

The Morality and Public Order Objection (MAPO)

In reality, MAPO constitutes the most problematic issue within DAG. Its problem has two dimensions: first, the concept of 'Morality and Public Order' has been arbitrarily 'borrowed' by the Paris Convention for the protection of Industrial Property, which states in article 6(B)(iii): *"Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases: (iii) when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order."*

ICANN has taken this provision completely out of context by inserting it within DAG, failing to consider the following: not all domain names are trademarks, therefore the Convention has no jurisdiction; and, more importantly even if it were to have jurisdiction, the Paris Convention affords each state to determine its own standards on Morality and Public Order. On the contrary, ICANN seeks to assign an independent panel. International law has refrained from seeking to establish international standards on morality and public order and historically this right has always been associated with the right of sovereignty. The connotation of the term is so subjective, that morality and public order can simply not be compartmentalized into specific standards.

We feel that ICANN fails to understand the dangers that such a provision will create and its impact upon fundamental constitutional rights and civil liberties. Assigning the International Chamber of Commerce (ICC) – a consortium of business or as their website claims *"the voice of world business championing the global economy as a force for economic growth, job creation and prosperity"* is troublesome and manifests a great amount of ignorance on the nature of morality and public order disputes. MAPO issues cannot be determined according to business practices or rationales; they are domains of national states.

Moreover, the criteria ICANN will ask these panels (which we are still unaware of the way they will be composed) to apply are also problematic: *"Incitement to or promotion of violent lawless action; • Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin; • Incitement to or promotion of child pornography or other sexual abuse of children; or • 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."*

How can a mere domain name registration 'incite' anyone to do anything? The concept of incitement incorporates that of intent and even in the most outrageous domain name registration we cannot possibly find intent. The only way to determine whether a domain name registration incites people to commit an unlawful act would be to also check content. In Brussels, NCUC raised this very comment with no convincing response. I would, therefore, like to ask ICANN

to produce to the wider community examples of names that incite users to commit unlawful acts.

I would like, therefore, to suggest the following:

A 'review panel', limited to only provide recommendations about names. The panel will be comprised of experts in international/criminal law, will be divergent to correspond to issues of geopolitics, religion, etc and will provide recommendations that the applicant may use before the European Court of Human Rights or the International Criminal court (depending on the basis of the objection – human rights vs criminal activities). Panels will have to be composed according to geography, cultural divergence and will not be associated with any business interests but will represent the interest of states/regions and will not answer to business dogmas.

Some gTLDs will not be created for commercial purposes so the ICC is not the appropriate forum for morality and public order determinations. International courts, on the other hand, are. They constitute the only bodies that we can turn to for such delicate and controversial issues. I am surprised that the experts ICANN claims to have consulted have not suggested International courts for this kind of disputes.

I would like to urge you to think very carefully when implementing this mechanism and the potentially detrimental effects it will have on the DNS and the Internet in general.