DOMINION ENTERPRISES

LANDMARK MEDIA ENTERPRISES, LLC

GUY R. FRIDDELL, III
EXECUTIVE VICE PRESIDENT

March 11, 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: Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations
        on String Confusion Objections

Dear Ms. Willett:

I write on behalf of DERCars LLC ("DERCars") to comment on the Proposed Review
Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion
Objections.

As an applicant for New gTLD string .CARS and a respondent in one of the two "Inconsistent
SCO Expert Determinations," DERCars supports the recognition by ICANN's New gTLD
Program Committee that a further review mechanism is necessary where objections raised by the
same objector against different applications for the same string resulted in different and
irreconcilable outcomes. Such Inconsistent SCO Expert Determinations are problematic both
from a policy and a programmatic standpoint. As a policy matter, where two or more expert
panels considering the same strings, the same objector arguments, and the same standards reach
diametrically different conclusions, it is a clear indication of an untenable outcome resulting in
one or more applicants facing "disparate treatment" that cannot be "justified by substantial and
reasonable cause," in direct contravention of Art. II, § 3 of the ICANN Bylaws (Non-
Discriminatory Treatment). From a programmatic standpoint, placing two or more applications
for the same string into different contention sets for ICANN's last resort auctions could cause
confusion, inconsistent auction results, and would clearly favor one applicant for the same string
over another based soly upon the "luck of the draw" in assignment of the expert to review the
string confusion objection.

While DERCars generally supports the proposed review mechanism, we believe that the NGPC
should make a few clarifications before adopting the review mechanism. The suggested changes
discussed herein will remove internal inconsistencies in the document regarding the Standard of
Review and will mandate consideration of the full record by the Panels of Last Resort when
evaluating the inconsistent rulings. These clarifications will ensure that the procedure set forth
in the Proposed Review Mechanism complies with relevant ICANN Bylaws.

Definition of Inconsistent SCO Expert Determinations

Background: Section 2(a) proposes to limit the definition of inconsistent SCO Expert Determinations to "objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ." As a result, the proposed review mechanism would apply to two circumstances: (1) the results of the .COM/.CAM objections; and (2) the results of the .CAR/.CARS objections. In both cases, two of the SCOs were determined in favor of the applicant while a third outlier SCO was determined in favor of the objector.

The NGPC already has determined that it would not intervene with regard to allegations of "potential consumer confusion resulting from allowing singular and plural versions of the same string." *See* https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm - 2.d. Thus, the proposed review mechanism is appropriately applied only to the limited cases where SCOs resulted in inconsistent outcomes with regard to the same strings, and therefore there is a question of whether there was a failure to apply ICANN's documented policies "neutrally and objectively, with integrity and fairness," as required by Article I, § 2.8 of the ICANN Bylaws.

Recommendation: DERCars supports the proposed definition of Inconsistent SCO Expert Determinations.

Composition of the Panels of Last Resort

Background: Section 2(c) would delegate to the International Centre for Dispute Resolution (ICDR) responsibility for constituting the three member "Panel of Last Resort." The proposed review mechanism does not include any criteria for the members of the panel.

Recommendation: DERCars supports providing the ICDR with responsibility for constituting the panel, but urges the NGPC to specify that each panelist must be independent from SCOs to be reviewed.

Standard of Review For Panel of Last Resort

Background: The Standard of Review in Section 2(b) is unnecessarily narrow and in tension with other statements in the document about the factors to be considered by the Panel of Last Resort. Specifically, Section 2(b) defines the Standard of Review as whether "the Expert Panel [could] have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review set forth in the Applicant Guidebook and the procedural rules." Viewing this statement in isolation, the role of the Panel of Last Resort would be to review each individual SCO expert determination in a vacuum to determine whether it is "reasonable" under the Applicant Guidebook and procedural rules. Under this standard, the Panel of Last Resort would not be required to reconcile the inconsistent Expert Determinations, or to even review and consider all of the inconsistent Expert Determinations.

It is clear, however, that ICANN does not intend for such a narrow review. Instead, Section 2(c) clarifies that the Panel of Last Resort "will be tasked with reviewing the Expert Determinations across a set to provide additional guidance." Section 2(c) goes on to state that "the Panel of Last Resort will evaluate the Expert Determination in the Losing Applicant's SCO, **in light of other Expert Determinations issued in the set**, to determine whether or not the Expert Determination in the Losing Applicant's SCO can reasonably stand as is" (emphasis added). Section 2(c) also mandates that the two possible outcomes of the review by the Panel of Last Resort must be with "reference to the other Expert Determinations." This approach is appropriate to determine whether there is "substantial and reasonable cause" for the disparate treatment in the Inconsistent SCO Expert Determinations as required by ICANN Bylaws, and should therefore be explicitly incorporated into the Standard of Review.

Recommendation: To ensure that the Panels of Last Resort apply the standard that ICANN intended and that is consistent with ICANN's Bylaws, DERCars proposes that ICANN amend the Standard of Review 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?"

Record to Be Considered

Background: The Proposed Review Mechanism also is unclear with regard to what record the Panels of Last Resort must consider when reviewing the Expert Determinations. The proposal makes reference to the following items: (1) the set of Expert Determinations; and (2) the Applicant Guidebook and procedural rules; it does not, however, address whether the Panels of Last Resort will have access to pleadings submitted by the parties to the International Centre for Dispute Resolution or to ICANN, such as the objections, the responses, any additional submissions, and any applicable requests for reconsideration.

DERCars agrees that the Review Mechanism should not include a further round of pleadings: the parties already have dedicated sufficient time and resources to briefing the substantive issues. At the same time, it is important that the Panels of Last Resort have access to the full record previously compiled. Although many of the SCO Expert Determinations include recitals of the parties' arguments, they do not include the arguments in their entirety and they may overlook entire arguments that the experts did not deem worthy of summary. Accordingly, reading the Expert Determinations is not a substitute for reviewing the pleadings submitted by each of the parties; such review should not be limited to the pleadings in the SCO involving the "Losing Applicant," but should include all of the pleadings from each SCO in the set to confirm that the objections were indeed identical. As demonstrated by Annex 1 to Request for Reconsideration No. 13-14, the arguments presented in the three .CARS proceedings were virtually identical. This similarity of arguments in the various SCOs is directly relevant to whether there was substantial and reasonable cause for the inconsistent Expert Determinations.

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Additionally, if there is a pending reconsideration request, that too should be available to the Panel of Last Resort, which may then determine whether the alleged grounds for reconsideration are relevant to the review. Should the NGPC not incorporate consideration of DERCars' pending request for reconsideration, the NGPC should then afford DERCars an opportunity to be heard, as is typical for ICANN appeal procedures. *See* ICANN Bylaws, Art. IV, § 2.12 (providing that a "requestor may ask for an opportunity to be heard").

Recommendation: To ensure that the Panels of Last Resort have access to all of the materials necessary to perform a comprehensive review, the Review Mechanism should expressly state that the International Centre for Dispute Resolution will provide to the panelists and the panelists will review: the Applicant Guidebook and procedural rules; the pleadings submitted in each proceeding in the set; each of the Expert Determinations in the set; and any requests for reconsideration timely submitted to ICANN.

Determinations of the Panels of Last Resort

Background: Although the Proposed Review Mechanism indicates that each Panel of Last Resort will consist of a three-member expert panel and that ICANN will accept the Panel of Last Resort's determination, it does not indicate how each three member panel will reach its determination.

DERCars believes that the Expert Determination in the Losing Applicant's SCO should only be permitted to stand if the Panel of Last Resort unanimously concludes that it is consistent with the Standard of Review (which should be revised to follow the language of ICANN's Bylaws as discussed above). The Proposed Review Mechanism expresses a clear preference of ICANN for resolving these Expert Determinations in favor of consistency (as evidenced by the fact that the Panel "is not authorized to reverse or otherwise amend either of the two other Expert Determinations within the set"). Consistent with this approach, ICANN should require unanimity among the three member panel to uphold the inconsistent Expert Determination.

Recommendation: Consistent with other aspects of the Proposed Review Mechanism, the three-member expert panel should be required to unanimously uphold the Losing Applicant's SCO as satisfying the ICANN Bylaws requirement of substantial and reasonable cause for disparate treatment; otherwise, the objector will be deemed the non-prevailing party to the SCO.

Very truly yours,

Guy R. Friddell, III