DOMINION ENTERPRISES

LANDMARK MEDIA ENTERPRISES, LLC

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EXECUTIVE VICE PRESIDENT

April 3, 2014

VIA Electronic Mail: comments-sco-framework-principles-11feb14@icann.org

Internet Corporation for Assigned Names and Numbers
c/o Christine Willett, Vice-President of gLTD Operations
12025 Waterfront Drive
Suite 300
Los Angeles, California 90094-2536

RE: Reply Comment to Public Comments on Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections

Dear Ms. Willett:

I write on behalf of DERCars LLC ("DERCars") in reply to public comments submitted to ICANN regarding the Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections.

Central to ICANN's proposed review mechanism is the recognition that, consistent with its Bylaws, ICANN must administer its programs in a manner that is neutral, objective, and does not cause disparate treatment to any party unless justified by "substantial and reasonable cause." While it is evident from the public comments that many parties view the proposed review mechanism as an appeals process, these parties are mistaken. In proposing a limited review, we understand that ICANN is seeking to satisfy its obligation to ensure fairness and equality, not to provide a substantive appeals process for all expert determinations. DERCars believes that the proposed limited review mechanism is both consistent with ICANN's mandate and necessary to remedy the disparate results in the .CAR/.CARS and .COM/.CAM sets, and encourages ICANN to adopt the proposed review mechanism, with the modifications proposed in DERCars' original comments.

I. ICANN IS OBLIGATED AND HAS AMPLE AUTHORITY TO ADDRESS THE DISPARATE RESULTS IN THE SCO EXPERT DETERMINATIONS.

The suggestion by some commenters that ICANN is prohibited from adopting a review mechanism is misguided and ignores the plain language of both the Applicant Guidebook (AGB) and ICANN's Bylaws that not only permits, but requires, ICANN to address inconsistent expert determinations that would result in unjustifiably disparate treatment of certain parties. The New gTLD process is subject to ICANN's Bylaws, which require enforcement of ICANN policies in a manner that is both neutral and fair to all participants. Specifically, Article I, Section 2.8 of the Bylaws requires that all decisions should be made by applying documented policies "neutrally and objectively, with integrity and fairness." Article II, Section 3 further elucidates this

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requirement, prohibiting the application of ICANN's standards, policies, and procedures "inequitably" or in a manner that "single[s] out any particular party for disparate treatment unless justified by substantial and reasonable cause." In proposing the review mechanism, ICANN has recognized that accepting diametrically opposite SCO expert determinations for the exact same strings without establishment that that there is "substantial and reasonable cause" for the disparate outcomes would be presumptively unfair and inequitable, and thus in contravention of ICANN's Bylaws.

ICANN is not bound by contract or by its established policies to accept inconsistent and disparate expert determinations without further review. In fact, the AGB is clear that each outcome of an SCO proceeding is "considered an expert determination and advice that ICANN will accept within the dispute resolution process." AGB § 3.4.6. It follows that, where ICANN determines that acceptance of an SCO expert determination would be inconsistent with its established policies, it is both permitted and obligated to take the necessary actions to reconcile any inconsistencies – in this case through the proposed limited review mechanism.

II. THE LIMITED REVIEW PROPOSED BY ICANN IS LOGISTICALLY FEASIBLE AND PROPERLY TAILORED FOR THE CIRCUMSTANCES.

DERCars agrees with the many commenters who argue that this initial round of dispute resolution proceedings demonstrates a clear need for an appeals process in future gTLD application rounds. Calls to expand the scope of the proposed review mechanism to include additional strings, however, are both misplaced and impractical. Rather than convert the narrowly tailored review mechanism for clear cases of disparate treatment into a full-scale appeals process, ICANN should limit the current scope of review to the two narrow situations that it has identified and consider before the next round of gTLD applications whether, as a policy matter, to add an appeals process.

The limited scope of review proposed by ICANN is particularly appropriate given the procedural setting from which ICANN's proposal arose. The review mechanism came to fruition not from a policy review of the New gTLD program or the dispute resolution mechanisms found in the AGB, but rather out of the BGC's consideration of requests for reconsideration of specific SCO expert determinations and its recommendation to draft a report on possible inconsistencies. From that report, the NGPC identified two sets of "inconsistent" SCO Expert Determinations. Implicit in the NGPC's approach was the limiting principle that the proposed review would not include all determinations that reached different conclusions, but instead only those where the results could not be reconciled, and therefore where there was not "substantial justification" for the disparate treatment, as required in the Bylaws. Based on this more limited standard, the narrow review proposed by ICANN is appropriate – particularly as it applies to the .CAR/.CARS set.

Unlike the numerous other cases referenced by commenters, the two cases identified by ICANN ***require*** further review under the Bylaws. Where separate panels considering the exact same strings reached opposite conclusions, this suggests a failure of process and disparate treatment

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that cannot be justified. The case of the .CAR/.CARS SCO expert determinations are truly exceptional, given that the ICDR never offered the option of consolidation and the arguments on which the experts relied were nearly identical. Even Donuts, despite admittedly benefiting from the inconsistent .CAR/.CARS SCO expert determinations, acknowledged that "such disparate treatment of two applications in the same set" would not be a fair outcome.[1]

In addition to being misplaced, proposals to expand the scope of the review process also are impractical. ICANN already has determined not to intervene in the majority of cases and, in fact, has entered into registry agreements for many strings that could be subject to a broader substantive appeal process.

Permitting losing objectors to request a review by the Panel of Last Resort, as advocated by Google in its own comments and through the Intellectual Property Constituency (IPC) and the Business Constituency (BC),[2] also is inconsistent with the purpose behind the proposed review mechanism. In proposing a limited review of the Inconsistent SCO Expert Determinations, ICANN is not proposing to provide a substantive review of each underlying decision; instead, ICANN is focusing on the single, inconsistent determination in each set to ascertain whether the disparate treatment in that one case is "justified by substantial and reasonable cause." Providing the losing objector with standing to challenge the two determinations that it lost would effectively convert the limited review into a general appeal process, forcing the Panelists to reconsider the merits of each individual expert determination rather than focus on the basis for the inconsistency. Google already had three panelists consider the substance of its identical arguments, two of which independently rejected them. The sole remaining question for ICANN, as required under its Bylaws, is whether the inconsistent decision can be reconciled with the other two decisions given the disparate treatment that would arise if the inconsistent decision is allowed to stand. Allowing the losing objectors to challenge the other two expert determinations would not advance this objective.

III. THE STANDARD OF REVIEW SHOULD BE SUFFICIENT TO ESTABLISH THAT ANY DISPARATE TREATMENT IS "JUSTIFIED BY SUBSTANTIAL AND REASONABLE CAUSE."

Three of the five parties commenting on the standard of review, including prevailing applicant Donuts, agreed that the standard of review must incorporate the concept of fairness and whether it is reasonable to have inconsistent outcomes. ICANN's Bylaws establish a high burden for the disparate treatment of a party, requiring that it be "justified by substantial and reasonable

[1] Public Comments of Donuts, Inc. (12 Mar. 2014) at 1.

[2] In addition to submitting comments under its own name, persons associated with Google also were fundamentally involved in the drafting of comments on behalf of both the IPC and the BC. *See* Public Comments of IPC (11 Mar. 2014) at 1, n.1 (explaining that "members contrituting to this comment include representatives of an Objector and a Prevailing Applicant in the SCO's identified in the proposed review mechanism" – which included the person who represented Google in the .CAR/.CARS SCO proceedings); Public Comments of BC (23 Mar. 2014) at 4 (noting that Andy Abrams, who submitted Google's comments, "led drafting" of the BC comments).

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cause."[3] In defining the scope of "Inconsistent SCO Expert Determinations," ICANN already has determined that the DERCars and UnitedTLD faced disparate treatment. The remaining issue for the Panel of Last Resort is to determine whether that treatment is "justified by substantial and reasonable cause," and the standard of review should reflect this requirement.

Although, as explained in DERCars' initial comments, ICANN clearly intended to incorporate the issue of fairness into the proposed review mechanism, the proposed Statement of Review fails to properly account for this concept. Accordingly, DERCars continues to believe that the Standard of Review should be revised to read: "Was there substantial and reasonable cause, when considering the standard of review as set forth in the Applicant Guidebook, the procedural rules, and the other Expert Determinations issued in the set, for the Expert Panel to reach a determination on the underlying SCO that is inconsistent with the other Expert Determinations issued in the set?"

In their highly similar comments, Google and the IPC urged ICANN to adopt a "clearly erroneous" standard of review. Their analogy to appellate review in US courts and the ICDR's appellate rules, however, is inappropriate. First, a clearly erroneous review is inconsistent with ICANN's Bylaws, which require that disparate treatment be "justified by substantial and reasonable cause." Even if one of the Inconsistent SCO Expert Determinations was not clearly erroneous, it still may not justify, by substantial and reasonable cause, the disparate treatment. Thus, applying the clearly erroneous standard could still produce results inconsistent with ICANN's Bylaws. Second, the underlying determinations were not in any way fact-based, as evidenced by the fact that the experts in all three .CAR/.CARS SCOs declined to consider how the proposed registries would be operated. DERCars explicitly urged the Expert to consider the proposed uses and how the average reasonable Internet user would encounter the two strings under the proposed applications, but the Expert declined.[4] Finally, unlike courts and arbitral appeals, which involve the review of a single dispute between two parties, here the panel will be reviewing the consistency of several proceedings. The issue, then, is not whether one Expert's determination, standing alone, was "clearly erroneous," but rather whether the determinations in the set, when considered together, can be reconciled in such a way as to justify the disparate treatment caused by the one outlier decision. As Allen Grogan, ICANN's Chief Contracting Counsel recently explained to the GAC, as a fundamental question of fairness and equality, the .CAR/.CARS SCOs "should be decided in a way where the same result applies to all of them."[5] This mandates use of a review standard other than "clearly erroneous."

[3] ICANN Bylaws, Art. II, § 3.
[4] *See Charleston Road Registry Inc. v. DERCars, LLC*, Expert Determination at 32 (declining to consider strength or weakness of the strings "in connection with actual usage" and, instead, considering "confusion as between two proposed generic terms as gTLDs for future use in connection with a complete domain name and a future website by unknown domain name registrants").
[5] Comments of Allen Grogan, Chief Contracting Counsel, ICANN, at GAC Plenary (22 Mar. 2014 1600 to 18:00 SGT), audio recording at 48:46, *available at* http://audio.icann.org/meetings/singapore2014/gac-plenary-1600-22mar14-en.mp3.

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IV. ALL PANELISTS SHOULD BE INDEPENDENT AND SELECTED BY THE ICDR.

DERCars believes that the ICDR should select the three panelists, with the criteria that they must be independent of each of the underlying SCOs. Although DERCars does not oppose the selection of experts who have experience with string confusion objections, as Google and the IPC propose, DERCars believes that it is more important that the experts are completely independent of the process that led to the inconsistent determinations.

The procedure that the IPC recommends for selecting panelists, which depends upon selection by "each party," is inappropriate for the proposed review process. Although the IPC proposal is modeled after the procedure used to appoint UDRP panels, the proposed review mechanism is not analogous to a traditional UDRP proceeding. UDRP disputes are bilateral disputes, where the panel is asked to adjudicate the rights of two parties. The proposed review process is not a bilateral process; rather, it is an ICANN-ordered review to ensure that the the underlying expert determinations were fair and administered in a manner that did not result in disparate treatment to a party without substantial and reasonable cause. If there is any "party" to a review proceeding, it is the losing applicant that was subject to the disparate treatment. Recognizing that it is not appropriate for a single party to select the arbitrators, however, DERCars would defer to the ICDR. Any broader view of the "parties" would need to include the prevailing applicants, who will be affected by the review at least as much as the prevailing objector. Because the UDRP model is unworkable with more than two parties, ICANN should instead rely on the ICDR to appoint the panelists, with the condition that they must be independent of any of the underlying SCOs in the set.

V. THE PANEL OF LAST RESORT MUST REVIEW A COMPLETE RECORD.

For the review to achieve its intended goal, the Panels of Last Review must have sufficient information to determine whether there was "substantial and reasonable cause" for the disparate and inconsistent results. ICANN should provide the Panel of Last Resort with any timely filed requests for reconsideration or other public comments submitted to ICANN by the losing applicants. This approach would ensure that the Panels of Last Resort consider a complete record while at the same time promoting efficiency by allowing for consideration, in a single proceeding, of any issues raised by the losing applicant.

VI. THE INCONSISTENT EXPERT DETERMINATION MUST BE REVERSED UNLESS IT IS UNANIMOUSLY UPHELD BY THE PANEL OF LAST RESORT.

Given the high standard set forth in ICANN's Bylaws to justify disparate treatment, the Inconsistent Expert Determinations should only be upheld by a unanimous decision of the Panel

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of Last Resort; otherwise they should be reversed. As explained above, Article II, Section 3 of the Bylaws prohibits ICANN from applying its standards, policies, and procedures "inequitably" or in a manner that "single[s] out any particular party for disparate treatment unless justified by substantial and reasonable cause." Fundamental concepts such as fairness and equality cannot be subject to the will of the majority: if even one panelist believes that the disparate treatment in an Inconsistent SCO Expert Determination is not supported by "substantial and reasonable cause," that determination should be reversed.

Requiring a unanimous determination of the Panel of Last Resort to affirm an Inconsistent Expert Determination also will reduce the likelihood of further disputes about the process for contention resolution auctions involving these strings. Article 3.2.2.1 of the AGB states that where a string confusion objection is successful, "the only possible outcome is for both applicants to be placed into a contention set and to be referred to a contention resolution procedure." There is wide disagreement, however, about how this should apply to the Inconsistent SCO Expert Determinatoins. In its comments, Google argued that "a reasonable solution for the .CAR/CARS and .CAM/COM strings would be to simply move all of the relevant applications into a single contention set for the purposes of the auction procedure, whether through direct or indirect contention."[6] Uniregistry Corp., meanwhile, argued that "[i]n no event would Uniregistry or Donuts, prevailing parties in their disputes, be placed in a contention set with .CAR."[7] By adopting an approach for the proposed review mechanism that favors consistency, ICANN could avoid having to resolve this contentious issue.

VII. CONCLUSION.

DERCars appreciates ICANN's recognition of the need to reconcile the Inconsistent SCO Expert Determinations with the principles of fairness and equality inscribed in ICANN's Bylaws. By adopting the proposed review mechanism with the minor changes recommended herein and in DERCars' initial comments, ICANN will take an important step toward this result.

Very truly yours,

Guy R. Friddell, III

[6] Public Comments of Google, Inc. (11 Mar. 2014) at 1.
[7] Public Comments of Uniregistry Corp. (12 Mar. 2014).