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COMMENTS OF THE INTERNET COMMITTEE OF THE INTERNATIONAL TRADEMARK ASSOCIATION (INTA) ON THE NEW GNSO POLICY DEVELOPMENT PROCESS – THE PDP-WT INITIAL REPORT
JULY 30, 2010

The Internet Committee (the Committee) of the International Trademark Association (INTA) is pleased to provide the following comments on the Initial Report of the Policy Development Process Work Team ("PDP-WT" or "WT"). The PDP-WT Report constitutes the "initial thinking and recommendations" of the WT with respect to the development of a new or revised GNSO policy development process. Specifically, the PDP-WT was tasked to develop "[a]ppropriate operating principles, rules and procedures" for a new policy development process and its implementation.

Executive Summary

The Committee appreciates the amount of consultation and work that went into considering the myriad points of developing a new PDP. The Committee agrees with some of the recommendations made by the WT, while noting that much of the WT's work is not yet complete and that this process is ongoing. Accordingly, while we provide summary comments below on some aspects of the Report, we look forward to reviewing and commenting on the WT's continued efforts.

Our comments to specific sections of the report are set out below.

Chapter 3: Stage I – Planning and Request for Issues Report

1.   <u>Who has the right to initiate a request:</u> The Report examines who should have a right initiate a request for an issues report and notes that current ICANN Bylaws reflect that issues can only be raised by the Board, GNSO Council or by Advisory Committee Initiation. After deliberation, the WT agreed that the current structure is adequate and specifically concluded that opening the process to other communities was unnecessary. (Recommendation 1). The Committee does not necessarily disagree with this conclusion, but believes that the PDP ought to address the manner in which unaffiliated groups and individuals can properly raise issues they would like considered; specifically, these parties should be provided information concerning the methods available to have their concerns considered. For instance, ICANN might maintain a funneling mechanism through which issues are vetted and/or passed to the GNSO or Advisory Committee or relevant constituencies likely to have similar concerns.

2.   <u>Procedures for Requesting an Issues Report:</u> The Report considered the methods by which interested parties could raise issues for policy development. In particular,

one area the WT focused on was the possibility of developing a "template" design that parties might use to outline new issues and bring them to the attention of the Board. After consideration, the WT suggested that a Policy Development Process Manual be developed (Recommendations 3 and 5) and that a template could be developed to help define issues (Recommendation 4).

The Committee wholeheartedly agrees with Recommendation 3 and suggests that said Manual also should be open for public comment as it is developed. In addition, the Committee generally agrees with Recommendation 4 but suggests that some basic template detail probably should be mandatory. In order to keep the PDP cycle clear of distractions, it seems that at least some basic threshold facts need to be established before the process begins, including, for instance a statement as to why the issue is important to a relevant constituency.

The Committee also suggests that issues for consideration be raised through an electronic/online process that is linked to relevant sections of the Policy Development Process Manual.

7.   Community Input: The PDP-WT considered whether procedures should be put in place for collecting public comment concerning an Issues Report, once issued (and before new policy development is considered). Ultimately, the WT recommended that a period of public comment during this period would be worthwhile (Recommendation 11). The Committee agrees with this position, as it would allow relevant stakeholders and community members to have input on new issues that may not be reflected in the Issues Report. ICANN staff, general counsel, and the GNSO should first generate an Issues Report to seek corrective action and/or additional information, but not necessarily recommendations.

10.   Impact Analyses: The Report considers whether, in relation to new policy development, economic or other analyses should be undertaken prior to the vote to initiate a PDP. The PDP-WT recommended that the Policy Development Process Manual and Guidebook should describe the option for the GNSO Council to require such analyses, where appropriate or necessary, prior to the vote on the initiation of a PDP (Recommendation 13). The Committee generally agrees with this recommendation with the caveat that more detailed guidance should be in the Guidebook regarding what constitutes "appropriate or necessary" and how the GNSO Council should consider and use such analyses. The Committee is concerned that, especially given the early placement in the process, the design of such studies may be flawed, and the findings could unfairly bias the outcome or even a decision to proceed with a PDP. The Committee also notes that the implementation of public comment periods (as discussed earlier in the PDP-WT Report) could provide adequate bases for parties to argue or support undue fiscal hardship or economic impact.

Chapter 4: Stage II – <u>GNSO Council Review of the Issues Report and Initiation of the Policy Development Process</u>

1.   <u>Maintaining flexibility when launching a Policy Development Process</u>: The PDP-WT considered whether to change the ICANN by-law provisions concerning the timing of initiating a PDP (whether after receipt of an Issues Report or upon direction of the Board). The Committee agrees that the previous 15 calendar day period within which the Council had to meet was too inflexible and unrealistic. The Committee therefore agrees with the proposed modified language set out in the Report (Recommendation 16). The Committee suggests that the clarifying language "***calendar*** days" be inserted in sub-clause "b."

5.   <u>Should expedited procedures be available in case of urgency</u>?   The WT considered whether the ICANN by-laws should be amended to address expedited policy development to address imminent threats or issues, especially in light of the fact that the Registrar Accreditation Agreement and the current registry agreements allow for establishment of temporary policy. Ultimately, the WT recommended (Recommendation 15) that further inquiry into a fast-track procedure be considered under certain circumstances. The Committee is in agreement that, under certain circumstances, emergency procedures (requiring by-law amendment) may be necessary. We concur with a sunset period that requires a subsequent (full) PDP procedure to confirm or adapt any temporary policy.

9.   <u>Public Comment Period after the Initiation of a PDP</u>:   The WT considered whether to amend the current ICANN by-law provisions concerning mandatory public comment periods, after the initiation of the PDP, to specify that such period shall open after the appropriate Working Group is formed and deliberated over the Issues Report allowing the WG to identify specific issues it would like addressed in the public comment period. The WT also seeks comments on whether this period should be mandatory or optional (Recommendation 23).

In response, the Committee believes that the public comment period must be mandatory. The Committee has no objection to said period opening after the WG has formulated its own questions/issues for public comment, provided that the period for public comment is ample and the scope of comments is not restricted to the WG's initial questions.

10.   <u>Clarification of "in scope of ICANN policy process or the GNSO"</u>: The Committee agrees with the clarifying language for this section of the by-laws.

Chapter 5. Stage III - Working Group

1.   How to maximize the effectiveness of Working Groups. The WT considered how to maximize the effectiveness and functioning of the Working Groups and examined whether there should be external mechanisms to report issues such as failure of the Group, inactivity, etc. The Committee is concerned that establishing additional mechanisms and/or layers of oversight and bureaucracy at this level seems to be excessive and may slow down the process. Accordingly, the Committee agrees with Recommendation 25.

2.   Communications with different ICANN Departments: The WT considered whether mechanisms to communicate with the Office of General Counsel or other ICANN departments need to be specified. In response, the WT recommended that further guidance and inquiry needed to be undertaken as to available mechanisms for communication. The Committee agrees that such inquiry is worthy and that mechanisms for communication with ICANN departments should be clearly established. (Recommendation 26).

3.   Linking policy development with ICANN's strategic planning and budgeting. The WT considered whether the PDP process should inform or be informed by ICANN's strategic planning or budgeting. The Committee notes that Working Groups and WTs are established to address policy issues and cure problems with the domain name system affecting Internet users and the public. The development of a robust policy development process is central to ICANN's ability to meet its obligations under the Affirmation of Commitments. Accordingly, while the initiation of a PDP might include consideration of how ICANN's budget and planning can best embrace the PDP and/or its possible outcomes, the priority must be on ensuring that GNSO policy development can address the public's needs, and ICANN should adequately budget and plan to meet those requirements.

4.   Public Comment: The WT considered whether the current ICANN by-law provisions concerning public comment should be amended or revised, either as to scope or timing. Ultimately, the WT recommended an amendment to the duration of public comment periods (to extend them) and to clarify that a summary and analysis of the public comments be provided by the staff manager to the WG (Recommendations 28 and 29).   The Committee agrees with the extension of timing for public comments, but believes the comment period should be at a minimum of 45 days to ensure that all members of the public have adequate time to comment on the often complex issues under consideration by the GNSO. In addition, there may be circumstances under which more than 45 days is necessary, either because of the likely interest in the issue, or the calendaring of the request, and that provision should be made for extending the period for public comment under certain defined circumstances.

Chapter 6. Stage IV – Voting & Implementation

2.   Public Comments.   The WT considered whether there should be a round of public comments before a final report is provided to the Council. The Committee agrees with Recommendation 36, namely that such a comment period be mandatory. The Committee further recommends that optional additional comment periods may be useful in certain circumstances, such as when a final report differs substantially from the initial report.

3.   Delivery of Recommendations to the Board. The WT considered the method and scope of the report delivered to the ICANN Board relating to the WG's investigation of the Issues Report. It noted that in addition to the GNSO Council Report on the WG's findings, there is also a Staff report to the Board, which traditionally has been kept confidential. The WT objected to the confidentiality of the Staff Report and considered ways of removing the confidentiality (and the complexities involved with doing so). After consideration, the WT recommended that the only report to the Board should be the Council Report, perhaps with the advice and input of the WG (Recommendation 39).

The Committee's view is that Staff should be allowed to provide its opinion to the Board, in an open, and non-confidential manner. Staff may be in a better position than most to decipher positive and negative suggestions and recommendations and should be heard in this capacity. The Committee otherwise agrees with Recommendation 39.

6.   Implementation. The Committee agrees that the PDP-WT recommendation to create an implementation review team will ensure policy is implemented as agreed to in other stages of the process (Recommendation 42).

Chapter 7. Stage V – Policy Effectiveness and Compliance

This Chapter addressed whether and how to assess 1) PDP Recommendations/Policy, 2) how the GNSO Council should review the PDP WG, and 3) whether and how to assess the overall PDP Process. The Committee agrees that periodic review of process and policies makes sense, particularly as to the effectiveness of the overall PDP process. However, with respect areas 1 and 2 above, it seems that providing a policy now on these issues might create an avenue to appeal policy decisions rather than provide meaningful insight. Furthermore, other aspects of the PDP-WT Report already address avenues for measuring whether specific policy implementations are successful. Furthermore, with regard to GNSO Review of the WG, the Committee believes that care should be taken in devising and implementing further policy. Review can be positive and beneficial, but the multiple layers of review and assessment proposed may be overly extensive and might hinder the PDP process. That said, a periodic review as to the effectiveness of the PDP Process would probably be beneficial. It may be that this review should be undertaken after a threshold number of PDPs have been completed so that these could be used to benchmark effectiveness of the process and thereby identify areas of possible improvement.

Section 8 – Overarching Issues

Prefatory Comments

The PDP-WT generated a list of "overarching issues" that it believed could either affect the overall PDP or impact various stages of the policy development process, and, accordingly, would have to be considered once an initial outline of the new PDP is completed. The Initial Report states that although the PDP-WT has not yet completed its work on these overarching issues, it intends to further deliberate on these issues with the benefit of the public comments to its Initial Report.

With respect to several of these issues (e.g., Timing, Development of Definitions, Transition/Implementation of the new PDP), there is little if any material upon which to comment. The Committee appreciates that it would be difficult for the PDP-WT to provide recommendations relating to the "overarching issues" in its Initial Report, and without having received public comments to the proposed new PDP. However, without firm recommendations or, in some cases, any roadmap suggesting the direction of the WT's discussions to date on a particular overarching issue, it is difficult for the public to comment. The Committee hopes that, if the WT generates a set of recommendations that differs substantially from its Initial Report after reviewing the public comments and revisiting the list of overarching issues, the public will have another opportunity to comment upon any recommendations relating to the overarching issues before the Council considers them.

a) *Timing*

The Committee agrees that an overall assessment of timing needs to be conducted, and understands that such an assessment would have been premature before the PDP-WT could consider how public comments will impact its recommendations regarding timing in the five stages of the proposed new PDP. The Committee hopes that the public will have a further opportunity to comment on any overarching timing recommendations that may be propounded following this public comment period.

b) *Translations*

The Initial Report states that ICANN staff has indicated that a "draft corporate translation policy is in the making," and that that policy might provide additional guidance to the PDP-WT in "due time." The Committee believes that provisions in the new PDP relating to translations should, where possible, be consistent with the translation policy being developed by ICANN.

The Initial Report also states that the WT considered the potential role of volunteers in the translation process. The Committee does not support the idea of utilizing volunteers to directly translate key documents or public comments, particularly because there is no discussion in the Initial Report about how such volunteers would be selected, or what the required qualifications of these volunteer/translators would be. However, the Committee may support the role of a volunteer editorial group that would review professionally prepared translations to ensure that the translations use technical terms correctly. The PDP-WT should outline the qualifications for volunteers seeking to participate on a translation editorial review group, and indicate how and by whom those individuals would be selected for involvement. Among the issues and credentials to be considered may be: (1) any formal training the candidate has in translation services; (2) the candidate's professional background and any constituency or stakeholder alliances; and (3) information relating to potential conflicts of interest that the candidate's participation on the editorial group could pose. The selection process, term of service, and grounds for removal also should be considered and clarified.

The Committee also believes that further consideration should be given to how the proposed translation of key documents and public comments will impact the new timelines

proposed for the public comment periods. Fairness and inclusion dictate that non-English speakers should have the same length of time to comment on initial reports generated under the new PDP. Providing translations of public comments also may improve inclusiveness, but may have a negative effect on the efficiency of the policy development process.

    c) *Development of Definitions*

While suggesting that certain terms may need to be redefined in connection with revamping the policy development process, the Initial Report did not provide specifics on this point. The Committee hopes that the public will have a further opportunity to comment on any proposed definitional changes once the PDP-WT has an opportunity to complete its work on this overarching issue.

    d) *Voting Thresholds*

The Committee agrees with the PDP-WT's assessment that a higher voting threshold should not apply if ICANN staff recommends against initiating a PDP. Applying a higher voting threshold in those circumstances would, in essence, give staff an indirect vote.

The Committee believes that the PDP-WT should make recommendations about how to handle competing WG charters. The Committee supports the proposal that, in the case of competing charters, the Council should select the charter by a majority vote.

Similarly, the Committee supports the recommendation that a majority of both houses should be required to change administrative elements of an approved charter (e.g., timelines), but that a supermajority should be required to modify the charter questions themselves.

    e) *Transition to New PDP*

The Initial Report did not provide any specifics on this point. The Committee hopes that the public will have a further opportunity to comment on any proposed recommendations relating the transition to the new policy development process once the PDP-WT has an opportunity to more fully consider this issue. Of particular note will be recommendations relating to (1) the timeline for the adoption of the new PDP, and (2) the effect of that adoption on working groups already convened under the "old" policy development process.

Thank you for considering our views on these important issues. Should you have any questions regarding our submission, please contact INTA External Relations Manager, Claudio Digangi at: cdigangi@inta.org