

Mr. Bruce Tonkin
Vice-Chair, ICANN Board; Chair, ICANN Board Governance Committee
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292

May 10, 2012

RE: Reconsideration Request of ICANN Board New gTLD Program Committee
Resolution 2012.04.10.NG5

Mr. Tonkin:

Please find attached a Reconsideration Request relating to Resolution 2012.04.10.NG5 of the ICANN Board New gTLD Program Committee, submitted on behalf of the International Olympic Committee.

We are submitting the Reconsideration Request to you in your capacity as Chair of the ICANN Board Governance Committee under Article IV, Section 2 of the ICANN Bylaws, within the 30-day window of opportunity to submit such a request.

Respectfully Submitted,

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**INTERNATIONAL OLYMPIC COMMITTEE'S
REQUEST FOR RECONSIDERATION OF
ICANN BOARD COMMITTEE RESOLUTION 2012.04.10.NG5
ON PROTECTING THE OLYMPIC NAMES**

1. Requester Information

The International Olympic Committee
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C/o:

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2. Request for Reconsideration of:

Board Action - New gTLD Program Committee Resolution 2012.04.10.NG5.

3. Description of specific action you are seeking to have reconsidered

The New gTLD Committee of the ICANN Board acknowledged receiving the GNSO's recommendation to extending certain protections to the Olympic and Red Cross names at the top level, but resolved as follows on April 10, 2012:

Resolved (2012.04.10.NG5) the New gTLD Committee chooses to not change the Applicant Guidebook at this time.

4. Date of action

The New gTLD Committee of the ICANN Board passed the resolution on April 10, 2012. The resolution was posted to the ICANN website on April 12, 2012. The rationale for the resolution was made available in the Preliminary Report – Meeting of the New gTLD Program Committee, posted to the ICANN website on April 20, 2012.

5. On what date did you become aware of the action?

We became aware of the action when the resolution was posted on April 12, 2012. We became aware of the rationale for the action when the Preliminary Report was posted on April 20, 2012.

6. Describe how you believe you are materially affected by the action:

From the very outset of the new gTLD process, the International Olympic Committee has maintained that the Olympic names are strongly protected by national laws. Any proposed contract between an applicant and ICANN to register a new gTLD that is identical or similar to an Olympic mark is subject to those laws. These national laws provide enhanced protection for Olympic names above and beyond ordinary trademark law. The Applicant Guidebook should reflect the nature of these protections, in order to protect the IOC's valuable Olympic names against infringement or dilution, and in order to obviate the necessity for the IOC engaging in protracted and costly legal proceedings or relying on ordinary trademark protections to protect its unique intellectual property, which would divert finances from its humanitarian Olympic Movement.¹

Last summer, the ICANN Board adopted Section 2.2.1.2.3 of the Applicant Guidebook, which prohibits delegation of top level domains that are identical matches with the IOC names OLYMPIC and OLYMPIAD in ten languages. By resolution adopted in Singapore in June 2011, the ICANN Board committed the matter to the GAC/GNSO for further implementation.²

In September 2011 the Government Advisory Committee issued a Proposal to the GNSO to protect the Olympic and Red Cross names in new gTLDs. The GAC proposal outlined the unique tapestry of legal protections provided to the Olympic movement through laws in multiple national jurisdictions.³ This *sui generis* legislation is in place to protect against domain name registrants who seek to trade on the goodwill of the Olympic movement by making unauthorized use of the marks, often for pornographic, phishing, gambling or auction sites.

After considering input from all ICANN Stakeholder Groups, the GAC and GNSO formulated the GNSO Recommendations. Those Recommendations bring the Applicant Guidebook more closely into line with national legal standards by providing for string similarity review, for letters of non-objection to be issued by the IOC, and for fair consideration of applicants' claims of legitimate interest in similar strings. The GNSO Recommendations resolve issues arising from potentially improper applications for

¹ See Letter from Urs LaCotte and Howard M. Stupp to Kurt Pritz and Amy Stathos, available at <http://www.icann.org/en/correspondence/lacotte-stupp-to-pritz-stathos-01feb11-en.pdf> (February 1, 2011).

² ICANN Board Resolution 2011.06.20.01, available at <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm> (June 20, 2011).

³ Letter from Heather Dryden to Stephane Van Gelder, available at <https://gacweb.icann.org/download/attachments/1540128/GAC+advice+on+IOC+and+Red+Cross+Sep.+2011.pdf?version=1&modificationDate=1317031625914> (September 14, 2011).

Olympic names at an early stage. By avoiding the prolonged and expensive legal proceedings that would otherwise be required to protect the Olympic names, they benefit all concerned--applicants, ICANN, and the Olympic Movement. The Recommendations thus serve the public interest by assisting the International Olympic Committee and its National Olympic Committees in fulfilling the non-profit mission of the Olympic movement.⁴

The ICANN Board Committee's failure to adopt the recommended protection at this time would subject the International Olympic Committee and its National Olympic Committees to costly and burdensome legal proceedings that, as a matter of law, they should not have to rely upon. By subjecting the International Olympic Committee to costly and burdensome Legal Rights Objections, the New gTLD Program Committee of the ICANN Board diverts resources away from the fulfillment of this unique, international humanitarian mission.⁵

7. Describe how others may be adversely affected by the action, if you believe that this is a concern.

The GNSO Recommendations are designed to bring the Applicant Guidebook more closely in line with national laws protecting the Olympic names. Applicants' proposed contracts with ICANN for new generic Top Level Domains are subject to that national legislative protection.

The GNSO Recommendations benefit applicants and ICANN by notifying applicants of potential problems with strings similar to the Olympic names early in the delegation process. The applicants would have the opportunity to obtain a letter of non-objection or demonstrate a legitimate interest in the top level domain for which they have applied; if they do not meet these standards, they can withdraw their applications.

By refusing to adopt the GNSO Recommendations, and by leaving the Applicant Guidebook as it is at this time, the ICANN Board Committee creates a risk that applicants may attempt to register top level domains similar to the Olympic names with ICANN, in violation of national law. This would subject them to costly legal proceedings that could have been avoided, had the GNSO Recommendations been adopted.

In addition, the action may affect ICANN adversely. Ignoring the Government Advisory Committee advice, which was affirmed by a consensus vote of the GNSO Council, may add fuel to the fire of governments advocating for greater control over internet governance.

⁴ See Letter from Urs LaCotte and Howard M. Stupp to Kurt Pritz and Amy Stathos, available at <http://www.icann.org/en/correspondence/lacotte-stupp-to-pritz-stathos-01feb11-en.pdf> (February 1, 2011).

⁵ See Letter from Howard M. Stupp to Kurt Pritz and Amy Stathos, available at <http://www.icann.org/en/correspondence/stupp-to-pritz-stathos-04apr11-en.pdf> (April 4, 2011).

8. **If you are complaining of an action, are you seeking a temporary stay of the action?**

No.

9. **Detail of Board Action – Required Information – If your request is in regard to a Board action, please provide a detailed explanation of the material information not considered by the Board.**

The New gTLD Program Committee of the ICANN Board addressed the GNSO Recommendations for protection of the Olympic and Red Cross names on April 10, 2012. It declined to make the recommended changes to the Applicant Guidebook at that time.⁶ Ten days later, on April 20, the Board Committee provided the rationales for its resolution: It found that the “recommendations of the GNSO are well taken.”

The Board Committee had concerns, however, about making changes at that time, during the first round of top level applications. As it pointed out, on April 10, when it issued its resolution, the comment period for the GNSO recommendations had not closed, the implementation details had not yet been worked out, and the first round application window for top level domains has already been open for three months. For those reasons, it determined not to change the top level “at this time.”

Later, after the Board Committee issued its resolution and rationales, the first application round was delayed, due to problems with the gTLD Application System. This unforeseen delay fortuitously provides the Board Committee with the time and opportunity to reconsider the GNSO Recommendations.

Each of the rationales for the Board Committee’s resolution is set forth below, with a response showing why the Board should take the time now to reconsider it.

Rationale: “The public comment ‘reply’ period remains open on this topic through 14 April 2012, therefore any Committee action at this time – other than maintaining the status quo – could not reflect all of the inputs received on this issue.”

The public comment period and reply period are now closed. There were no substantive comments in opposition to the proposal that were not fully considered before the GNSO Council passed the motion. The reply date is now past, and the application period is still open. This rationale no longer supports the Board Committee’s action on the GNSO Recommendation.

Rationale: “The comments received to date also demonstrate the existence of opposition to the adoption of the recommendations.”

⁶ GNSO Approved Recommendations available at <http://gns0.icann.org/meetings/agenda-council-26mar12-en.htm> (March 26, 2012).

All comments, both in favor of and in opposition to the recommendations, were heard and given full consideration by the GNSO Names Discussion Group and Council, as requested by the Non-Commercial Stakeholder Group at the GNSO Council meeting on March 14, 2012 in Costa Rica.⁷ After considering all comments, the GNSO Council adopted the recommendations by a majority vote.

Additionally, the Board Committee did not consider that recommendations do not have to be universally accepted to be approved by ICANN. The existence of some opposition to the adoption of the GAC and GNSO Recommendations is not a sufficient rationale for rejecting them.

Rationale: *“Implementation details have not been worked out to address these recommendations”*

The Board Committee did not consider that the GNSO Recommendations can be implemented by string similarity review panels, which are already provided for in the Applicant Guidebook. The Applicant Guidebook, Section 2.2.1, outlines the duties of the string similarity review panels and shows how the panels will be equipped to make such determinations.⁸ The string similarity review panels are also fully equipped to consider letters of non-objection.⁹

There is ample time to work out the implementation details before the evaluation period begins--especially in view of the recent extension of the application period.

Implementation details relating to other aspects of the new gTLD program--such as the Trademark Clearinghouse and the Uniform Rapid Suspension System-- have not been fully worked out, either. That is not a sufficient rationale for rejecting the GNSO recommendation.

Rationale: *“A change of this nature to the Applicant Guidebook nearly three months into the application window – and after the date allowed for registration in the system – could change the basis of the application decisions made by entities interested in the New gTLD Program.”*

The Board Committee did not consider that applicants were placed on notice of the contemplated protection of the Olympic words well before the application window opened, so they could make their application decisions accordingly. The ICANN Board resolution adopted in Singapore in June 2011 expressly contemplated protection of the Olympic and Red Cross names at the top level in the first round and entrusted the matter to the GAC/GNSO to work out further details.¹⁰ The GAC proposal, which contemplated

⁷ Available at <http://gns0.icann.org/calendar/> (March 14, 2012, March 26, 2012).

⁸ Applicant Guidebook, Module 2, Section 2.2.1.1.1, available at <http://newgtlds.icann.org/en/applicants/agb> (January 11, 2012).

⁹ Applicant Guidebook, Module 2, Section 2.2, available at <http://newgtlds.icann.org/en/applicants/agb> (January 11, 2012).

¹⁰ ICANN Board Resolution 2011.06.20.01, available at <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm> (June 20, 2011).

string similarity review for these terms at the top level, was published on September 14, 2011.¹¹ The GNSO Names Discussion Group was formed in 2011 and was deeply engaged in discussions about protection at the top level before the application window was opened for the first round of applications.

All applicants were placed on notice of these developments, which were fully publicized. Transcripts were made available to the public within twenty-four hours of every GAC/GNSO discussion group teleconference.¹² The scope of protection was publicly considered and voted upon the entire time. The public actively participated in the GNSO Council consideration of the motion at the meeting in Costa Rica on March 14, 2012.¹³ The industry press also reported on the consideration of the protections.¹⁴ In view of these public, publicized developments, no diligent applicant could have made good-faith decisions based on the assumption that there would be no string similarity review for the marks protected in Section 2.2.1.2.3 of the Applicant Guidebook.

Beyond that, all applicants' proposed contracts with ICANN are already subject to existing national law, which provides strong protection to the Olympic words. The GNSO Recommendations are designed to bring the Guidebook more closely in line with these preexisting legal standards, to which applicants and ICANN are subject. For these reasons, applicants could not make decisions based on standards lower than the GNSO-Recommendations.

Furthermore, it is well known that the Applicant Guidebook is not in its final form, and is subject to change. For example, text on sensitive and controversial strings is going to be removed from the Applicant Guidebook at the direction of the GAC.¹⁵ It is incongruous to change the Guidebook this way at the GAC's behest, yet to refuse recommendations backed by both the GAC and the GNSO. The sophisticated entities that are applying to become Top Level Domain registries are well aware that the Applicant Guidebook is not in its final form, and is subject to change. This rationale does not support the action by the Board Committee.

Rationale: "The status quo is that the Applicant Guidebook already provides several other protections available to the IOC and Red Cross for the top level, including a moratorium on the delegation of certain names at the top level in the first round of applications; an objection process which allows parties with standing to submit an objection on the grounds that an application infringes its existing legal rights; and the GAC Early Warning and Advice Processes."

¹¹ Letter from Heather Dryden to Stephane Van Gelder, available at <https://gacweb.icann.org/download/attachments/1540128/GAC+advice+on+IOC+and+Red+Cross+Sep.+2011.pdf?version=1&modificationDate=1317031625914> (September 14, 2011).

¹² Available at <http://gns0.icann.org/calendar/>.

¹³ Available at <http://gns0.icann.org/calendar/> (March 14, 2012).

¹⁴ See e.g. Kevin Murphy, *Olympic Showdown Spells Doom for ICANN, Film at 11*, available at <http://domainincite.com/olympic-showdown-spells-doom-for-icann-film-at-11/> (March 19, 2012).

¹⁵ GAC Communiqué – San Jose, Costa Rica, available at https://gacweb.icann.org/download/attachments/9470303/CR_Communique_FINAL.pdf?version=1&modificationDate=1331878654000 (March 16, 2012).

When the Board Committee considered the GNSO Recommendations for enhanced protection of the Olympic names, it did not consider the unique status of the legal protections afforded to the International Olympic Committee. National laws provide enhanced protection for Olympic names above and beyond ordinary trademark law. Under these national laws, the Olympic names cannot be used by unauthorized persons for any commercial goods or services, even if that use is unlikely to cause confusion. To subject the IOC to use of trademark Rights Protection Mechanisms would not reflect the spirit and intent of the sui generis national laws that protect Olympic names.

Last summer, the ICANN Board adopted Section 2.2.1.2.3 of the Applicant Guidebook, which prohibits delegation of top level domains that are identical matches with the IOC names OLYMPIC and OLYMPIAD in ten languages. This moratorium acknowledges that the Olympic names are entitled to special protection, but is not fully aligned with the national legislation protecting the Olympic words. By resolution adopted in Singapore in June 2011, the ICANN Board entrusted to the GAC and GNSO the issue of implementing proper standards for protection of the Olympic and Red Cross names.¹⁶

The GAC and GNSO accordingly formulated the GNSO Recommendations. Those Recommendations are designed to bring the Guidebook more closely into line with national legal standards. The standards set forth in the Recommendations avert improper applications for Olympic names at an early stage. By avoiding the prolonged and expensive legal proceedings that would otherwise be required to protect the Olympic names, the Recommendations benefit all concerned--applicants, ICANN, and the Olympic Movement.

It makes little sense to reject those Recommendations at this time, and to relegate the International Olympic Committee to the costly, time-consuming legal proceedings that the GNSO Recommendations are designed to avoid. Subjecting the International Olympic Committee to costly and burdensome legal rights proceedings would divert funding, time, and attention from the unique Olympic global humanitarian mission, as described by various communications to ICANN from the International Olympic Committee and from the GAC.¹⁷

¹⁶ ICANN Board Resolution 2011.06.20.01, available at <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm> (June 20, 2011).

¹⁷ Letter from Urs LaCotte and Howard M. Stupp to Kurt Pritz and Amy Stathos, available at <http://www.icann.org/en/correspondence/lacotte-stupp-to-pritz-stathos-01feb11-en.pdf> (February 1, 2011), Letter from Howard M. Stupp to Kurt Pritz and Amy Stathos, available at <http://www.icann.org/en/correspondence/stupp-to-pritz-stathos-04apr11-en.pdf> (April 4, 2011), Letter from Heather Dryden to Stephane Van Gelder, available at <https://gacweb.icann.org/download/attachments/1540128/GAC+advice+on+IOC+and+Red+Cross+Sep.+2011.pdf?version=1&modificationDate=1317031625914> (September 14, 2011).

10. What are you asking ICANN to do now?

Adopt the GNSO Recommendations for Protection of the Olympic and Red Cross names as a matter of urgency.

11. What grounds of justification support your request?

See answers to number 9 above. The rationales offered by the ICANN Board Committee do not warrant its resolution refusing to adopt the GNSO Recommendations at the top level at this time.

The GNSO Recommendations to protect the Olympic and Red Cross names should be adopted at this time because they comport with national laws protecting the Olympic and Red Cross names; because the public has had the opportunity to comment on the Recommendations during the comment period, which is now concluded; because both the GAC and GNSO have voted to recommend these protections; because the recommended protections can be implemented through string similarity panels; because applicants have been afforded ample notice of the protections contemplated in the Recommendations; and because the GNSO Recommendations benefit all concerned--applicants, ICANN, and the Olympic Movement--by averting improper applications for Olympic names at an early stage, and by avoiding the prolonged and expensive legal proceedings that would otherwise be required to protect the Olympic names.

For the above reasons, the GNSO Recommendations should be adopted at this time.