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AIPLA Comments Regarding the GNSO Council's Approved Motion on Domain Tasting

These comments are submitted on behalf of the American Intellectual Property Law Association (AIPLA) to the ICANN Board and its Generic Names Supporting Organization (GNSO) regarding the GNSO Council's Approved Motion on Domain Tasting.

AIPLA is a national bar association whose more than 16,000 members are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of trademark, copyright, patent, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property.

Domain tasting, the practice whereby would-be registrants leverage the 5-day Add Grace Period (AGP) to register thousands of domain names free of charge and test their value before deciding whether or not to keep them, has become an unanticipated abuse of the AGP. The AGP was originally implemented to protect registrars from registrants who failed to pay for domain names, and to allow a registrant to delete a newly registered domain that was erroneously registered (e.g., with a typo), obtain a correctly spelled domain name, and get a full refund for the mistakenly registered name.

Unfortunately, speculators have realized that the AGP allows them to try out any domain for five days for free. Domain tasting now constitutes the majority of domain transactions, improperly taking advantage of the AGP to undermine the normal operation of the DNS in order to reap a profit for a select few who have perfected tasting mechanisms. Often, tasting involves the violation of trademark rights through typosquatting. Domain tasting harms consumers and wastes their time, because an inadvertent entry of a misspelled URL or trademark by a consumer performing an internet search for a particular web site may lead to a confusing parking page whose sole purpose is to generate search engine advertising income for the typosquatter. Moreover, it appears that the concerns which led to the original implementation of the AGP are no longer material.

For these reasons, AIPLA supports the complete elimination of the Add Grace Period. There is no doubt that such a measure would result in the immediate elimination of the problem of domain tasting. In the event that the ICANN Board of Directors is unwilling to eliminate the AGP, AIPLA supports, in principal, the domain tasting motion approved by the GNSO Council on April 17, 2008, and urges its adoption by the Board. Ideally, prior to adoption by the Board, the policy should be amended as proposed by the Intellectual Property Interests Constituency in its statement of March 28, 2008 (appended to this submission). These amendments would clarify and give greater effect to the new policy.

Finally, AIPLA supports the immediate implementation of the proposed ICANN domain name budget fee. This fee will help generate necessary funds for ICANN's operations from DNS users and should, at the same time, significantly curb domain tasting.

Appendix:

Intellectual Property Constituency Statement on Domain Name Tasting

March 28, 2008

Pursuant to the GNSO Council's March 6, 2008 Motion, the Intellectual Property Constituency ("IPC") submits this Constituency Statement on the GNSO Council's Draft Domain Name Tasting Motion ("Draft Motion"). This Constituency Statement is intended to supplement and incorporate by reference the IPC's December 5, 2007 Constituency Statement. The IPC arrived at the positions below in accordance with the requirements of the GNSO Policy Development Process as outlined in the ICANN bylaws.

I. Constituency Position

A. IPC Supports the Draft Motion with Reservations

As outlined in the IPC's December 5, 2007 Constituency Statement, the IPC believes that domain tasting harms intellectual property rights holders, Internet users, the domain name system generally, and ICANN itself. The IPC further believes that only domain name speculators would be negatively impacted by prohibition of, or action that effectively prohibits, domain tasting. Consistent with these views, the IPC maintains that domain tasting must be eliminated. The IPC has some reservations about the Draft Motion, which are set forth below. Subject to those reservations, the IPC is cautiously optimistic that the policy embodied in the Draft Motion will virtually eliminate domain tasting. Accordingly, and provided the concerns below are addressed, the IPC supports the Draft Motion.¹

1. "May not" (para. 1.a) should be changed to "shall not."

2. "Extraordinary circumstances" (para 1.a) requires further delineation. In its current form, the Draft Motion lacks sufficient guidance to the Applicable gTLD Operators² as to what constitutes "extraordinary circumstances" to warrant an exemption for a Registrar from the AGP deletion ceiling set forth in paragraph 1.a of the Draft Motion. The IPC is concerned that the absence of more detailed guidance will lead to exploitation of the exemption. The GNSO Council could provide this further guidance by including in the Draft Motion either an illustrative list of the types of circumstances that would be considered "extraordinary" (e.g., system failure, natural disaster) or a requirement that ICANN Staff develop guidelines for what types of circumstances would be considered extraordinary.

3. "Regularly" (para. 1.a) also requires further delineation as it is subject to widely varying interpretations. One Applicable gTLD Operator could interpret it to mean "every month," another could interpret it to mean "once every six months," while another could interpret it to mean "more than once." As suggested above, the GNSO should revise the Draft Motion to identify the relevant frequency or require that the ICANN Staff develop one in consultation with the community.

¹

One member suggested that the IPC propose that the Add Grace Period ("AGP") be shortened from five days to one day.

²

References to "Registry Operator" in paragraph 1.b should be replaced with "Applicable gTLD Operator."

The IPC proposes that “regularly” refer to a 12-month period. The last sentence of paragraph 1.a would then read: Acceptance of any exemption will be at the sole reasonable discretion of the Applicable gTLD Operator; however, “extraordinary circumstances” which occur more than once in every 12-month period will not be deemed extraordinary.

4. Information provided pursuant to the reporting requirements (para. 1.c) must be publicly disclosed. The IPC endorses the concept of a reporting requirement as a mechanism to ensure both transparency and accountability. However, the Draft Motion does not explicitly state that information provided to ICANN pursuant to the reporting requirement will be publicly disclosed. Any exemption to application of a policy must be publicly disclosed. All stakeholders and Internet users are entitled to know which Registrars have requested an exemption and on what basis. Similarly, all stakeholders and Internet users are entitled to know whether the Applicable gTLD Operator granted the requested exemptions. The Draft Motion should specify that the information required to be reported by the Applicable gTLD Operators to ICANN be provided as part of and released to the public in the ICANN | Registry Operator Monthly Reports. Public disclosure of this information will enhance transparency and accountability as well as facilitate independent assessment of the effectiveness of the proposed changes in eradicating domain tasting.

5. The Draft Motion should include a timeframe or deadline for implementation. Adding a timeframe or deadline for implementation that would start from the date of Board vote on the GNSO Council’s policy recommendation would both ensure prompt implementation and avoid further domain tasting harms.

6. The GNSO Council must take action promptly if the policy resulting from the Draft Motion does not eliminate, or virtually eliminate, domain tasting. Further, a formal review of the policy’s efficacy should be conducted at the end of the two-year period referenced in paragraph 2.a.

B. IPC Supports the Draft Motion in Addition to the Imposition of the \$0.20 ICANN Fee.

The IPC supports the Draft Motion as policy mechanism intended to eliminate domain tasting in addition to the imposition of the \$0.20 ICANN fee now under consideration through the budget process.

II. Methodology for Reaching Position

The issue of domain tasting has been discussed within the IPC on numerous occasions over the past year, including the meetings of the IPC held in conjunction with the San Juan and Los Angeles ICANN Meetings. A draft constituency statement was circulated to IPC officers and leadership on March 20, 2008, and was discussed on a teleconference of the IPC membership, including its officers and GNSO Council representatives, on March 20, 2008. Revisions and additions proposed by members and officers via email were discussed via email and incorporated as agreed upon. Additional revisions were subsequently circulated and discussed via email.

III. Impact on Constituency

The IPC does not anticipate its members will be harmed by the restriction of the applicability of the AGP as set forth in the Draft Motion. If passage and implementation of the Draft Motion eliminates or virtually eliminates domain tasting, the harms set forth in the December 5, 2007 IPC Constituency Statement will be eliminated. If it does not, those harms will continue.

IV. Time Period Necessary to Complete Implementation

The IPC anticipates that implementation could probably occur within 90 days after a Board vote to adopt the policy recommendations contained in the Draft Motion (as may be revised based on recommendations herein).

Respectfully submitted,
Kristina Rosette
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Intellectual Property Interests Constituency