy.

ICANN ORGANIZATION RECOMMENDATION:

ICANN organization recommends that the Board authorize the President and CEO to defer compliance enforcement of the Thick Whois Consensus Policy for 180 days to allow additional time for the registrars and Verisign to reach agreement on amendments needed to the Registry-Registrar Agreements to implement the policy.

PROPOSED RESOLUTION:

Resolution Text Superseded

Resolution Text Superseded

PROPOSED RATIONALE:

Rationale Text Superseded

Rationale Text Superseded

Rationale Text Superseded

Rationale Text Superseded

Signature Block:

Submitted by: Akram Atallah

Position: President, Global Domains Division

Date Noted: 18 October 2017

Email: akram.atallah@icann.org

ICANN BOARD PAPER NO. 2017.10.29.1d

TITLE: **Refinement of string similarity review in IDN ccTLD Fast Track Process**

PROPOSED ACTION: **For Consideration and Board Approval**

EXECUTIVE SUMMARY:

The ICANN Board is being asked to approve an amendment to the Final Implementation Plan for Internationalized Domain Name (IDN) country code Top Level Domain (ccTLD) Fast Track Process, proposed in the joint response by the country code Names Supporting Organization (ccNSO) and Security and Stability Advisory Committee (SSAC) on string similarity review.

The proposed amendment of the Implementation Plan addresses the situation where an applied-for IDN ccTLD string is considered confusingly similar only in uppercase (but not in lowercase). In that situation, the amendment would allow the requestor of the IDN ccTLD application to propose appropriate risk mitigation measures as part of the application process for review by experts. If the IDN ccTLD string is considered confusingly similar in lowercase, the similarity review evaluation cannot be successfully completed.

The joint response from the ccNSO and SSAC addresses questions raised by the Board to the ccNSO and SSAC after their inputs were received in reply to the Board resolution on 25 June 2015. In that resolution, the Board asked ccNSO, in consultation with other stakeholders including the GAC and SSAC, to provide further guidance on the refinement of the second string similarity review process, including the interpretation of split recommendations for uppercase and lowercase similarity review.

JOINT CCNSO AND SSAC RECOMMENDATION:

The ccNSO and SSAC jointly recommend that if the first and the second string similarity reviews set out in the Final Implementation Plan result in a finding that the applied-for IDN ccTLD string is confusingly similar only in uppercase but not in lowercase, the requestor should

be allowed to suggest mitigation measures within three months. These mitigation measures are then reviewed by relevant experts and if the proposed risk mitigation measures are adequate, the requested string is deemed to have passed the string similarity evaluation. The final mitigation measures are to be agreed upon by the time the IDN ccTLD applicant requests for the delegation of the IDN ccTLD string.

PROPOSED RESOLUTION:

Whereas, the ICANN Board of Directors approved the Final Implementation Plan for IDN ccTLD Fast Track Process on 30 October 2009 (<http://www.icann.org/en/minutes/resolutions-30oct09-en.htm#2>);

Whereas, as part of a review and update to the Implementation Plan, the ccNSO Council, following the development of the IDN ccTLD String Selection recommendations, requested the ICANN Board to include a two-panel process for string similarity evaluation (<http://ccnso.icann.org/node/38787>);

Whereas, the ICANN Board of Directors approved the Update to the IDN ccTLD Fast Track Implementation in order to implement the two-panel process for string similarity review. The Extended Process Similarity Review Panel (EPSRP) was approved for inclusion in the IDN ccTLD Fast Track process on 27 June 2013, and staff was directed to develop the relevant Guidelines and update the Final Implementation Plan accordingly (<https://www.icann.org/resources/board-material/resolutions-2013-06-27-en#2.a>);

Whereas, following the 2013 update, and upon the request of the relevant applicants, the pending IDN ccTLD strings under the Fast Track process were evaluated through the EPSRP process, and the EPSRP reports for the three applications were published with evaluation results on the ICANN website on 14 October 2014 (<https://www.icann.org/resources/pages/epsrp-reports-2014-10-14-en>). One application received a split result, based on evaluations of potential confusion in both lowercase and uppercase representations of the applied-for string;

Whereas, public feedback was received during the third annual review of the IDN ccTLD Fast Track process on issues related to the experimental methodology and results reported by the EPSRP, including the interpretation of the EPSRP's split recommendations on confusing similarity in regards to uppercase and lowercase forms of the applied-for string (<https://www.icann.org/public-comments/idn-ccTld-fast-track-2015-01-15-en>);

Whereas, following the public comment for the third annual review, on 25 June 2015 the ICANN Board resolved to ask the ccNSO, in consultation with other stakeholders, including GAC and SSAC, to provide further guidance on and refinement of the methodology of second string similarity review process (<https://www.icann.org/resources/board-material/resolutions-2015-06-25-en#2.a>);

Whereas, in response to a letter from the Board seeking additional clarifications the ccNSO and SSAC provided a joint response on 19 September 2017, proposing changes to the Final Implementation Plan for the IDN ccTLD Fast Track Process;

Resolved (20xx.xx.xx), the ICANN Board of Directors thanks the ccNSO, GAC and SSAC for collaborating to address the issue related to string similarity review and for developing the "Joint ccNSO SSAC Response to ICANN Board on EPSRP".

RESOLVED (2017.10.29.xx), the ICANN Board of Directors approves amending the Final Implementation Plan for IDN ccTLD Fast Track Process as suggested in the Joint ccNSO SSAC Response. The President and CEO is directed to incorporate the amendment into the Implementation Plan previously adopted by the ICANN Board on 30 October 2009 (and amended on 5 November 2013) and implement the amendment as soon as practicable.

PROPOSED RATIONALE:

Why the Board is addressing the issue?

On 5 November 2013, ICANN organization published an updated [Final Implementation Plan for the IDN ccTLD Fast Track Process](#) including the [Guidelines](#) for the Extended Process Similarity Review Panel (EPSRP), implementing the two-panel string similarity review, as per the [resolution](#) by the ICANN Board of Directors on 27 June 2013. Following the update, three eligible IDN ccTLD Fast Track applicants, for Bulgaria (in Cyrillic), European Union (in Greek) and Greece (in Greek), exercised their option to undergo the second similarity review. The EPSRP completed the review and ICANN organization published these [reports](#) on 14 October 2014.

For each application, the EPSRP documented its findings with respect to the applied-for string. The reports each included a detailed description of the methodology and results of the experiments for string similarity. The EPSRP did not aggregate its findings for a string based on experiments conducted on uppercase and lowercase forms of the string. The EPSRP concluded that from a visual similarity point of view, uppercase and lowercase characters are distinct entities. And given that there is no scientific or policy basis as to how to combine results of uppercase and lowercase similarity found for IDN ccTLDs, the EPSRP could only provide separate recommendations for each of these forms. Therefore, where the findings of the EPSRP are split based on different findings for confusing similarity for uppercase and lowercase forms of a string, there is no mechanism to deduce single aggregated recommendation of the second string similarity review done by EPSRP.

Based on this experience of the EPSRP analysis, during the third review of the IDN ccTLD Fast Track Process, the community provided [public comments](#) raising issues regarding the methodology of the EPSRP, including the assessment of split recommendations (e.g., confusing similarity in uppercase but not in lowercase).

To address these comments, the ICANN Board (through [resolution 2015.06.25.16](#)) asked the ccNSO, in consultation with other stakeholders, including GAC and SSAC, to provide further guidance on and refinement of the methodology of second string similarity review process, including the interpretation of split recommendations, to be applied to the relevant current and

subsequent cases in the IDN ccTLD Fast Track Process as well as to inform the proposed policy for the selection of the IDN ccTLD strings.

The relevant working group of the ccNSO, in collaboration with GAC members, published its [report](#) for a [public comment](#) before finalization. SSAC submitted an alternative view in [SAC 084](#) and then in [SAC 088](#) and [SAC 089](#). At the request of the Board the ccNSO and SSAC worked together to reach a solution, which ccNSO and SSAC chairpersons provided as a [joint response](#) to ICANN Board on 19 September 2017.

With this resolution, the Board now concludes the 2015 review of the Fast Track program and moves forward with the update to the Final Implementation Plan for the IDN ccTLD Fast Track Process as suggested in the joint ccNSO and SSAC response. Addressing this issue is aligned with ICANN's Mission as stated at Section 1.1(a)(i) of the ICANN Bylaws: "Coordinates the allocation and assignment of names in the root zone of the Domain Name System." With this outstanding issue cleared, the review cycle for the Implementation Plan can now commence.

What concerns or issues were raised by the community?

SSAC provided initial input in [SAC 084](#) and further clarified in [SAC 088](#) and [SAC 089](#) that in case of a split recommendation "the default finding should be to reject the label if confusability exists in either form", maintaining that the use of principles of conservatism, inclusion and stability following RFC 6912 be applied to processes like EPSRP. However, the ccNSO Council noted the Unicode Technical Report # 36: [Unicode Security Considerations](#) states that the "use of visually confusable characters in spoofing is often overstated ... [which] account for a small proportion of phishing problems" which may be mitigated by measures suggested in the Unicode report. In joint response, the ccNSO and the SSAC agree on a process to address the concerns raised by SSAC by allowing the requester to propose measures to be reviewed by experts to determine if confusable similarity is effectively mitigated.

What significant materials did the Board review?

The board has reviewed various materials and factors in its deliberations and in taking its action today. The relevant and significant materials include, but are not limited to, the following:

- [Final Implementation Plan for IDN ccTLD Fast Track Process](#) - 5 Nov. 2013
- [Guidelines for the Extended Process Similarity Review Panel \(EPSRP\) for the IDN ccTLD Fast Track Process](#) - 4 Dec. 2013
- [Unicode Technical Report # 36: Unicode Security Considerations](#) – 19 September 2014
- [Extended Process Similarity Review Panel \(EPSRP\) Reports for IDN ccTLD Applications](#) – 14 October 2014
- [Public comments on the annual review of the IDN ccTLD Fast Track process](#) – 17 March 2015
- [The ICANN Board Resolution 2015.06.25.16](#) – 25 June 2015
- The response to the [public comment](#) on the draft [report](#) by the WG on EPSRP – 20 July 2016
- [SAC 084: SSAC Comments on Guidelines for the Extended Process Similarity Review Panel for the IDN ccTLD Fast Track Process](#) - 31 August 2016
- [GAC comment on EPSRP Working Group – Public Comment](#) – 28 September 2016
- [SAC 088: SSAC Response to ccNSO Comments on SAC084](#) - 06 November 2016
- GAC Advice to Board, Point 7, in the [GAC Communiqué at ICANN 57](#) – 8 November 2016
- [SAC 089: SSAC Response to ccNSO Comments on SAC084](#) - 12 December 2016
- [ccNSO Letter to ICANN Board re: EPSRP Final Report](#) – 30 January 2017
- [ccNSO WG on EPSRP – Final Report](#) – 6 January 2017
- [Joint ccNSO SSAC Response to ICANN Board](#) - 19 September 2017

What factors did the Board find to be significant?

The ICANN Board has noted that the ccNSO and the SSAC members have worked together to converge on an effective mechanism which addresses the competing concerns raised during the process. IDN ccTLD requestor should propose effective risk mitigation measures to address the security concerns earlier raised by the SSAC.

Are there positive or negative community impacts?

This decision has a positive impact because it clarifies the ambiguity in the second similarity review guidelines, in case of a split recommendation, allowing IDN ccTLD string evaluations to proceed so long as effective risk mitigation measures can be determined and implemented. This decision also supports the public interest through expanding the potential availability of IDN ccTLDs to additional countries and territories in support of local Internet users.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

Upon implementation, there are fiscal impacts because the ICANN organization must engage relevant experts to review the mitigation strategies proposed by the requestor.

Are there any security, stability or resiliency issues? What concerns or issues were raised by the community?

The joint response from the SSAC and ccNSO explains that there are four ways uppercase and lowercase forms of the applied-for string can be found confusingly similar. In the first case where neither is found confusingly similar, the string should pass the evaluation. In the second and third cases where the lower case is found confusingly similar, whether uppercase is found confusingly similar or not, the associated risks are too high and difficult to mitigate, so the string should not pass. In the fourth case, where lowercase is not similar but uppercase is confusingly similar, SSAC notes a cautionary approach is appropriate. The joint response notes that SSAC's view is that risk is a continuum and in this fourth case cautionary approach could be for the IDN ccTLD requestor to propose mitigation measures which are deemed sufficient to reduce the risks to an acceptable level by relevant experts. Only then the string can pass the string similarity evaluation.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

The update suggested by ccNSO was already subject to required public comment after the initial report was drafted. The comments included a response from the GAC in support of the findings and a response from SSAC through SSAC 084 with further responses in SAC 088 and SAC 089 suggesting an alternative approach. To overcome the diverging views, which manifested following the public comment, ccNSO and SSAC have worked together to clarify their positions and find common ground which is presented in their joint response to the Board. Further public comment is not needed to incorporate the adjustment suggested in Final Implementation Plan for the IDN ccTLD Fast Track Process by the joint ccNSO and SSAC response.

Signature Block:

Submitted by: Akram Atallah

Position: President, Global Domains Division

Date Noted: 13 October 2017

Email: akram.atallah@icann.org

Directors and Liaisons,

Attached below please find Notice of date and time for a Regular Meeting of the ICANN Board of Directors.

29 October 2017 – Regular Meeting of the ICANN Board of Directors - at 04:00 UTC (8:00am in Abu Dhabi). This Board meeting is estimated to last approximately 120 minutes.

<https://www.timeanddate.com/worldclock/fixetime.html?msg=Regular+Meeting+of+the+ICANN+Board&iso=20171029T08&p1=2&ah=2>

Some other time zones:

28 October 2017 – 9:00pm PDT Los Angeles

29 October 2017 – 12:00am EDT Washington, D.C.

29 October 2017 – 5:00am CEST Brussels

REGULAR MEETING OF THE ICANN BOARD

Note: The first 45 minutes of this Board Meeting is reserved for private session. At 8:45am, a required 15-minute break will occur for IT to set up for the public session of this Board Meeting from 9:00am – 10:00am.

Agenda

- Consideration of Reconsideration Request 17-4
- Request for New or Additional Information from the Governmental Advisory Committee re: Advice on Amazon Applications
- Request to Defer Compliance Enforcement of Thick WHOIS Consensus Policy
- Refinement of string similarity review in IDN ccTLD Fast Track Process
- AOB

MATERIALS – You can access the Board Meeting materials, when available, in Google Drive here:

Contact Information Redacted

If you have trouble with access, please let us know and we will work with you to assure that you get access to the documents.

If call information is required, it will be distributed separately.

If you have any questions, or we can be of assistance to you, please let us know.

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