**Minority Report**

This report is concerned with GAC’s draft public policy principles on the New gTLDs[[1]](#footnote-2) (Draft Principles).

I wish to supplement the work of the Committee by adding these comments.

It is my view that Principle 2.1 is fundamentally flawed insofar as it fails to include any reference to Freedom of Expression.

GACs own Operating Principles, as amended at Mar del Plata, April 2005, provide at §6.3 that ICANN’s decision making should take into account public policy objectives including, among other things:

1. secure, reliable and affordable functioning of the Internet, including uninterrupted service and universal connectivity;
2. the robust development of the Internet, in the interest of the public good, for government, private, educational, and commercial purposes, world wide;
3. *transparency and non-discriminatory practices in ICANN’s role in the allocation of Internet names and address;*
4. effective competition at all appropriate levels of activity and conditions for fair competition, which will bring benefits to all categories of users including, greater choice, lower prices, and better services;
5. fair information practices, including respect for personal privacy and issues of consumer concern; and
6. *freedom of expression.*

Given that one of GACs overall policy objectives is Freedom of Expression, it is astonishing that it is not mentioned anywhere in the Draft Principles —not even once.

This is all the more extraordinary given the Draft Principles expressly address the concerns of Rights’ claimants, at 2.7.

The internet is not solely concerned with commercial use and speech and it is critical that proper consideration be given to Freedom of Expression. This is a consumer concern and is why trade mark law is so often an inadequate analogy.[[2]](#footnote-3)

It is now well established in international jurisprudence that Freedom of Expression should only be subject to limits prescribed by law. A classic example is the balance in Article 10 of the European Convention on Human Rights. Eg:

Article 10 of the Convention provides:

“(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, *may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,* in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Freedom of Expression is therefore predominant and subject only to those limits both prescribed by law *and* necessary in a democratic society for one of the enumerated purposes.

I propose that Draft Principle 2.1 should reflect a similar balance. The predominant concern should be Freedom of Expression, subject only to those limits supplied by law and in the interests of preventing the promotion of hatred, racism, discrimination etc. Most nations do have laws preventing this type of speech so this should not be problematic.

In relation to “abuse of specific religions or cultures,” unless that abuse would fall within one of the laws aforementioned, then presumably in the delicate balancing act between Freedom of Expression and limits prescribed, this conduct is deemed by a given society to fall within the right to Freedom of Expression.

Different societies have reached different answers to these difficult questions –whose should prevail and by what “transparency and non-discriminatory” process should this be determined?

Certainly in democratic traditions, it has never been acceptable to have secret closed committees, accountable to no-one, decide what can be said or published based on criteria known only to them and not subject to law or of law –this is censorship.

Given that this is an issue that nations are struggling with themselves and that no international or regional solutions have been reached, by law or otherwise – I would suggest that ICANN is not the appropriate body to address these issues and should defer to the law.

If the proposed name **would infringe a law** in a nation state and that nation state objects to the application, then that application should be granted with conditions restricting or preventing its use in the objecting nation state and any supporting nation states. This prevents one State imposing its laws on the others.

This applies similarly to names at the second level, and other levels, where it should not be left to the discretion of the gTLD, who again should have the ability to decline only on the basis of law.

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1. GAC Principles and Guidelines on Public Policy Issues Regarding the Implementation of New gTLDs, Draft Version #2 (17/10/06). [↑](#footnote-ref-2)
2. Not only does trade mark law contain many compromises in its complex defences which are not reflected in the Domain System, but entry on the register, for registered marks, was at the government’s discretion and thus contained an element of state sanction –allowing it to impose a Victorian “taste and decency” approach redolent of 1930’s Britian. [↑](#footnote-ref-3)