

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-18

8 JANUARY 2014

The Requester seeks reconsideration of ICANN's acceptance of the 16 November 2013 Expert Determination dismissing the Requester's community objection to the application for the .LGBT gTLD.

I. Brief Summary.

Afilias applied for the .LGBT string. The Requester filed a Community Objection against Afilias' application, and lost. The Requester claims that the actions of the Expert Panel were inconsistent with ICANN policies, which influenced the Panel in rendering the determination. Specifically, the Requester contends that the Panel: (i) inserted an unsupported notion that a delineated community is only entitled to protect one gTLD with a name or acronym that is significant to the community; (ii) introduced future "Contention Resolution Proceedings" into the findings and used them as a basis in the determination; and (iii) should have addressed the Requester's Objection independent of other objections and other applications for gTLDs related to the gay community.

As a result, the Requester asks the ICANN to reject the Expert Determination and return it to the Panel to make a new determination. The Requester also asks that ICANN provide the Panel with an explanation of the purported policy violations brought to ICANN's attention. With respect to the first claim, the Panel correctly referenced and applied the standard for hearing a community objection. Contrary to the Requester's assertion, the Panel did not determine that a clearly delineated community is only entitled to protect one gTLD with a name or acronym that is significant to the community. Rather, the Panel noted that the Requester

failed to establish a likelihood of material detriment to the legitimate interests asserted by the Requester – the interests in operating its own gTLD.

With respect to the other claims, the Requester has identified no policy or process that restricts the Panel’s ability to refer to or consider other ICANN proceedings involving the string at issue. On the contrary, the New gTLD Dispute resolution Procedure makes clear that, in addition to applying the standards, the Panel “may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.”

In sum, the Requester has failed to demonstrate that the Panel applied the wrong standards in contravention of established policy or procedure. Therefore, the BGC recommends that Request 13-18 be denied.

II. Facts.

A. Background Facts.

Afilias Limited (“Afilias”) applied for the .LGBT string.

On 12 March 2013, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (“ILGA” or “Requester”) filed a Community Objection with the International Centre for Expertise of the International Chamber of Commerce (“ICC”) to Afilias’ application asserting that there is “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Applicant Guidebook (“Guidebook”), § 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2(e).)

On 14 May 2013, Afilias responded to the Requester’s Objection.

On 7 June 2013, the ICC appointed Professor Dr. Bernhard Schlink as the Expert (“Expert” or “Panel”) to consider the Requester’s Objection.

On 16 November 2013, the Panel rendered an “Expert Determination” in favor of Afilias. The Panel determined that the Requester had standing to object as an “established institution associated with a clearly delineated community.” (Determination, Pg. 6, ¶ 13.) Based on the submissions and evidence provided by the parties, the Panel determined that the Requester failed to establish that Afilias’ application creates a likelihood of material detriment to the legitimate interests of the gay community. (Determination, Pgs. 7-8, ¶¶ 18-23.) The Panel dismissed the Requester’s Objection and deemed Afilias the prevailing party. (Determination, Pg. 8, “Decision”.)

On 18 November 2013, the ICC notified ILGA of its Decision.

On 3 December 2013, the Requester filed Request 13-18.

B. The Requester’s Claims.

The Requester claims that the actions of the Panel were inconsistent with ICANN policies and that such actions influenced the Panel in rendering his determination. Specifically, Requester contends the Panel:

1. Inserted an unsupported notion that a clearly delineated community is only entitled to protect one gTLD with a name or acronym that is significant to the community;
2. Introduced future Contention Resolution Proceedings into the findings and used them as a basis in the determination; and
3. Should have addressed the Requester’s Objection independent of other community objections and other applications for gTLDs related to the gay community.

(Request, Section 8.)

III. Issues.

In view of the claims set forth in Request 13-18, the issues for reconsideration are as follows:

- A. Whether the Panel applied the wrong standard in contravention of established policy or process by:
1. Determining that a clearly delineated community is only entitled to protect one gTLD with a name or acronym that is significant to the community;
 2. Considering future Contention Resolution Proceedings and using them as a basis for the determination; and
 3. Considering other community objections and pending applications for gTLDs related to the gay community and using them as basis for his determination.

IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Objections.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹ (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration relating to staff action or inaction is appropriate if the BGC² concludes, or if the Board or the NGPC³ agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or

¹ Article IV, Section 2.2 of ICANN's Bylaws states 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:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

² Board Governance Committee.

³ New gTLD Program Committee.

processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.⁴

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, here the BGC is not to evaluate the Panel's substantive conclusion that the Requester failed to establish that Afilias' application for .LGBT creates a likelihood of material detriment to the rights of a significant portion of the gay community. Rather, the BGC's review is limited to whether the Panel violated any established policy or process, which the Requester suggests was accomplished when the Panel "acted inconsistent with ICANN policies" for evaluating community objections. (Request, Section 8, Pg. 4.)

The standards for evaluating community objections include a four-part test to help an expert panel determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

⁴ See BGC Recommendation on Reconsideration Request 13-5 at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc>.

(Guidebook, Section 3.5.4.) Section 3.5.4 also includes a list of factors that could be used to evaluate each of the four criteria. (*See Id.*) The factors relevant to the Requester’s claims are discussed below.

V. Analysis and Rationale.

A. Requester Failed To Demonstrate That The Panel Applied The Wrong Standards In Contravention Of Established Policy or Process.

1. The Panel did not Incorrectly Determine that a Clearly Delineated Community is Only Entitled to Protect One gTLD.

The Requester claims that the Panel erroneously inserted an unsupported notion that a clearly delineated community is only entitled to protect one gTLD with a name or acronym that is significant to the community. (Request, Section 8, Pg. 4.) To support this assertion, the Requester relies on the following Panel statements:

It may happen that among the registrants of the string .LGBT will be non-gay and even anti-gay registrants who try to use the registration for anti-gay purposes. But not all names that can be formed and used and may emerge to designate the gay community and not all commercial utilization of them can be protected completely against abuse....

In other words, the gay community’s legitimate interest – to operate its own gTLD, not have its name usurped and exploited, and not to have a gay-related gTLD abused – cannot legitimize an exclusive claim to all names that can be formed and used and may emerge to designate the gay community nor to the gTLDs with the corresponding names.

(Determination, Pg. 7, ¶¶ 20 & 21.) The Requester contends that the Panel’s application of this “unsubstantiated policy” is “counter intuitive to the goals of the Community objection proceedings.” (Request, Section 8, Pg. 5.) The Requester’s conclusions in this respect are not supported.

As noted above, to prevail on a community objection, the objector must, among other things, establish that the “application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be

explicitly or implicitly targeted.” (Guidebook, Section 3.5.4.) The Guidebook includes a list of relevant factors that could be used by a panel in making this determination. The factors include, but are not limited to, the following:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

(Guidebook, Section 3.5.4.)

Here, the Panel correctly referenced the above standard (Determination, Pg. 7, ¶ 17) and indicated that the Requester focused on the likelihood of material detriment to the “interests,” as opposed to the “rights,” of the gay community (Determination, Pg. 7, ¶ 18). The Panel noted that the Requester argued that the gay community needs its own gTLD, and that the gTLD should be safe and reliable, and should not be operated only for profit. The Panel further noted that the Requester “emphacize[d] that the ‘Gay Community is of course known by the name gay’” and that the Requester “fears an usurpation and exploitation of the name of the gay community, should Afiliis operate the string .LGBT.” (Determination, Pg. 7, ¶ 18.)

The Panel agreed with the Requester that the interests in operating its own gTLD and the interests in not having its name usurped and exploited are legitimate interests of the gay community, but concluded that the Requester has not demonstrated “how Afilias’ operation of the string .LGBT could be a detriment to the gay community’s interest in operating its own gTLD under the name gay.” (Determination, Pg. 7, ¶ 19.) Thus, contrary to the Requester’s assertion, the Panel did not determine that a clearly delineated community is only entitled to protect one gTLD with a name or acronym that is significant to the community. Rather, the Panel noted that the Requester failed to establish a likelihood of material detriment to the legitimate interests asserted by the Requester – the interests in operating its own gTLD. The Panel further noted:

Occasional abuse is not regarded as damage to the reputation of the gay community. Neither does the possibility of occasional abuse mean that Afilias would not operate the string .LGBT in accordance with the interests of the gay community. It does not interfere with the gay community’s core activities, nor does it cause economic damage to the gay community.

(Determination, Pg. 7; ¶ 20.)

As shown above, the Requester’s argument does not support reconsideration because the Requester failed to demonstrate how the Panel’s actions contradict any established policy or process.

2. The Panel did not Improperly Consider Future Contention Resolution Proceedings.

The Requester alleges that the Panel “introduced future Contention Resolution Proceedings into his findings and used them as a basis in his determination.” (Request, Section 8, Pg. 5.) To support this assertion, the Requester relies on the following Panel statement:

ILGA has shown a likelihood of material detriment to the legitimate interests of the gay community if there is no gTLD designated to serve the gay community and to operate under appropriate principles that grant safety and financial rewards for the gay community.

(Determination, Pg. 8, ¶ 23.) The Requester contends that community objection proceedings should be ruled on the merits of the community objection and not based on “speculation and presumption” on the outcomes of future ICANN proceedings, particularly whether the gay community will have their own gTLD. (Request, Section 8, Pg. 6.) The Requester’s arguments here are likewise unsupported.

Nothing in the Guidebook or the Procedure restricts the Panel’s ability to refer to or consider other ICANN proceedings involving the string at issue or other related strings. Nor does the Requester cite to or otherwise reference any such provision to support its assertion. On the contrary, the Procedure makes clear that, in addition to applying the standards that have been defined by ICANN, the Panel “may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.” (Procedure, Art. 20(b).)

Further, the Panel does not mention or otherwise refer to Contention Resolution Proceedings or the outcome of such proceedings in the Expert Determination as the Requester implies. As stated above, the Requester asserted in support of its Objection that the gay community has legitimate interests in operating its own gTLD. The Requester also made clear that the gay community did not file a community application for the .LGBT string, but instead, the gay community “took the lead on the community application for [.GAY]” and that this application has the support of the Requester and other gay community organizations.

(Determination, Pg. 5, ¶ 7.) Based on the Requester’s contentions, the Panel could not properly evaluate the likelihood of material detriment to the Requester’s interest of needing its own gTLD without considering the fact that the community the Requester represents has applied for its own gTLD.

Providing further context to the Panel statement upon which the Requester relies, the remainder of the cited paragraph illustrates that the Panel considered the pending .GAY application in evaluating the likelihood of material detriment to the gay community's interest of operating its own gTLD:

ILGA has not proven that other gTLDs with names that can be targeted to the gay community are likely to cause material detriment to the legitimate interests of the gay community or a significant portion thereof. They can only cause a certain amount of competition, and Afilias has convincingly argued that there is a legitimate interest in targeting the gay community without belonging to it or without belonging to the portion of it that supports the string .gay. A coexistence of an 'official' gTLD of the gay community and another 'unofficial' gTLD is no material detriment to the legitimate interests of the gay community.

(Determination, Pg. 8, ¶ 23.)

Per the above, there is no support for the Requester's claim that the Panel improperly considered future Contention Resolution Proceedings in rendering his determination.

3. The Panel did not Improperly Consider Other Community Objections and Pending Applications for gTLDs Related to the Gay Community.

The Requester asserts that the Panel should have addressed the Objection "independent of other Community objection filings and other applications for gTLDs related to the gay community." (Request, Section 8, Pg. 6.) To support this assertion, the Requester relies on the following Panel statement:

While the gay community cannot exclude competition, it could file and has filed its own application for a gTLD that is designed to serve the gay community and to operate accordingly: dotgay's community application for the string .gay.

(Determination, Pg. 8, ¶ 22.) The Requester contends that it is ICANN policy that each community objection should be evaluated on its own merits and that because the same Panel was appointed for all objections to .GAY and .LGBT, the manner in which each objection was examined has been compromised, particularly on the likelihood of material detriment element.

The Requester suggests that its Objection would have been handled differently if there were no .GAY applications. (Request, Section 8, Pg. 7.) For the same reasons as stated above, the Requester's arguments are unsupported.

Nothing in the Guidebook or the Procedure restricts the Panel's ability to refer to or consider other community objections or pending applications involving similar strings; the Panel "may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable." (Procedure, Art. 20(b).) Further, the fact that the gay community applied for and supports the .GAY application is an issue that was put before the Panel by the Requester, and as stated above, the Panel could not properly evaluate the likelihood of material detriment to the Requester's interest of needing its own gTLD without considering that fact.

VI. Decision

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies ILGA's Reconsideration Request (Request 13-18). As there is no indication that the Panel violated any policy or process in reaching the determination dismissing the Requester's community objection, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 13-18 shall be final and does not require Board consideration. Article IV, Section 2, Paragraph 15 of the Bylaws provides that the BGC is delegated with authority by the Board to make a final determination and recommendation for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final and establishes precedential value. (Bylaws, Art. IV, § 2.15.) The BGC has the discretion, but is not

required, to recommend the matter to the Board for consideration and action, as the BGC deems necessary. (*See id.*) As discussed above, Request 13-18 seeks reconsideration of action or inaction taken by staff. After consideration of this particular Reconsideration Request, the BGC concludes that its determination on this matter is sufficient and that no further consideration by the Board is warranted.