



IPC Reply Comment on the Proposal for the Use of Mandatory Policy Advisory Boards for Regulated Industry Sector and Consumer-Trust-Sensitive New gTLD Strings

I. INTRODUCTION.

Intellectual Property Constituency ("IPC") appreciates this opportunity to provide comments to the At-Large Advisory Committee ("ALAC") which is seeking to obtain feedback and collect community input concerning the development of the Proposal for the Use of Mandatory Policy Advisory Boards for Regulated Industry Sector and Consumer-Trust-Sensitive New gTLD Strings (the "PAB Model"), and to which TLD strings it may best apply. The IPC further appreciates that the ALAC will analyze the results, and work in collaboration with other community members to determine subsequent action to address important issues of consumer safety, trust and confidence.

The IPC joins those calling for greater safeguards for certain sensitive strings, one such option being the PAB Model. The development of these safeguards, however, should involve the entire ICANN community and a consideration of the impact on new gTLD applicants, consumers/users, and businesses and it should respect all substantive and procedural laws under the applicable jurisdictions. Pursuant to the ICANN multi-stake holder process, the IPC supports the initiation of greater community discussion and input in order to develop (i) a framework for identifying strings that are regulated, invoke a higher level of trust or carry a higher level of risk associated with Internet user harm and (ii) a range of solutions and safeguards applicable to these strings and mechanisms to ensure compliance and accountability with such safeguards and solutions.

II. THE PAB MODEL RATIONALE.

The intention behind the PAB Model is to put forth a solution to a problem that was not expressly addressed by the ICANN community during the development of the new gTLD Program. That problem, as identified in the PAB Model's rationale and in the GAC Beijing Communiqué, was the threat to consumers by "strings that are linked to regulated or professional sectors" as these strings are "likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm".¹ The GAC identified eight (8) recommended safeguards for such identified "Category 1" strings.

In part as a response to these recommendations, ICANN instituted Public Interest Commitments ("PICs"). The IPC agrees with the drafters of the PAB Model that the PICs do not provide a sufficient mechanism to protect consumers. As an initial matter, there is a disincentive in these consumer protection matters because the injuries that the GAC, the PAB Model proponents and the IPC are concerned about have not occurred yet. However, experience has shown that such problems are foreseeable and are threatened. As a result, unless a person, business or organization wants to be a good citizen and prosecute such an issue prospectively (if they are even deemed to have standing at this stage); there is little present motivation to do so.

With respect to PICs, the PICDRP framework as currently proposed requires a lengthy, expensive, adversarial process.² There are numerous barriers to its effectiveness as a remedy for injured consumers. For instance, all proceedings must be in English, and there will be an undisclosed upfront filing fee required to be paid by the complainant that is only recoverable if

¹ GAC Beijing Communiqué <https://www.icann.org/en/news/correspondence/gac-to-board-11apr13-en.pdf>

² See draft procedure for Public Interest Commitments Dispute Resolution Procedure (PICDRP), <http://www.icann.org/en/news/public-comment/draft-picdrp-15mar13-en.htm>.

the complainant is successful. In sum, although the IPC supports the PICDRP concept (with some modifications³), it is not the primary mechanism that ought to be in place to institute safeguards to protect the public. As pointed out by the GAC, the threat to consumers/users is clear and present in certain sensitive strings. To require injury to consumers before ICANN will enforce PICs that are already thought to be inadequate is not an acceptable solution.

III. IPC SUPPORTS THE GOALS OF THE PAB MODEL.

The IPC believes that policies should be implemented to ensure that new gTLDs that are identical or similar to “sensitive strings” do not violate consumer trust or otherwise harm the public.

To effectuate this goal, the IPC asserts that there should be oversight or other means for ensuring that registrant eligibility policies are inclusive, transparent, pro-competitive and non-discriminatory and serve the affected community and the general public, particularly Internet users of domain registrant services.

The IPC further asserts that new registry operators should be responsible for adhering to the policies established for the particular gTLD. ICANN should therefore consider additional measures to ensure that standard and acceptable practices guide new gTLD policies and protect the public interest related to “sensitive strings”. To assist, the GNSO should convene a process involving the entire Internet community, including new gTLD applicants and registry operators. While this would mean a delay in rollout of some new gTLDs, we believe registrants and industry organizations would be encouraged to participate in order to reach an expeditious conclusion.

³ See PICDRP - Reply Comments of the Intellectual Property Constituency dated 27 April 2013. <http://forum.icann.org/lists/comments-draft-picdrp-15mar13/msg00009.html>

In this regard, we also believe that the correct means for ensuring that new registry operators adhere to the policies and practices proposed as part of registry applications and approved by ICANN as part of the application and contracting process would be to empower ICANN's Compliance team to review the actual practices and hold registries to their proposals. We also agree with the concept that in the new gTLD program, Internet users and the relevant community should be protected by protecting the rights and specifying the responsibilities of gTLD applicants and registrants. This protection should assure rights equivalency and the elimination of undue advantage.

The IPC is also concerned that any solution should not violate the contracts already signed between ICANN and the new registry operators by unilaterally limiting their role to the "technical management" of their registries, or lead to inequality and prejudice, whereby those who have yet to sign their contracts are subjected to a level of oversight and scrutiny which cannot unilaterally be imposed on those who have already signed. The proposal would give the proposed PABs the power to establish the policies for the new registries, and require the registry operators to implement these without having a voice in their development. It is suggested instead that, should a Policy Advisory Board model be adopted, such boards should indeed operate in an advisory capacity to the registry operators and should be expressly given a voice in the development of PICs and standing to institute a PICDRP should the registry operator violate the negotiated PICs.

In order to more fully consider these concerns and those of the entire Internet community, including the ALAC and proponents of the PAB model, IPC would support multi-stakeholder efforts to consider and develop clear procedure for considering determining when a gTLD should be considered a "sensitive string" and what requirements or guidelines may be appropriate.

IV. CONCLUSION.

In conclusion, whilst the IPC supports a number of the goals underlying the PAB Model, the IPC suggests the following points and re-emphasizes its assertion that there ought to be additional community input in the development of safeguards for sensitive strings.

The PAB proposal would see the primary role of registry operators for these regulated and sensitive TLD strings being limited to “technical management of the gTLD and implementation of policies” established by the PAB. Where strings are intended to be operated in fields which are highly regulated, due to the inherent risks to consumers from fraud or other abuse, then a proposal which provides the registry operators of such strings with input, advice and guidance from expert entities within those highly regulated fields is laudable. A number of industry areas, businesses and non-profits now utilize advisory boards. As is implicit in the name, however, such advisory boards are not usually intended to be a substitute for the board of directors, and are not responsible for the governance of the organization, nor for monitoring its performance, approval of strategy or assessment of risk, all of which remain within the remit of the main board. Advisory boards can serve a very valuable function in supporting and complementing the main board by providing expert insight and advice but the ultimate decision-making authority and, importantly, the collective responsibility for those decisions remains with the board.

Under the current PAB proposal this would not be the case. Where the proposed gTLD registry operator is a for-profit company, as will generally be the case, the unilateral ceding by ICANN of the control and decision-making functions to a third party board is liable to be

legally problematic. Whilst the exact scope may vary depending on the laws of the country of incorporation, company directors will have a number of important fiduciary responsibilities and duties to any company that they run, including acting legally, honestly and in good faith at all times, to exercise reasonable care, skill and diligence, and to exercise independent judgment. Directors who are limited to technical management and the implementation of policies developed by others will not be satisfying their fiduciary duties.

The IPC notes that in its Singapore Communiqué, the GAC set forth a number of questions and requests for clarification relating to the New gTLD Programme Committee's (NGPC) proposed manner of implementing the GAC safeguards, including the reliance on PICs and the PICDRP, thereby indicating continued GAC concern at the adequacy of the proposed approach.⁴

As highlighted above, the IPC also has concerns that the current manner of implementation of the PICs and the PICDRP does not provide the necessary safeguards for sensitive and regulated strings. Rather than the unilateral imposition of PABs in the form currently proposed by the ALAC, however, for TLDs operating in regulated industries and in relation to certain other sensitive strings consideration should be given to:

1. A prohibition on the unilateral amendment of the terms of the PIC by the Registry Operator. Any amendment should be required to go to public comment but, in any event, no amendment will be permitted which would dilute or remove a term included in the PIC in order to satisfy the GAC safeguard advice.
2. Ensure a robust PIC compliance program by ICANN, independent of any PICDRP.
3. Reforms to the PICDRP, including:

⁴ GAC Singapore Communiqué <http://www.icann.org/en/news/correspondence/gac-to-board-27mar14-en.pdf>

a. Widening the scope of those who may seek to enforce compliance with the PIC. Currently only persons or entities who believe they have been harmed may make such a complaint, which excludes a number of potentially legitimate complainants who have not themselves been harmed, such as consumer groups, whistle blowers and governments.

b. Streamlining and shortening of the process, particularly for situations where the alleged breach gives rise to the risk of fraud or deception of the public or other abuse.

c. Providing for additional remedies where the Registry Operator is held to have breached their PIC, including the financial redress for those who have been harmed by a breach of the PIC, and ensuring that offending domains registered in breach of the PIC are revoked.

d. Ensuring that any PICDRP Panel includes someone with relevant expertise in the industry to which the string relates.

4. Consider the adoption of some form of Policy Advisory Boards, which would provide advice and guidance that the board of the Registry Operator must take into consideration, but does not exercise control, unless agreed to by the new gTLD applicant.

Respectfully submitted

The Intellectual Property Constituency