



OPERATING EUROVISION AND EURORADIO

DATE

6 march 2015

BY EMAIL AND REGISTERED MAIL:

E-mail: john.jeffrey@icann.org

John O. Jeffrey, Esq.

General Counsel & Secretary
ICANN

General Counsel Office
12025 Waterfront Drive, Suite 300
CA 90094-2536, Los Angeles
UNITED STATES OF AMERICA

SUBJECT:

Abuse of ICANN Appeal Procedures

*Afilias Limited, BRS Media, Inc. and Tin Dale, LLC
concerning the .RADIO TLD*

Dear Mr Jeffrey,

On 25 February 2015, it has been brought to our attention by a Program Analysis and Operations Manager of the Global Domains Division of the Internet Corporation for Assigned Names and Numbers ("ICANN") that the companies in the abovementioned reference (collectively "Complainants") have commenced a Cooperative Engagement Process ("CEP") with ICANN regarding the .RADIO generic Top-Level Domain ("TLD"), following on from the rejection of their Reconsideration Request by the ICANN Board Governance Committee.

We should first like to raise the question why, under such circumstances as these, the EBU was not properly informed of the commencement of this CEP, given that the EBU as TLD applicant is directly involved and an obviously interested party to these proceedings. We are not aware of any provision in ICANN's Bylaws that makes this particular process sufficiently transparent to the TLD applicant in such cases.

Secondly, as will be explained in more detail below, Complainants' efforts to delay and obstruct the .RADIO application process lack any merit, are in conflict with ICANN's own bylaws', and are directly harming EBU and the radio community it represents. Accordingly, the EBU should like to request ICANN to please confirm in writing, by **Friday, 13 March 2015** at the latest, that ICANN will:

- (1) conclude the Cooperative Engagement Process with Complainants;
- (2) dismiss any request for an Independent Review Process regarding the .RADIO gTLD; and
- (3) immediately allow EBU's application for .RADIO to proceed through the contracting and testing phases with TLD.

EUROPEAN BROADCASTING UNION

L'Ancienne-Route 17A
PO Box 45
1218 Le Grand-Saconnex
Geneva, Switzerland

Tel. +41(0)22 717 21 11
www.ebu.ch

1. ICANN properly approved EBU's Community-Based application for the .RADIO TLD and rejected Complainants' request for reconsideration

We should like to recall that Complainants already sought reconsideration of the .RADIO application decision by ICANN in favour of the EBU and that they had their request denied by ICANN's Board Governance Committee. It is our understanding that Complainants failed to state any proper grounds for reconsideration. In the EBU's view, there is no new or additional, substantive or procedural basis for Complainants' current Cooperative Engagement Process, let alone any reason whatsoever to start an Independent Review Process. It seems to be the obvious and sole intention of the Complainants to impede, hinder or delay EBU's legitimate interest in developing the .RADIO gTLD, rather than to the appeal ICANN's decision.

The EBU applied for the .RADIO TLD on a "community-priority" basis with the support and engagement of the global radio community, including, among the relevant organizations in the sector: not only all the world's broadcasting unions, that officially represent radio broadcasters at ITU and UNESCO, but also AMARC (world community radio), AER (commercial radio), the Metropolitan Opera and many others. The EBU was invited to Community Priority Evaluation ("CPE") on 19 February 2014. The CPE Panel's Report was completed on 10 September 2014, and concluded that EBU's community-based application prevailed in its contention set.¹ ICANN subsequently accepted the CPE Panel's report, allowing only EBU's application for the .RADIO TLD to proceed.

As relevant to the gTLD application process, ICANN's Bylaws provide: "Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ... to the extent that he, she, or it have been adversely affected by ... one or more staff actions or inactions *that contradict established ICANN policy(ies)* " [emphasis added].² Complainants filed a Reconsideration Request with ICANN's Board Governance Committee ("BGC"), apparently claiming that the CPE result was contrary to policy and they were thus harmed by their elimination from contention.

The BGC rejected Complainants' request. In a final determination issued on 20 January 2015, the BGC concluded that Complainants had failed to "identify any misapplication of policy or procedure by ICANN staff or the CPE Panel." Instead, the BGC found that Complainants "simply disagree[d] with the CPE Panel's determination and scoring of the Application (...)", and that "substantive disagreements with the CPE Panel's Report (...) are not proper bases for reconsideration".³ The BGC thus denied Complainants' request on the ground that Complainants had "failed to show that either the CPE Panel or ICANN staff acted in contravention of established policy or procedure (....)".⁴

Given the BGC's strongly-worded denial of Complainants' reconsideration request, EBU was surprised to learn from ICANN's list of pending matters that ICANN had apparently permitted

¹ See <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

² ICANN Bylaws, Article IV, § 2.2.

³ Determination of the BGC Reconsideration Request 14-41, at p. 1, available at <https://www.icann.org/en/system/files/files/determination-afiliat-et-al-20jan15-en.pdf>.

⁴ *Id.* at p. 1

Complainants to initiate a Cooperative Engagement Process ("CEP") on 2 February 2015.⁵ As a direct result of this ongoing CEP, EBU's .RADIO TLD application continues to be in 'on hold' status as of the date of this letter.

2. *Complainants' efforts to delay and obstruct the .RADIO application process are procedurally improper and substantively meritless*

ICANN's decision to engage in a CEP with Complainants result in delays and uncertainty which are both harming the EBU and its many supporters in the radio community. ICANN's Bylaws provide that the CEP is not an independent process, but a recommended proceeding to a request for independent review ("IRP"), intended only "for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP."⁶ However, the IRP is expressly limited to a review of ICANN Board actions⁷, and thus cannot be (ab)used to hinder the EBU in its activities which are in line with the Board's action.

Apart from the question whether the Complainants have met the required deadlines,⁸ the EBU feels that the IRP would not be applicable in this case. For the CPE Panel's report, and ICANN's acceptance of that report, are clearly not Board decisions or actions. There are no relevant Board meeting minutes on which a CEP or IRP could be based. Because the IRP does not contemplate review of staff actions, ICANN has no mandate to engage in a CEP - being nothing more than an informal precursor to an IRP - with Complainants.

Finally, there is nothing in ICANN's Bylaws that permits Complainants to employ the CEP or IRP processes to reconsider the CPE Panel Report finding that the EBU prevailed in its contention set for the .RADIO TLD. Complainants filed a Reconsideration Request - their only recourse following the CPE Panel Report - and the BGC denied that request in a well-reasoned written determination that concluded the CPE Panel had not violated any established policy or procedure. As ICANN's Bylaws stipulate unambiguously: "The Board Governance Committee's determination [of a Reconsideration Request] is final and establishes precedential value."⁹

The lack of respect for this clear provision and Complainants' overall behaviour demonstrate their pattern of improperly pursuing one or more of the ICANN accountability mechanisms where they failed to prevail in their contention set. It is well past time for ICANN to put a halt to Complainants' dilatory tactics and allow the EBU's application to proceed.

3. *The delays caused by Complainants are directly harming both the EBU and the global radio community*

The EBU's .RADIO application has, as of the date of this letter, been in process for more than two years. As the prevailing applicant for the .RADIO TLD, EBU rightfully wishes to execute a Registry Agreement with ICANN for the .RADIO TLD as soon as possible, so that

⁵ See <https://www.icann.org/en/system/files/files/cep-irp-pending-25feb15-en.pdf>.

⁶ ICANN Bylaws, Article IV, Section 3.14.

⁷ *Id.*, Section 3.2.

⁸ *Id.* at Section 3.3.

⁹ *Id.* at Section 2.15. This provision should foreclose any claim by Complainants that the BGC's denial of their Reconsideration Request can be challenged through a CEP/IRP.

it can commence the difficult work of developing a successful domain that uniquely serves the interests of the global radio community. Should a .RADIO launch be further delayed, the EBU and the radio community would undoubtedly suffer harm as a result of not being able to offer its .RADIO services for an indeterminate period.

The .radio TLD is a community-based application to provide the radio industry with a platform through which radio broadcasters and other radio industry stakeholders worldwide will collaborate to promote audio content distribution and community-wide services, promoting quality and competition in the public interest, for the benefit of listeners and Internet users. The EBU and its partners in the global radio community hope to create an online basis governing the radio community for the greater good. The EBU has therefore consistently sought to exemplify best practices and good governance throughout the development and success of its application, in order to

- (a) facilitate the creation and dissemination of audio content and foster digital communications amongst and within entities and individuals composing the Radio community and listeners throughout the world;
- (b) advocate the fundamental rights of communication and freedom of expression through radio services, and in particular the right of radio broadcasters (and other radio providers) to communicate;
- (c) provide a platform for the development of radio and .radio-specific services in the digital space;
- (d) provide the community with a trusted and secure namespace enabling and facilitating its transformation into the next generation radio industry;
- (e) promote the Radio community and the radio industry in general and foster the development of both industry and community;
- (f) reduce cybersquatting and abusive acquisition of 2nd level domain names as much as possible, in view of bad experiences with comparable TLD's in the media world.

While .RADIO is EBU's sole TLD focus, most of the Complainants operate vast portfolios of TLDs: Afiliis is directly involved in over 40 gTLD applications (indirectly in many others), including .POKER, .INC, .LOTTO, .WEB, while Tin Dale/Donuts in another 300+ of such applications, including .MEDIA, .SEARCH, .VIDEO; BRS Media already owns the .AM and .FM domains. This makes it apparent that the sole reasons for their behaviour are based on purely commercial motives.

In particular, they do not share a community vision for .RADIO and do not enjoy the support of the radio community, as they in fact deny that there is such a community. Their lack of good faith is demonstrated by their ongoing efforts to obstruct and delay the EBU's application.

In sum, based on the substantive and procedural requirements set forth in ICANN's Bylaws, there is no basis for Complainants' continuing efforts to review and overturn the CPE Panel's

conclusion that EBU prevailed in its contention set for the .RADIO TLD. Accordingly, as soon as possible, the EBU requests that ICANN will proceed as per the aforementioned request.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Alain Artero', written over a horizontal line.

Alain Artero
Project manager
European Broadcasting Union

cc (via email only):

Afilias: jkane@afilias.info

BRS Media: gtbundy@brsmedia.fm

Tin Dale LLC/Donuts Inc.: tindale@donuts.co

Amy Stathos, Deputy General Counsel, ICANN: amy.stathos@icann.org

Chris LaHatte, Ombudsman, ICANN: ombudsman@icann.org