

## EXPLANATORY MEMORANDUM

### “QUICK LOOK” PROCEDURE FOR MORALITY AND PUBLIC ORDER OBJECTIONS

Any person or entity has standing to submit a Morality and Public Order Objection. This broad rule of standing, while justified by the universal nature of such objections, may also open the door to objections that are frivolous and/or abusive. Adopting a “quick look” procedure for reviewing Morality and Public Order Objections is therefore appropriate. The purpose of the quick look is to provide for the expeditious review of objections and, where appropriate, the dismissal of objections that are frivolous and/or abusive.

Issues that must be addressed in formulating this “quick look” procedure include: (a) What standard should be applied? (b) What binding effect will the determination have? (c) Who will review the objection? (d) When will this review occur? These issues are related to each other. For example, the timing of the “quick look” depends, in part, upon who does it.

#### (a) What standard should be applied?

A formulation of the standard for “quick review” that captures the various types of frivolous or abusive objections at issue here is: “**manifestly unfounded and/or an abuse of the right to object**”.<sup>1</sup>

A Morality and Public Order objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as the grounds for such an objection. See Draft Applicant Guidebook, § 3.4.3.<sup>2</sup> For just two examples:

- A valid objection may be filed against a string that incites or promotes violent lawless action. In contrast, an objection against a string that on its face merely promotes action that may be illegal but is not violent would be manifestly

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<sup>1</sup> Compare Article 35(3) of the European Convention on Human Rights, which provides:

“The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.”

<sup>2</sup> The four identified standards are: (i) incitement to or promotion of violent lawless action; (ii) incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin; (iii) incitement to or promotion of child pornography or other sexual abuse of children; or (iv) a determination that an applied-for gTLD string would be contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law.

unfounded. Examples of the latter may range from peaceful civil disobedience to tax evasion.

- Defamation does not fall within the categories that have been defined as grounds for Morality and Public Order Objections.<sup>3</sup> Thus, while the victim of an alleged defamation expressed by a gTLD string may well have legal remedies in one or more jurisdictions, a Morality and Public Order Objection against the string, based solely upon the alleged defamation, would be manifestly unfounded.

A Morality and Public Order objection that is manifestly unfounded may also be an abuse of the right to object. An objection may be framed to fall within one of the accepted categories for Morality and Public Order objections, but other facts may clearly show that the objection is abusive. For example, multiple objections filed by the same or related parties against a single applicant may constitute harassment of the applicant, rather than a legitimate defense of legal norms that are recognized under general principles of international law. An objection that attacks the applicant, rather than the applied-for string, could be an abuse of the right to object.

**(b) What binding effect will the determination have?**

The review of an objection to determine whether it is manifestly unfounded and/or an abuse of the right to object would normally be a review of the merits of the objection. If there is a finding that the objection is, indeed, manifestly unfounded and/or an abuse of the right to object, that decision should be final, within the scope of the New gTLD Dispute Resolution Procedure (the “Procedure”). In contrast to the DRSP’s administrative review and dismissal of an objection that does not comply with Articles 5-8 of the Procedure, which is without prejudice to the objector’s submission of a new objection that complies with the Procedure (Article 9(b)), the dismissal of an objection that is manifestly unfounded and/or an abuse of the right to object would be final. The objector could not re-file the objection and try again.

Hence, the dismissal of an objection that is manifestly unfounded and/or an abuse of the right to object would be an Expert Determination, rendered in accordance with Article 21 of the Procedure.

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<sup>3</sup> There is such diversity among the laws of different countries in this domain that one cannot identify generally accepted legal norms that are recognized under general principles of international law.

**(c) Who will review the objection and make the decision?**

It is a fundamental principle of the New gTLD Program that objections to applied-for gTLDs will be heard by independent experts. It would be inconsistent with this principle for ICANN to intervene at an early stage of the dispute resolution procedure and screen out objections that it considers to be manifestly unfounded and/or an abuse of the right to object.

All objections must be filed with the appropriate DRSP – in the case of Morality and Public Order objections, the International Centre for Expertise of the International Chamber of Commerce. The DRSP could, in theory, review objections to determine whether they are manifestly unfounded and/or an abuse of the right to object. However, as explained above, the procedure under consideration here is a review on the merits, leading to an expert determination. Such review would be inconsistent with purely administrative nature of the DRSP's role.

A procedure could be established whereby a third party (*e.g.*, a standing panel of experts) was given the authority to review Morality and Public Order objections and to dismiss those that it determines to be manifestly unfounded and/or an abuse of the right to object. This preliminary review by a third party could presumably be carried out quickly. However, such review would add expense and complexity to the New gTLD Dispute Resolution Procedure: In order to be useful and efficient, the review would have to be carried out immediately after the filing of objections (*i.e.*, before the applicant has filed its response, pursuant to Article 11 of the Procedure), which means that all Morality and Public Order objections would have to be reviewed by the third party. The relatively slight gain in speed does not appear to justify the added expense and complexity.

It appears, therefore, most appropriate for the Panel itself to review the objection quickly and to dismiss it summarily if the Panel finds the objection to be manifestly unfounded and/or an abuse of the right to object. It is the Panel that has the authority and the expertise to determine that an objection is manifestly unfounded and/or an abuse of the right to object if that objection is filed under any of the four standards for Morality & Public Order; it is the Panel that is empowered under the Procedure to render an expert determination on the merits.

If several objections have been consolidated, pursuant to Article 12 of the Procedure, the Panel would review all of them and dismiss those, if any, that it found to be manifestly unfounded and/or an abuse of the right to object.

Some have argued in relation to various dispute resolution processes that panelists might tend to find in favor of the respondent on a quick look process so the proceedings continue to the merits. While such a possibility cannot be completely dismissed, it is the general nature of a dispute resolution process that the parties pay panelists. Further, in light of the types of panelists being sought for M&PO objections (i.e., eminent jurists with internal reach and experience) and balancing all factors discussed above, it seems most appropriate to rest the responsibility with the Panel. Further, it is contemplated that panelists and DRSPs will be scrutinized as the objection process for new gTLDs evolves to ensure they are performing within the confines of the rules and procedures.

**(d) When will this review occur?**

The quick review of the objection would be the Panel's first task, after its appointment by the DRSP. It is true that the Panel will not be appointed until after the applicant's submission of its response to the objection and its payment of the filing fee. However, the Panel should benefit from having the applicant's views on record when making its quick review determination. Indeed, if the applicant has not argued that the objection is manifestly unfounded and/or an abuse of the right to object, the Panel would not normally reach that conclusion itself.

If the quick review does lead to the dismissal of the objection, the proceedings that normally follow the initial submissions (including payment of the full advance on costs) would be avoided, and it is currently contemplated that the filing fee paid by the gTLD applicant/respondent would be refunded, pursuant to Procedure Article 14(e). In addition, the existence of a provision in the Procedure that gives the Panel the power summarily to dismiss objections that are manifestly unfounded and/or an abuse of the right to object should deter some frivolous Morality and Public Order Objections.

**(e) Conclusion**

In order, therefore, to implement a “quick look” procedure for Morality and Public Order objections, ICANN added the following text to Article 20 (“Standards”) of the Procedure:

“The Panel has the power to dismiss at any time a Morality and Public Order Objection that it finds to be manifestly unfounded and/or an abuse of the right to object. Such dismissal shall be rendered as an expert determination pursuant to Article 21 of the Procedure.”