

STATEMENT ON BEHALF OF THE **NON-COMMERCIAL USERS CONSTITUENCY (NCUC)**

To the ICANN Board of Directors and the Governmental Advisory Committee (GAC)

Thank you for giving us the opportunity to submit our comments on the GAC scorecard. We believe that this process could have been avoided if better communication channels existed and any institutional arrangements were better agreed. We would like to state that due to issues of time, this document has not been signed by the whole membership of NCUC, but it reflects the position of previous statements made on these issues. Please find below our comments.

A. "SENSITIVE" STRINGS AND FREE SPEECH

On sensitive strings and the GAC "early warning flag", we believe the Board cannot accept a standard that allows the GAC to object to a string "for any reason." We continue to believe that objections must be based on clear standards rooted in principles of international law and that protecting freedom of expression is one of the criteria that must always be taken into consideration.

We also question whether objections to individual strings for any reason constitutes "public policy advice." To us it seems to be more of an implementation role.

Objections Procedure - NCUC supports the recommendations made by the Rec 6 Cross-Community Working Group (CWG), including those which garnered Strong Support among members of the CWG. We believe that the recommendations are fair, reasonable, workable and represent a balanced set of views from across the ICANN community. To the extent that the Board and the GAC seek clarity on these issues on the Scorecard, we strongly recommend adoption of the Rec 6 CWG recommendations.

B. PROTECTION OF RIGHTS OWNERS AND CONSUMER PROTECTION ISSUE

Trademark Clearinghouse

The Trademark Clearinghouse was never meant to be part of the rights protection mechanisms scheme. The original idea behind the Trademark Clearinghouse was that it will be a repository of trademark data and its principal reason will be to create a more efficient and cheap registration system. The principal users of the Trademark Clearinghouse will be Registries and Registrars.

NCUC objects to the GAC's recommendation (6.1.1) that the TC should accept *all types of intellectual property rights*. This is a mistake. ICANN does not have the resources, the ability nor institutional capacity to support the creation of a massive data of intellectual property rights. ICANN's domain name management concerns the implication of domain name upon trademarks only. We find the Board's response reasonable and we hope that it will avoid engaging in a process that can place ICANN in a fragile position.

Finally, we applaud the ICANN Board for its approach in the rest raised by the GAC in relation to the TC.

Uniform Rapid Suspension System (URS)

NCUC applauds the Board for its decision not to accept a 'loser pays' model and for appreciating the need for an appeal's system. We, however would like the Board's attention to the following two issues:

Default

We have an issue with the idea that default is equated to bad faith and, thus, that the defaulting party should (almost) automatically lose. Default can occur for many reasons apart from bad faith. It can occur because messages were lost, misplaced, or caught in spam filters; because registrants in non-English speaking countries (or non-lawyers) do not understand the documents they have received; because they fear identifying themselves in response to a malicious complaint; or other reasons that do not involve bad faith. Failing to accept the fact that default might occur for various reasons will create problems for individual and small-scale registrants, for registrants in developing nations and for registrants who are not familiar with the ICANN administrative proceedings and need to find a lawyer to assist them. It is unfair and unwise to deem as bad faith actors anyone who isn't able to respond in 14 days.

We are concerned that the way the GAC proposes that default be treated, registrants can too easily be deprived of domain name stability. The URS system may operate rapidly without limiting further the rights of individual, legitimate users or opening its structure to abusive gaming.

Transfer of the domain

The URS was justified by the Implementation Recommendations Team (IRT) on the grounds that it was a mechanism with distinct remedies from UDRP and not a replacement for it; this rationale was also followed by the STI. According to the IRT report: **“The URS is intended to supplement and not replace the UDRP. They are separate proceedings with distinct remedies. The URS is designed to provide a faster means to stop the operation of an abusive site. The UDRP is designed to result in the transfer of the abusive domain name.”**

Seeking to allow the transfer of the domain name under the URS becomes problematic at various levels. First of all, the whole foundation of the URS's justification (and the way it was 'sold' to the Internet community) collapses. Secondly, by allowing transfer under the URS a variety of issues emerge: what will be the compatibility between the URS and the UDRP? What will be the differences between the two mechanisms?

If the URS is not meant to be a process that invites substantive evaluation but rather seeks to examine superficially the alleged infringement, then allowing a remedy that seeks transfer of the domain name is against due process and basic principles of justice.

Finally if transfer is allowed, we are very concerned with how the URS will fit within the whole UDRP system and the GNSO's recent recommendation to open it for review. Any sort of transfer within the URS will make the existence and sustainability of the UDRP redundant and unnecessary.

C. CONSUMER PROTECTION ISSUES

The Board should not be trying to predict the "utility" of new domains. It should seek information that will help it to evaluate possible market failure.

D. LAW ENFORCEMENT ISSUES

Registries' cooperation with law enforcement should respect due process of law. We are also concerned that no uniform law enforcement accreditation exists to enable registries to distinguish between legitimate and illegitimate requests.

CONCLUDING COMMENTS

NCUC supports the GAC's position regarding "Providing opportunities for all stakeholders including those from developing countries" which is consistent with the work of the JAS Cross-Community Working Group, which is already addressing the concerns raised by the GAC. As was clarified at this week's meeting in San Francisco, the JAS work will not result in a delay in the launch of new gTLDs as it concerns implementation issues that will not hold up the launch process. Additional input and concerns should be addressed to the JAS team and not be used as a reason to further delay the launch of new gTLDs.

Finally, we would like to inform both the ICANN Board and the GAC that NCUC is willing to work closely with both of them and try to find solutions for these important issues.