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AT-LARGE ADVISORY COMMITTEE

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Statement of the Committee

To the Public Consultation on the Implementation Recommendation Team (IRT) Final Report of 29th May 2009

Introductory Text
By the Staff of ICANN

This Statement was drafted by ALAC Member Patrick Vande Walle at the request of the ALAC, and follows on from the ALAC Statement on the Draft IRT Report (AL.ALAC/ST.0509/2.Rev1) of 12th May 2009.[1]

The original draft of this document was posted for At-Large community consultation on 13th June, closing on 26th June; several members of the community made comments.[2] This final text synthesized those comments made and a vote of the ALAC began on 2nd July, ending on 6th July.

The results were announced on 7th July by the Staff, said result being that the Statement was endorsed by a vote of 11-0-0. The result may be verified under the following URL: https://www.bigpulse.com/pollresults?code=rTMLwJFB8EWRmdUuR8ir

[End of Introduction]

[1] Available at http://www.atlarge.icann.org/correspondence/correspondence-15may09-en.htm.

[2] The draft statement, and the comments made by members of the community, may be reviewed at https://st.icann.org/alac-docs/index.cgi?statement_of_the_alac_on_the_irt_s_final_report_al_alac_st_0609_1.

ALAC Statement on the IRT's Final Report

The At-Large Community recognizes the large amount of work done in a very short time by the IRT working group and thanks the working group for this first step. We are also appreciative of the need to minimize name confusion, as well as forms of abuse such as phishing. However, we have significant concerns about the process that created the IRT, as well as what we believe to be needless haste in its action.

The entire new-gTLD policy development process has been deliberately cautious, with multiple drafts of the application guide and associated comment periods. We are sorry to see that at least one recommendation of the IRT working group, the thick WHOIS, has already been integrated in the application guide, although the IRT report is still being reviewed by the communty. We do not at this stage say if we think that the thick WHOIS model is good or bad, but we wish to highlight the fact that this has been included in the DAG before any consultation took place.

Furthermore, we regret that no representatives of the individual users, domain name registrants or consumers have been part of the drafting group. We are aware of a number of qualified individuals who expressed interest in participating in the IRT but were summarily refused without reason. The IRT also had no representatives of the potential new gTLD operators, the very groups that will be expected to implement the policies resulting from this process.

The undue haste of the process, the refusal to include representatives from the stakeholders to be affected by the IRT's policies, and the complete lack of transparency in the group's selection calls into question the legitimacy of the group's conclusions. We expect that future developments will be more inclusive of the entire ICANN community.

In addition, this report requires an in-depth legal analysis of the IRT recommendations by an independent third party -- to see how its recommendations comply with relevant international conventions and treaties -- before ICANN commits to support the Globally Protected Marks List proposal or the Uniform Rapid Suspension system.

ICANN, in its limited technical coordination role as declared in its mission, has absolutely no authority to create any international or even global law to change the territorial nature of trademark rights. What is recommended by IRT is to set up a private ordering through DNS governance by ICANN to create a *de facto* global enforcement for trademarks, irrespective of legal limits of trademark protection. We do believe this be an obvious mission creep for ICANN.

IP Clearinghouse, Globally Protected Marks List and associated rights protection mechanisms, and standardized pre-launch rights protection mechanisms

Given our reservations expressed above, this section requires significantly more input from all interested and affected stakeholders. As it is proposed, the Globally Protected Marks List poses a significant concern related to community-based gTLDs. We can envision instances in which that a community-specific mark may be better known to local communities, in which case it is the "global mark" that is the cause of end-user confusion. Simply put, The IRT Proposals are both outside the scope of trademark law and outside the scope of ICANN. ICANN can welcome the creation of a worldwide trademark database, either by WIPO or through a private, market-based solution, but it should neither make this task its own nor delay its own work while others build and populate an IP Clearinghouse.

Trademark registrants should be entitled to trademark protection, but not a first-right of registration. Prospective domain name registrants should have at least as good an opportunity as anyone else in the world to register a domain name that they intend to use for any lawful, non-infringing purpose. For this reason, "Rights Protection Mechanisms" ("RPMs") should protect trademarks, not allocate domain names. Any RPM that acts as an allocation mechanism should be rejected. By that test, a significant effect of the IRT's "GPML" is to allocate domain names to a certain category of trademark registrant, usurping registration opportunities from registrants, even in countries where the so-called "GPML" has no registration or effect.

The premise of the GPML is that certain words cannot be used in other than their trademark sense, anywhere those words are used in the DNS, anywhere in the world. In other words, trademark owners do not have the right, under law, to remove from our language basic words like pony, sun, tide and cheer. Neither do they have the right of "first dibs" or rights of first refusal to these ordinary words in new gTLDs. Trademark owners don't own strings of characters; their trademark is only a limited right to use the mark for an applied-for set of goods and services subject to territorial and other well known recognized limitations. That's the agreement trademark owners accept when they apply for and receive a trademark.

Uniform Rapid Suspension System (“URS”)

Again pending our reservations expressed above to the legality of the proposed system, we believe much of its fairness will depend on the implementation.

A 14-day notice is insufficient to allow individual domain name registrants to react to complaints. In addition, we are concerned about the method of delivery of the notice. The volume and nature of spam has led to e-mail being unreliable as a means of communications for such important notices. The validity of e-mail notifications that may be used in subsequent legal proceedings may easily be challenged under most jurisdictions. Therefore, we believe that any notification needs to be done by registered or certified paper mail. If e-mail is being used at all, it should be used as a backup to paper documentation, and must implement the highest security standards by digitallly signing both headers and content. This would greatly help both in bypassing spam filters and as a legal proof.

As well, given the global nature of the Internet, suspension notices may be ignored or misunderstood in good faith by recipients who do not understand the documents' language. Any such notices must be sent in the official language(s) of the country of delivery, and include text (or a pointer to text) in local language detailing recipients' rights under the process.

The implementation of the URS "takedown" process is needlessly complex and provides inadequate protection to registrants. At a minimum, the right to take down a domain name must have a fixed expiry after its registration (we recommend either 90 or 120 days). This process must be used a tool to clean up unlawful registrations at launch, not for routine trademark enforcement. At some point, registrants need to have confidence that their names are theirs and will not be taken down by a process such as this one. If the URS is intended to be more than such a new-domain tool, it must go through the normal GNSO policy-development process before implementation.

The current URS proposal does not indicate which mechanisms will be put in place to guard against frivolous or other abuse of the URS process. The policy must include substantive penalties and other disincentives to minimize groundless or punitive threats.

"Post Delegation Dispute" is Inappropriate.

The IRT section on a proposed “Post Delegation Dispute” mechanism is poorly described, but the intent seems to be to ask ICANN to expand its contractual compliance program to a registry’s treatment of trademarks. Many of the items described in this section, such as a registry creating an environment for trademark abuse, are hard to measure and inappropriate for either dispute resolution or contractual compliance. The best remedies for the sorts of problems described in this section are in courts of law, not in a new dispute mechanism.

WHOIS requirements for new TLDs

Our main concern is respect of privacy of the personal data of individuals, as guaranteed under the laws of several countries. We are surprised that the only reference to privacy in the report is about privacy as a (paid for) service. That the issue of privacy as a legal or constitutional right has not even been examined, calls into question the enforceability of these provisions. We encourage the IRT to investigate this matter further, with the assistance of stakeholders with expertise on privacy issues.
A full and fair 60-day public notice period -- with special notice to all the Data Protections Commissioners who have participated in past WHOIS proceedings -- would provide a minimum of the input needed for the IRT's new "WHOIS requirements for new TLDs" section.

Furthermore, the legal need for registrar and registry operators to comply with local laws or international frameworks like the Safe Harbor Agreement would in effect prevent such a public WHOIS system from being effective.

As stated in other contexts before, the ALAC believes that the current WHOIS system should be adapted to balance the right to the privacy of individuals with the legitimate concerns of the IP rights holders, law enforcement agencies and other clearly identified parties. We believe the .tel model is a good compromise and suggest to the board to implement this model in all new gTLDs, whether or not there would be a legal requirement for the registry operator. We think there would be an added value for the Internet users at-large to have a coherent and similar WHOIS system, regardless of the gTLD. We also see advantages for ICANN to have only one model of WHOIS in registry agreements, now ICANN is going for a more industrialized model.

Use of algorithm in string confusion review during initial evaluation

The ALAC reaffirms the position taken in its recent comments on the new-gTLD Applicant Guide, that evaluation of string confusion must be restricted to visual similarity, and not be inappropriately enhanced to include "aural or meaning". This is a very subjective area that would open the door to endless disputes.

Finally, we consider that the policies to be decided should be applied to existing gTLDs, too. If they would be limited to the new gTLDs, this would put them at a competitive disadvantage with the incumbents.