



AT-LARGE ADVISORY  
COMMITTEE

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**Statement on the IRT Draft Report**

Response of the ALAC to the Public Comment Period on the IRT Draft Report

Introductory Note

by the Staff of ICANN

The statement below was originally drafted by ALAC Member Patrick Vande Walle, as agreed during the April 26<sup>th</sup> 2009 meeting of the At-Large Advisory Committee. It was then published for review by the ALAC and the Regional Secretariats on 2<sup>nd</sup> May 2009. The original version statement may be [viewed here](#). Due to the timelines built into the IRT process itself, it was understood that the statement would not be able to undergo the full, At-Large community-wide consultation as doing so would prevent the comments of the ALAC from being taken into account by the IRT as it completes work on its report.

Members of ALAC proposed some amendments (a comparison between the original statement and the final version may be [viewed here](#)). The Chair of ALAC requested the Staff to begin a vote on the draft Statement for a five day period, which began on 7<sup>th</sup> May 2009 and closed on 12<sup>th</sup> May 2009.

The results were announced on 13<sup>th</sup> May by the Staff, said result being that the Statement was endorsed by a vote of 10-0-1.

## **Draft ALAC Statement on the IRT 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. There is no legitimate reason for the extremely short time given to submit comments on the IRT report, which fails to offer adequate time for analysis.

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.

Notwithstanding the above concerns, the importance of the issues concerned requires a response from ICANN's At-Large community. We submit the present draft of our comments to the IRT, reserving the right to submit an amended version once the ALAC has engaged in full consultation with our 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. 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.

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 digitally 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 resolution mechanisms at the top level

The ALAC has not had the time to review this part of the document.

### **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.

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 does not offer the functionalities needed to balance the right to the privacy of individuals with the legitimate concerns of the IP rights holders. 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.