*July 2011 – This white paper has been drafted by Danny Younger[[1]](#footnote-1) as a submission to the ICANN 2012-2015 Strategic Plan Development Process*

# INTRODUCTION

In the next three to five years, the ICANN organization will be faced with a host of new issues in the wake of its unprecedented roll-out of hundreds of generic top-level domain names. While a more limited launch would have served to allay many community fears[[2]](#footnote-2), a decision was reached to proceed with a full launch in the belief that ICANN could scale up to meet the challenge. Assuring that we can continue to protect our Internet’s delicate eco-system and the public interest therein remains our foremost obligation; in pursuit of that goal, this strategic initiative (which calls for a structural realignment of a portion of ICANN’s constituent bodies) is presented for consideration.

# THE THREAT MATRIX

As this is not ICANN’s first launch of new gTLDs, one would think that we might be able to take some comfort in the benefit of past experience so that proper plans might be laid to better protect the DNS… unfortunately, both staff and volunteer participant turnover has resulted in a critical loss of institutional memory (average staff tenure is now pegged at 3.57 years[[3]](#footnote-3) while the last major Proof of Concept TLD series was launched a full eight years ago). As a safeguard, this non-exhaustive list of prior and anticipated issues presented below will hopefully serve to frame the type and nature of threats that can be expected to arise in the course of the upcoming new gTLD roll-out.

## PRE-REGISTRATION ACTIVITIES

In prior years pre-registration scams proliferated in conjunction with the launch of new TLDs. In December 2000, the U.S. FTC posted a Consumer Alert[[4]](#footnote-4) and prior to the launch of .EU the web-pages of the European Commission offered similar pre-registration warnings. Pre-registration activities have led to lawsuits[[5]](#footnote-5) and limited policy guidance on this topic has earlier been provided by the DNSO Names Council[[6]](#footnote-6) . Pre-registration activities for the new gTLD launch cycle have already commenced[[7]](#footnote-7) but no current policy guidance is available from the GNSO nor are any new ICANN Advisories on this subject-matter posted.

## CYBERSQUATTING & THE IMPACT OF DEFENSIVE REGISTRATIONS

Cybersquatting is the registration, traffic in, or use of a domain name with bad faith intent to profit from the goodwill of a trademark belonging to someone else. The phenomenon poses a financial burden upon intellectual property holders that are obliged to defensively register their domains, secure name-watch services, and make use of dispute resolution procedures. A report from the Coalition Against Domain Name Abuse (CADNA) anticipates that the “launch of 400 generic top-level domains could cost brand owners worldwide over $746 million”[[8]](#footnote-8) – these costs, of course, will invariably be passed onto consumers. Estimates of defensive registration costs have gone as high as $155.85 billion[[9]](#footnote-9).

## REGISTRAR ROGUE BEHAVIORS

ICANN-accredited registrars have been at the receiving end of summary cybersquatting judgments. One such entity was ordered to pay $31,150,000 for violations of the U.S. Anti-cybersquatting Consumer Protection Act.[[10]](#footnote-10) That entity had its contract with ICANN renewed. The term “rogue registrar” came to prominence following the collapse of the RegisterFly operation. Lawsuits alleged that RegisterFly systematically defrauded customers attempting to register or renew Internet domain names[[11]](#footnote-11). The latest set of revisions to the Registrar Accreditation Agreement (RAA), some of which would curtail such inappropriate behaviors, has not yet been adopted.

## REGISTRY ROGUE BEHAVIORS

During calendar year 2009, ICANN received complaints about the business conduct of Labitrav, a .travel registrant and Tralliance, the registry operator of .travel. The companies in question are separate, privately-held legal entities incorporated under the laws of the State of Florida. Both entities are owned in whole or substantial majority, by the same party. The complaints alleged that Labitrav was infringing the intellectual property rights of various brand and trademark holders, as well as, engaging in cybersquatting activities. In August and September 2009, Contractual Compliance compiled a working list of 479 potentially infringing .travel domain name registrations filed by Labitrav. The list of names is confidential and proprietary to ICANN.[[12]](#footnote-12) The issue was resolved through recourse to the “cooperative engagement” clauses of the .travel registry agreement.

## THE IMPACT OF DOMAIN NAME MONETIZATION SCHEMES

The launch of hundreds of new gTLDs affords an opportunity for those engaged in domain name monetization to litter vast swathes of our Internet with advertising and typo-squatting adverts, the same way that many highways are cluttered with billboards. Domain name monetization utilizes pay-per-click mechanisms. The PPC model has been criticized for increasing the prevalence of cyber-squatting and speculative behavior by encouraging parties to grab names that are similar to famous brands or people and are therefore more likely to generate significant traffic. It has also raised questions about whether “good names” are being used solely to create paid links and PPC revenue, rather than enable new users to create an online identity or substantive content.[[13]](#footnote-13) The newest monetization efforts have focused on utilization of highly local geographic indicators by parties that have no nexus whatsoever with the targeted community.[[14]](#footnote-14)

## CYBERATTACKS & NEW GTLDS

New gTLDs can occasion cyber-attacks. On 26 June 2008, ICANN itself was victimized by a group of hackers who gained unauthorized access to ICANN’s domain registration account at Register.com. Attackers altered the DNS configurations of several domains – icann.net, iana-servers.com, icann.com, internetassignednumbersauthority.com and iana.com – so that visitor traffic was routed to defacement web site published at free web hosting accounts operated by Atspace.com.[[15]](#footnote-15) As to the timing of the incident, it occurred at the outset of the ICANN Paris meeting where public discussions regarding new GTLDs were held.

## AN INCREASE IN PHISHING ATTACKS

Phishing is a way of attempting to acquire sensitive information such as usernames, passwords and credit card details by masquerading as a trustworthy entity in an electronic communication. A study released by Gartner, Inc. in 2007 revealed that phishing attacks in the United States alone cost Internet users over $3.2 billion. The problem is growing, with no signs of slowing down. The survey found that 3.6 million adults lost money in phishing attacks in the 12 months ending in August 2007, as compared with 2.3 million the previous year. With the projected number of new gTLDs created in the proposed program, the costs of fraud to unsuspecting consumers will undoubtedly eclipse that figure.[[16]](#footnote-16)

## DOMAIN TASTING ISSUES

Although ICANN has previously announced the “End of Domain Tasting”[[17]](#footnote-17), it appears that the beast is not yet dead. The latest manifestation of domain tasting has arrived in the form of commercially-mined NXD traffic data sold via auction[[18]](#footnote-18). Current registry contracts allow for the commercial use of traffic data regarding domain names for almost any purpose. You can count on pre-registration data to similarly be exploited by either the registrar or domain name monetization community. In “reverse domain tasting”[[19]](#footnote-19) domains are allowed to resolve for a period of time after expiration in order to gauge their traffic levels. No ICANN policy on domain name hoarding by registrars has ever been established.[[20]](#footnote-20)

## DOMAIN NAME FRONT-RUNNING

Domain name front running is the practice whereby a domain name registrar uses insider information to register domains for revenue earning purposes. In January 2008, Network Solutions was publicly accused of this practice when the company began reserving all domain names searched on their website for five days.[[21]](#footnote-21) Recent pre-registration activities have the potential to manifest as front-running endeavors as registrars can scrutinize these expressions of interest to build their own massive portfolios of desirable properties to be cycled through a shell-registrar network when the new gTLDs launch.

## SUNRISE SCREENING/VERIFICATION PROCESS ISSUES

Prior new gTLD Launch cycles have suffered from a particular set of problems: The lack of any screening or verification in the .info Sunrise period led to serious abuses, including an unusually high number (43%) of registrations that had to be cancelled or transferred. These problems required the new Registry to expend significant resources -- from staff time to attorneys’ fees to compensation to WIPO for trademark verification – to address the scope of the problem. It also raised significant public questions about the integrity of the Registry’s processes and database, and the actions of some of its Board members.[[22]](#footnote-22)

Although ICANN’s Intellectual Property Constituency previously offered some guidance to potential registry operators on rights protection mechanisms (RPMs), notably via their “Perfect Sunrise” publication[[23]](#footnote-23), no comparable guidance to the current round of new gTLD applicants has yet been articulated.

## OVERARCHING SUNRISE & LANDRUSH ISSUES

One category of complaints raised during the prior launch cycle, brought by potential registrants and others in the ICANN community, asserted that trademark holders should not receive any prior registration privileges, i.e., there should not be a Sunrise process. Instead, all domains should be awarded during Land Rush. It is difficult to argue, for example, that an individual named Ivan Brian Moore has less right to register ibm.info than the International Business Machines Corporation.[[24]](#footnote-24) With the advent of .brand opportunities, there is even less need now for sunrise mechanisms that favor trademark interests at the expense of the global public interest (and trademark interests can continue to police their marks by way of the UDRP).

## “SHORT LIST” QUEUE-JUMPING

The process .info and .biz previously used to allocate names – called a “round robin” – was criticized for enabling manipulation of the system. Some registrars kept their list of desired names short and offered coveted slots to their best customers. Others used registrars they controlled to do the same, while they opened their own lists to the general public.[[25]](#footnote-25) Sadly, today’s situation is substantially worse with certain registrars controlling over a hundred different shell, phantom or “acquisition” registrars.[[26]](#footnote-26) When the .EU land-rush period began, a large number of shell companies were set up as phantom registrars to obtain priority and grab as many “generic” domain names as possible. 400 registrars were investigated by EURid and sued for breach of contract for the abuse.[[27]](#footnote-27) Rampant manipulations of allocation processes can assuredly be expected in this upcoming new gTLD round as well (as no controlling policies are yet in place).

## DEFICIENCIES IN REGISTRATION PROTOCOLS

The earlier “Proof of Concept” TLD launch was fraught with deficiencies that could, through the ignorance of new TLD operators, be replicated in the upcoming round. As but one example, Afilias acknowledged that shortly after Sunrise began it became evident “third parties were seeking to circumvent the provisions of the Sunrise Period requirements as well as the intent and spirit thereof by inappropriately registering domain names with no corresponding qualified trademark.” In hindsight, it is obvious that greater attention to the challenge of conducting a Sunrise registration during start-up planning could have reduced the ease with which people were able to circumvent the requirements.[[28]](#footnote-28) We probably won’t know until it’s too late if new registry applicants are even aware of this lesson.

## BEHAVIORS ACCOMPANYING REGISTRAR FAILURES

Some insufficiently capitalized registrar entities might not survive the new vertical integration environment. What then can the public expect when a registrar begins to fail? For starters, registrars have already learned that they can engage in cybersquatting activities for quite a period of time before being slapped on the wrist by ICANN’s woefully understaffed Compliance Department. They also know that there are no penalties currently applied to any front-running activities. In due course, those registrars that are more ethically challenged will likely first attempt to save their failing enterprises through domain name monetization/cybersquatting activities. Should such efforts be unsuccessful, one can next expect that customer service will disappear, transfer-out requests will not be honored, auth-code requests will be ignored and customers may well be defrauded. The RegisterFly debacle made all of this abundantly clear.[[29]](#footnote-29)

## BEHAVIORS ASSOCIATED WITH REGISTRY FAILURES

It is inevitable that some new registry operations will fail, and such failures will have attendant consequences. We have recently noted the disconcerting behaviors of one registry that has lost over 100,000 registrations in the last year… this entity has recently convinced its sponsoring community to amend its Charter to allow for a new industry sector (that sector – content provisioning -- just happens to coincide with the business activities of the son-in-law of one of the registry owners who is now aggressively monetizing the namespace to turn it into even more of a billboard strewn junkyard than it is already). Of course, the registry has revised its name use policy to put in place additional incentives for name use.

## ICANN COMPLIANCE DEPARTMENT ISSUES

Although ICANN’s plan calls for going from a handful of current gTLDs to hundreds, ICANN’s Compliance Department remains at last year’s FTE staffing levels. Making matters worse is the fact that the most heinous of offenses, cybersquatting, front-running and such, are not enforced by this department; instead they have invoked clauses such as 5.4 in the Registrar Accreditation Agreement to justify the contract renewal of ICANN’s most notorious cybersquatting registrar and have used the “cooperative engagement” clauses in registry contracts to conveniently dispose of registry-related cybersquatting activities. There are no sanctions, there are no penalties, nor are there any prospects for terminating the contracts of those who most flagrantly abuse our societal norms. As issues next begin to emanate from ICANN’s shell registrar community in the upcoming new gTLD launch, you can rest assured that you will be told that ICANN has no policies in place that prohibit the practice of shell accreditations. Finally, as substantive revisions to the RAA are still not in place, the ICANN Compliance Department will lack the tools necessary to better protect the public interest.

## VERTICAL INTEGRATION ISSUES

There exists a widely acknowledged penchant for “gaming” in the domain name industry. Writing on this topic in a joint letter penned by Afilias, PIR and Neustar, the authors stated: “We maintain that the current restraint against a registry distributing its own TLD should be maintained to avoid creating incentives to abuse registry data and to protect the registrants and other registrars from unfair gaming of the registration system.”[[30]](#footnote-30) If three of the largest registries believe that gaming will necessarily occur, you can probably take that assertion to the bank. How will registrants be hurt? “Clearly, registrants may be harmed by an integrated registry/registrar operation’s ability to identify high value domains, hold those domains off the market (either directly or through affiliates) and to then monetize them at a premium price. These practices, in their various forms, are the equivalent of domain name scalping where a registrant is forced to pay a price that is a multiple higher than the “face value” or standard retail price.”[[31]](#footnote-31) No policies are currently in place to attend to these matters.

## PROLIFERATION OF PORNOGRAPHY

The global Internet community can expect the ongoing proliferation of Internet pornography as .XXX and related strings are entered into the root system. ICANN has made it clear that it doesn’t respect the religious, cultural and family sensitivities of the community and will treat the launch of such TLDs as just another competitive effort. Meanwhile, sovereign natures will begin to block these TLDs (as India has already indicated[[32]](#footnote-32)) putting us on a path to a fragmented Internet. ICANN continues to lack a policy directive that would meaningfully address the issue of controversial strings.

## PROCESSING NEW REGISTRY SERVICE REQUESTS

In the highly charged competitive environment to be expected in the immediate future, existing GTLD registry operators will attempt to remain competitive by expanding their service offerings. While security, stability and resiliency considerations will be evaluated by a standing panel of experts, the same cannot be said for competition evaluations – they are currently managed by a single individual, the ICANN General Counsel. This poses an unacceptable risk. We have already seen in the case of the last .JOBS proposal that a determination was reached that no competition issues were implicated. As it turns out, a breach notice[[33]](#footnote-33) ultimately had to be issued precisely because of adverse competition concerns[[34]](#footnote-34). As the handling of competition issues by ICANN remains a flawed process[[35]](#footnote-35), and as no system improvements are on the table, an ongoing risk to the community remains.

## THE RISK OF AN IDN REGISTRY COLLAPSE

As new gTLDs are launched, some will be catering to non-ASCII language communities. Although ICANN has established registry transition protocols to attend to the possibility of registry failures[[36]](#footnote-36) it has not yet envisioned those difficulties associated with a failing vertically integrated registry-registrar operation that offers services in a spoken/written language unfamiliar to a successor operator. How will customer service considerations be managed? Will the successor operator be able to scale up to meet the language challenge as well as the technical challenge expediently?

## REGISTRAR CAPITALIZATION ISSUES

As pointed out by Michele Neylon[[37]](#footnote-37), “Most registries work on pre-funded basis ie. registrars have cash on deposit with each registry operator. With each registration, transfer or renewal monies are debited from their account. If they don’t have sufficient funds with the registry they can’t process any registrations etc. Pretty simple? Well it might be if you’re only dealing with a few registries, but if you have hundreds of them it can get quite messy. Let’s say there are 500 new domain extensions. If the minimum funding level for each registry were set at 5000 (doesn’t matter which currency, but let’s use dollars), then that means that each registrar who wants to offer all 500 extensions will need to set aside 2.5 million dollars before they’ve sold a single domain!

At present, unfortunately, a lot of registry operators only offer wire transfers as a method of payment. That means that you can easily be waiting 2 or 3 working days for funds to appear in your account. While a registrar might need to be careful about the funding levels they maintain at each registry they interact with weird stuff happens. Based on my own experience I’ve seen a 300 or 400% increase in activity with a domain extension practically wipe out our balance in a matter of minutes or hours – and there’s no easy way to plan for that kind of crazy spike. Some registry operators offer credit card payments, which can help get you out of a “rut”, but a lot don’t. Some offer an “emergency credit” system, which can give you a bit of “padding” to make it through the 24 – 72 hours that it takes a wire transfer to hit their bank, but not all do.”

Until these types of operational issues are sorted out, there are reasons to be very concerned: registrants may wind up placing registration requests in good faith with registrars that financially might not be able to honor their commitments. That’s a scary proposition.

## NEXUS & THE LANDSCAPE OF LOCAL GEOGRAPHICAL NAMES

Governments of the world have long expressed concerns about the use of geographical names/indicators in the DNS. While their concern is focused on the national level, at some point the Internet community may need to heed concerns raised at the local level. We already are seeing registrations in the form of *anyvillage/anystate.gTLD* that are appearing as monetization exercises.[[38]](#footnote-38)

## THE MENACE OF PROXY SERVICES

Consumers, intellectual property interests and the law enforcement community all have issues with registration data hidden behind proxy services[[39]](#footnote-39). Within ICANN, studies have been commissioned that will take at least another year to complete before multi-year policy-making processes thereafter can commence. In the intervening time frame, millions of new registration records will appear through the new gTLD process with a significant percentage that will actively mask the identities of those engaged in abusive practices.

## THE THREAT OF FREE DOMAINS

Hypothetical scenario: a vertically-integrated new gTLD registry offers free registrations (akin to free blogging opportunities offered via blogger.com) -- this effort has the potential to achieve market dominance and topple many of the current registration-for-fee business models. An accelerated rate of business failures poses a risk.

## RAPID TAKE-DOWN ISSUES

The World Intellectual Property Organization has written to the ICANN Board pointing to serious deficiencies in the proposed Uniform Rapid Suspension mechanism[[40]](#footnote-40). As one of ICANN’s Core Values is to recognize “the policy role of other responsible entities that reflect the interests of affected parties”, one would expect that some measure of policy guidance from WIPO would have been taken into account. Final Applicant Guidebook revisions do not appear to reflect any substantive changes to the URS.

## THE ISSUE OF NON-CONFORMING REGISTRATIONS

In prior launch cycles, the most prevalent kind of abuse was the fabrication of trademark information in order to secure valuable “real estate” on the Internet before Land Rush began. There was no preliminary screening or verification before registration by Afilias or most registrars, so it was possible to obtain a name simply by placing any information in the required fields and rendering payment. It was reported widely at the time that Bob Connelly, a member of the Afilias Board, resigned in protest because of the way start-up was conducted, after declaring it an “abomination.”[[41]](#footnote-41)

## REASONABLE COST ISSUES

In the earlier new gTLD rollout Afilias proposed charging registrars a wholesale price of $5.75 per year per Sunrise registration, which was the same price as a normal registration. It concluded that at this price it was not feasible to check/verify submissions. Abuse ensued.

## INTERNAL ENGINEERING ISSUES

Hundreds of new registries can offer the prospect of hundreds of new problems. In a prior Sunrise period, at least one large registrar, for example, submitted tens of thousands of Sunrise applications with the identical information of “10-01-2000” (one day before the October 2, 2000 cutoff) in all Trademark Date fields and “US” in all Trademark Country fields. It was discovered later that most of the trademark owners had submitted valid data to the registrar, and that the registrar formatted the fields this way because of internal engineering problems.[[42]](#footnote-42)

## FABRICATED TRADEMARK DATA ISSUES

Abuse of process comes in many forms and such can be expected to accompany the new gTLD rollout. Prior examples may be cited such as the fabrication of trademark data in order to procure potentially valuable names, particularly “generic” names like “star.info” and “fashion.info.” In one notorious case, a registrant obtained nearly 5,000 Sunrise registrations without valid trademarks. The registrant was Konrad Plankenstein and the registrar was Speednames. Appendix J of the Registry Agreement may have increased this kind of abuse by making it clear that neither Afilias nor registrars had any obligation to verify trademark information. It was generally known among registrars, and at least some of their customers, that Afilias was not going to check Sunrise applications prior to processing. Registrants who falsified trademark data presumably believed that the benefit of gaining a highly desirable name outweighed the risk of losing it later upon discovery. [[43]](#footnote-43)

## THE ISSUE OF REGISTRANT CONFUSION

One can anticipate potential registrant confusion concerning the nature and manner of new gTLD start-up mechanisms (e.g., when and how they’re expected to apply, when they will be receiving decisions and the nature of the ground rules). As noted in the .info discussions, there were reports of significant confusion among actual and potential registrants, registrars and others following launch of the new gTLDs as a whole. Some of it flowed from the “proof of concept” notion to try different start-up mechanisms and from the existing structure of having registrars serve as intermediaries between registries and registrants. Some of the confusion stemmed from the need for registries and registrants to communicate about new mechanisms and procedures through registrars, rather than directly. With sponsored TLDs, the whole notion of “sponsorship” was also new. It was not entirely clear what ICANN’s “delegated authority” over policy development would mean in practice. In addition, in the sponsored communities there was less familiarity with the role of registrars, and a marked preference for being able to deal with a Sponsoring Organization that was familiar (and precisely the reason why the Sponsor was selected by ICANN in the first place).[[44]](#footnote-44)

## THE TRADEMARK & GENERIC NAME ISSUE

Trademark holders have been able to claim “generic” words in advance of the general public – a process that has engendered numerous legitimate complaints. For example, the domain name “sun.info,” was registered during Sunrise by Sun Microsystems, Inc.[[45]](#footnote-45). We can expect similar grievances to be raised in the new gTLD launch as ICANN has not modified its policies in this regard.

## THE LOTTERY ISSUE

Initial efforts by .biz to design an alternative distribution system led a court to determine it would have constituted an illegal lottery. On July 23, 2001, David Scott Smiley, doing business as Smiley Productions and Skyscraper Productions, LLC, filed a class action suit on behalf of all .biz registrants in California Superior Court using that argument. The plaintiffs alleged unjust enrichment and violation of competition and consumer protection laws by distributing the TLD through means that constituted an illegal lottery. The plaintiffs moved for a preliminary injunction, which the Court granted. The court found there was reason to believe that the Land Rush system, particularly the $2.00 fee, violated California’s lottery law. The Court granted a preliminary injunction against NeuLevel. NeuLevel maintains the view that it would have prevailed on the merits, but it decided to settle the case for roughly $3 million (which included refunding the application fees and paying attorneys’ fees) in the interests of getting the TLD launched as quickly as possible.[[46]](#footnote-46) As new gTLD operators embark on developing new allocation systems, similar challenges may be encountered.

## LEGAL & REGULATORY ISSUES

Prior new gTLD start-up mechanisms resulted in numerous lawsuits being filed even though each applicant for a new gTLD executed detailed waivers as part of its original application to ICANN[[47]](#footnote-47); some operators also faced challenges from alternate root registries and such challenges may once more be expected in the upcoming new gTLD round. On the regulatory front, just as the EU Data Protection Act of 1998 necessitated certain Registry Agreement modifications, new legislative activities in other parts of the world might also impact the ICANN processes in the future.

# PUTTING THE THREAT MATRIX INTO CONTEXT

Admittedly, there were a host of issues associated with the prior limited rollout of new gTLDs. As we move forward, ICANN will not be launching just a few gTLDs, it will be launching hundreds of new gTLDs – and this is sure to remain a source of consternation. While many parties will be negatively impacted by ICANN’s decision, the fundamental challenge that we face is ensuring that ICANN can scale up to properly meet its obligations as steward of the global domain name system so that whatever detrimental impacts may result from this program will be outweighed by the benefits that will accrue under the program.

To ensure such benefits, a policy-formulating and regulatory regime needs to be in place that will effectively serve the needs of the public interest.

# THE AT-LARGE COMMUNITY & THE PUBLIC INTEREST

To answer the question, “Where does ICANN need to be in three to five years’ time?” we must first thoroughly understand our own construct and the nature of those deficiencies that hamper our forward progress.

The ICANN organization has previously been described by its own CEO as “a collection of squabbling interests, tied up in an elaborately complicated organizational chart” with At-Large membership serving as the “single largest distraction from what should have been the central ICANN focus”.[[48]](#footnote-48)

It is the structure of the At-Large and its impact that I wish to address as, in my view, no single group within ICANN is currently more lacking in policy-formulating and regulatory acumen than this particular community – and that represents an unacceptable hazard that impacts the public interest.

## THE AT-LARGE AS CURRENTLY PORTRAYED

In a written response to questions posed by a member of the U.S. House of Representatives, ICANN V.P. Kurt Pritz described the At-Large Advisory Committee (ALAC) as the “home within ICANN for the voice of the Internet end-user”[[49]](#footnote-49) and as an enabler of robust processes for the community that will facilitate the filing of new gTLD objections (as a safeguard against the introduction of a new top-level domain containing terms such as racial epithets). In this context, the ALAC is portrayed by ICANN as a champion fighting to ensure that community sensitivities are recognized and are properly accorded their due.

In light of this portrayal, one might think that the ALAC has provided carefully-honed channels of input/communication that regularly allow for an upward steady flow of comments from the world-wide base of Internet end-users to their designated “representatives” on the At-Large Advisory Committee, but you would be very wrong. One might also think that the Statements of the ALAC (as expressions of the public interest) have a very high impact on ICANN’s policy or policy implementation activities, but nothing could be further from the truth.

If the At-Large Community is ever to be regarded as it has been portrayed by ICANN management, then certain changes will need to be made over the course of the next three to five years to turn this vision into a reality.

The changes proposed herein are to be regarded as those that would likely be proposed within the context of ICANN’s regularly scheduled review cycles. Inasmuch as the last review of the ALAC commenced on 30 March 2007[[50]](#footnote-50) and in that the ICANN bylaws specify that “These periodic reviews shall be conducted no less frequently than every five years”[[51]](#footnote-51), the next review will soon be upon us. It is in this context and in its relation to the Strategic Plan that these comments are offered.

## MAKING THE CASE FOR A CHANGE

At issue is effective participation and productivity. Over the years I have vociferously argued that conditions are such that ALAC members regularly fail to engage in “work”; my opening remarks[[52]](#footnote-52) to the ALAC Review’s 2008 mid-term consultation were as follows:

1. ALAC New GTLD WG -- no comments in last 3 months
2. ALAC Domain Tasting WG -- no comments -- ever.
3. ALAC IDN WG -- no member discussions in last 9 months
4. ALAC IPv6 WG -- no discussion in last six months
5. ALAC MGTPLAN WG -- no discussion in last seven months
6. ALAC WHOIS WG -- one post in last ten months
7. ALAC list -- devoid of any user issues discussion
8. Monthly meetings -- 98% of time spent on internal matters

I would love to be able to state that the last three years have seen a transformative sea-change in ALAC work activities, but such is not the case… active policy-related discussion still eludes the ALAC.

## CURRENT ALAC WORKING GROUPS: EMPIRICAL DATA

1. GTLD WG – 2.68 comments per week
2. ENGAGEMENT WG – less-than-one (.91) comment per week
3. ICANN-FUTURE WG – less-than-one (.69) comment per week
4. ALAC WHOIS WG – less-than-one (.54) comment per week
5. IDN WG – less-than-one (.38) comment per week
6. FINANCE SUB-COMMITTEE – less-than-one (.18) comment/week

To be fair, even though the ALAC has never once in eight years produced a working group report, this level of productivity (measured by amount of comments tendered) should still be compared to the typical output of GNSO working groups (that do produce reports).

## WORKING GROUPS COMPARED

1. GNSO VERTICAL INTEGRATION – 53.65 comments per week
2. GNSO MORALITY/PUBLIC ORDER – 42.75 comments/week
3. GNSO WHOIS TF – 12.88 comments per week
4. GNSO NEW GTLD PDP – 8.67 comments per week
5. GNSO FAST FLUX – 7.90 comments per week
6. GNSO IRTP-B – 7.45 comments per week
7. GNSO PENDR – 7.00 comments per week
8. GNSO RAA TEAM B – 4.28 comments per week

## THE ROOT OF THE PROBLEM

While the figures tend to speak for themselves, at issue is why the ALAC performance is so lackluster by comparison…

Within the GNSO one finds spirited discussion between several different special interest communities. In order to arrive at consensus, ideas need to be forged in the heat of combative dialogue wherein only those views that can muster broad community-wide support will prevail. As former ICANN CEO Stuart Lynn indicated, “ICANN is intended to be a lightning rod for loud and noisy debates, and considerable contention.”[[53]](#footnote-53)

Contrast this environment with that which one finds within the ALAC ambit – in ALAC circles one finds only like-minded non-commercial organizational representatives whose natural inclination is to tacitly agree with the views of their non-commercial colleagues. Dissent is rare and comments are almost non-existent (other than those that indicate +1). This approach (which fails to challenge the ALAC to justify and advance their positions against opposition), remains flawed and as such fails to properly serve the public interest.

# THE AT-LARGE COMMUNITY WITHIN ICANN

Presently the At-Large is comprised of 134 non-commercial organizational entities and a handful of individuals. The vast majority of these certified organizational entities (At-Large Structures) almost never participate in any mailing list or teleconference discussions and complaints regarding such member non-participation routinely are fielded, studied, examined and agonized over[[54]](#footnote-54) (invariably leading to an onslaught of ever more frequent calls for enhanced outreach[[55]](#footnote-55) to thereby attain more participants).

With regard to those that actually participate in the process, an ALAC member at the Singapore session opined: “while a few of us are working hard, most of us are hardly working”.

# TURNING THE SITUATION AROUND

The public interest is best served by thoughtful, well-considered substantive and broadly representative commentary that has emerged from a cordial yet combative consensus-engendering environment where arguments need to meet the test of universal acceptability. If the At-Large is to carry the banner of the public interest, then its contributions must also be able to withstand the heat of intensive debate and must become part of the policy-recommending process.

As an Advisory Committee to the ICANN Board, the ALAC typically provides Statements after the remainder of the community has prepared policy propositions. If the At-Large is to be associated with the public interest component within ICANN, then it needs to do more than offer after-the-fact commentary; instead, it needs to actively be involved in the grass-roots preparation of policy as a full participant in a multi-stakeholder discussion environment.

# THE WAY FORWARD

In prior years, after a substantial period of study, the recommendation was put forward to create an At-Large Supporting Organization (ALSO)[[56]](#footnote-56). The specific recommendations were these:

(a) Create an At-Large Supporting Organization (ALSO) as a regionally-based framework for informed participation of any interested individual and for At-Large involvement in ICANN policy and decision-making (including mechanisms to foster discussion among individuals and with ICANN's decision-making bodies);

(b) Focus At-Large membership on an identifiable and vested community (an ALSO electorate) to provide a practical mechanism for voter registration and self-funding (e.g. The ALSC recommends that membership be based on individual domain name holders and efforts continue to be made to identify an additional membership option with a reasonable level of verification);

(c) Provide a proportionate role for At-Large members in selecting ICANN's Board (along with other ICANN constituencies) (e.g. The ALSC recommends 6 At-Large Directors in a 19 member Board);

Instead of creating a Supporting Organization, the ICANN Board created an Advisory Committee; instead of a self-funded vested community comprised of individual domain name holders, the at-large composition was re-designed to primarily be associated with ICANN-funded non-commercial organizational entities; and instead of a significant role on the ICANN Board, the At-Large now elects only a single Board member.

So, with the bulk of these blue-panel recommendations rejected by an earlier ICANN Board, how then do we move forward properly?

# A RE-ALIGNMENT IN THE PUBLIC INTEREST

While some will argue that ALAC improvements are on the way[[57]](#footnote-57) and will be ready any day now, the blunt truth is that no amount of tweaking will repair a problem that stems from a structural deficiency – you simply can’t put like-minded folks together in a single construct that essentially yields the following:

* + - “…and this is my opinion”
    - “ditto”
    - “+1”
    - “…any other comments?”
    - [SILENCE]

The public interest requires another arrangement, an arrangement more conducive to the preparation of carefully-considered and thoughtful work product.

# MERGING THE AT-LARGE WITH THE GNSO

Understanding that the ICANN Board has already rejected the notion of a separate Supporting Organization for the At-Large, the only viable option left is to consider merging the at-large with an existing Supporting Organization.

This is a fairly easy objective to meet that can successfully be managed at both a significant cost-savings for the organization and without an excessive expenditure of either time or human resources during the transition phase. The GNSO is the ideal candidate body for such a structural merger.

## STRUCTURAL CONSIDERATIONS

From a structural perspective there is inherently no difference between the non-commercial organizations and individuals that currently constitute the at-large and the non-commercial organizations and individuals that presently comprise the Non-commercial Stakeholders Group – they are 2 sides of the same coin.

## FINANCIAL CONSIDERATIONS

The Draft FY12 Operating Plan and Budget contains a section that details expenses on an area basis. The Expense Area Group documentation indicates that support for ALAC and At-Large activities constitutes 8.10% of ICANN’s $67million budget… in other words; ICANN invests $5,427,000[[58]](#footnote-58) in support of:

* + Policy work and secretariat support for ALAC
  + Outreach efforts to regional organizations and global engagement
  + Translation of documents
  + Interpretation costs for meetings and conference calls
  + Overhead costs such as rent, human resources and accounting

By merging the ALAC with the GNSO, certain cost savings can assuredly be realized.

## POLICY CONSIDERATIONS

A merger would allow those that have not benefited from vibrant policy debates to actively join in the fray – this would be healthy for the eco-system.

## FRAMEWORK CONSIDERATIONS

The ICANN Board has the ability to create a new constituency:

“The Board may create new Constituencies as described in Section 5(3) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN.”

The Board can choose to create an at-large constituency within the Non-Commercial Stakeholders Group and it could readily be designated as the At-Large Constituency. Charters could be prepared and drafted in advance to facilitate a smooth transition. Election mechanics, as offered by the GNSO Secretariat, are already in place. GNSO Toolkit provisioning for constituencies is almost ready and should be available by the time the transition occurs.

# PUTTING THIS TRANSITION INTO A STRATEGIC CONTEXT

I am reminded of the thrust of the comments put forth by former ICANN CEO Stuart Lynn in his paper “President's Report: ICANN – The Case for Reform”:

“The simple fact is that a private sector process cannot effectively function if major and important elements of the private sector do not participate productively in that process… We must find another, more effective path for appropriate input into the ICANN process by the general user community that will accomplish the key purpose underlying the At Large concept – to ensure that the broad public interest is effectively reflected and protected in the ICANN consensus development process.”[[59]](#footnote-59)

I share Stuart’s vision. The at-large community must be integrated into the consensus development process. A structural merger achieves this goal.

* **THE AT-LARGE AS A PUBLIC INTEREST ELEMENT**

While the At-Large has always been associated with the notion of the broad public interest – a notion derived from the proposed composition of the original ICANN Board where half of the directors were to have come from the at-large – the At-Large as we know it today is not the equivalent of the Public Interest… it is only a single component thereof.

As expressed by departing Chairman of the Board Peter Dengate Thrush:

“Let me just give my view about that discussion that was yesterday about defining the "public interest." I think we should resist that with all our might and main. Whoever defines the "public interest" will have won the big chunk of the argument and will have excluded the others because there is no such thing as "the public interest." There are many public interests, and they are always competing. Our job is to get it right.”[[60]](#footnote-60)

Chairman Thrush has recognized that our next major challenge involves attending to necessary structural considerations; he states:

“Things we could have done better, I think we need to keep a close eye on the structure of ICANN. It should always be an elegant tension as the members of the community contest with each other for resources, contest with each other for policy positions.”[[61]](#footnote-61)

Thus far we have not seen the at-large enabled to contest with other communities on matters of policy. This needs to change so that the public interest may properly be supported by their contributions. We are entering into an era that will call for a fair amount of policy development to meet the new gTLD challenges ahead, and as such, the at-large needs to be fully integrated into the policy environment.

## STRATEGIC PLANNING

One of the goals of a strategic planning exercise is to determine where we want to be several years down the road. A secondary objective is to outline those steps that will turn ICANN into a more effective organization.

At the moment, the at-large within ICANN does not operate as an effective institution and most officers within the ALAC will readily admit that the vast bulk of their Statements are “ignored”[[62]](#footnote-62) …but the problem is not insurmountable and is amenable to correction -- an old adage can serve to guide us in this matter: “a place for everything, and everything in its place”.

Just as you wouldn’t take half of the registrars and park them in a GNSO constituency while putting the other half into an Advisory Committee of the Board, no logical construct should allow for placing half of ICANN’s non-commercial organizations within the GNSO while the other half of the non-commercial organizations (the ALSs) structurally reside within an Advisory Committee construct.

We are coping with the after-effects of a flawed structural design that has kept part of the community out of the policy-formulating process. By bringing the at-large community into the GNSO fold, a greater degree of thoughtful policy development can be expected to emerge (as we will be adding a large number of new participants into the mix that can become attuned to constructively contributing within the GNSO’s working group environment).

# FINAL THOUGHTS

Meeting the challenge posed by the introduction of hundreds of new gTLDs will require the combined effort of all within ICANN, and the at-large community needs to quickly become part of the solution. Some within the at-large have already started moving in this direction – we have already noted the effort of at-large members to create a Consumer Protection Constituency within the GNSO.

Strategically we should be thinking about accelerating the pace of this transition... we need not wait for ICANN’s formal structural review process that can easily consume years of energy, as there is nothing that precludes the possibility of establishing an at-large constituency within the GNSO at this moment in time.

All regional at-large organizations could be migrated to the GNSO without undue difficulty. Should the Board elect to retain the services of the ALAC during the transition period, the ALAC could continue to independently function as a think-tank until such time as the transition of ALSs to the NCSG is finalized.

Thank you for your consideration of these remarks.

1. The author wishes to acknowledges the tremendous benefit derived from Miriam Sapiro’s July 2004 paper entitled “Evaluation of the New gTLDs: Policy and Legal Issues” from which a large amount of Threat Matrix data was sourced -- <http://www.icann.org/en/tlds/new-gtld-eval-31aug04.pdf> [↑](#footnote-ref-1)
2. The White Paper recognized that the "challenge of deciding policy for the addition of new domains will be formidable" and noted that "[a]t least in the short run, a prudent concern for the stability of the system suggests that expansion of gTLDs proceed at a deliberate and controlled pace to allow for evaluation of the impact of the new gTLDs and well-reasoned evolution of the domain space." [↑](#footnote-ref-2)
3. <http://www.icann.org/en/factsheets/analysis-turnover-22jun11-en.pdf> [↑](#footnote-ref-3)
4. <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt084.shtm> [↑](#footnote-ref-4)
5. <http://www.icann.org/en/announcements/advisory-03nov00.htm> [↑](#footnote-ref-5)
6. <http://www.icann.org/en/announcements/icann-pr29sep00.htm> [↑](#footnote-ref-6)
7. <https://www.uniteddomains.com/ntld/pre-register-new-domains> ; <http://www.quintaris.com/blog/news-release-stake-your-claim/> [↑](#footnote-ref-7)
8. <http://www.cadna.org/en/newsroom/press-releases/icanns-gtld-launch-costs-businesses> [↑](#footnote-ref-8)
9. <http://domainincite.com/new-gtlds-will-cost-155-billion-honest/> [↑](#footnote-ref-9)
10. <http://blog.ericgoldman.org/archives/2009/01/onlinenic_loses.htm> [↑](#footnote-ref-10)
11. <http://en.wikipedia.org/wiki/RegisterFly#cite_note-ClassAction-12> [↑](#footnote-ref-11)
12. <http://www.icann.org/en/minutes/board-briefing-materials-2-05aug10-en.pdf> [↑](#footnote-ref-12)
13. <http://www.icann.org/en/policy/briefs/domain-name-monetization-jun08-en.pdf> [↑](#footnote-ref-13)
14. See, for example, <http://www.middlesmithfieldpennsylvania.travel> [↑](#footnote-ref-14)
15. <http://www.icann.org/en/committees/security/sac040.pdf> [↑](#footnote-ref-15)
16. <http://www.bakerlaw.com/files/Uploads/Documents/News/Articles/INTELLECTUAL%20PROPERTY/2011/IPO_Comments_Einhorn-3-2011.pdf> [↑](#footnote-ref-16)
17. <http://www.icann.org/en/announcements/announcement-12aug09-en.htm> [↑](#footnote-ref-17)
18. http://www.thedomains.com/2011/06/05/was-snapnames-verisign-high-traffic-score-domain-name-auction-just-a-big-domain-tasting-experiment/ [↑](#footnote-ref-18)
19. <http://en.wikipedia.org/wiki/Domain_tasting> [↑](#footnote-ref-19)
20. <http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm> at 3.7.9 [↑](#footnote-ref-20)
21. <http://www.domainnamenews.com/featured/domain-registrar-network-solutions-front-running-on-whois-searches/1359> [↑](#footnote-ref-21)
22. <http://www.icann.org/en/tlds/new-gtld-eval-31aug04.pdf> [↑](#footnote-ref-22)
23. <http://www.icann.org/en/topics/new-gtlds/perfect-sunrise-jun08-en.pdf> [↑](#footnote-ref-23)
24. <http://www.icann.org/en/tlds/new-gtld-eval-31aug04.pdf> [↑](#footnote-ref-24)
25. Ibid. [↑](#footnote-ref-25)
26. <http://www.icann.org/en/registrars/accredited-list.html> [↑](#footnote-ref-26)
27. <http://www.icann.org/en/topics/new-gtlds/trademark-protections-evidence-use-07jun11-en.pdf> [↑](#footnote-ref-27)
28. <http://www.icann.org/en/tlds/new-gtld-eval-31aug04.pdf> [↑](#footnote-ref-28)
29. <http://blog.icann.org/2007/04/faqs-for-registerfly-customers/> [↑](#footnote-ref-29)
30. <http://www.icann.org/en/correspondence/raad-to-dengate-thrush-09sep09-en.pdf> [↑](#footnote-ref-30)
31. Ibid. [↑](#footnote-ref-31)
32. <http://thenextweb.com/asia/2011/03/24/india-to-block-xxx-top-level-domain/> [↑](#footnote-ref-32)
33. <http://www.icann.org/en/correspondence/burnette-to-johnson-fassett-27feb11-en.pdf> [↑](#footnote-ref-33)
34. “It appears that Employ Media and SHRM, through the Direct Employers Association, intend to use the .JOBS TLD primarily to compete with other internet job boards.” [↑](#footnote-ref-34)
35. Competition and Vertical Integration issues remain a concern for Governments – see the correspondence from the European Commission and the USG: <http://www.icann.org/en/correspondence/eu-to-icann-17jun11-en.pdf> <http://www.icann.org/en/correspondence/strickling-to-dengate-thrush-16jun11-en.pdf> [↑](#footnote-ref-35)
36. <http://www.icann.org/en/topics/new-gtlds/registry-transition-processes-clean-30may11-en.pdf> [↑](#footnote-ref-36)
37. <http://www.internetnews.me/2011/06/12/some-considerations-for-new-tld-operators-from-a-registrar-perspective/> [↑](#footnote-ref-37)
38. See, for example, <http://pittsburghpennsylvania.travel> [↑](#footnote-ref-38)
39. “What causes us more problems is the proxy registration where we cannot -- no longer see the identification of the registrant. And very often, if people are paying for their registration, they are using stolen credit card data. Now, what do we need is to identify who is behind these domain name registrations or get a trail. If you don't have the real name, perhaps you have other information that can lead us to these criminals.” <http://brussels38.icann.org/meetings/brussels2010/transcript-proposed-raa-amendments-21jun10-en.txt> [↑](#footnote-ref-39)
40. <http://www.wipo.int/amc/en/docs/icann021210.pdf> [↑](#footnote-ref-40)
41. <http://www.icann.org/en/tlds/new-gtld-eval-31aug04.pdf> [↑](#footnote-ref-41)
42. http://www.icann.org/en/tlds/new-gtld-eval-31aug04.pdf [↑](#footnote-ref-42)
43. Ibid. [↑](#footnote-ref-43)
44. Ibid. [↑](#footnote-ref-44)
45. Ibid. [↑](#footnote-ref-45)
46. <http://www.icann.org/en/tlds/new-gtld-eval-31aug04.pdf> [↑](#footnote-ref-46)
47. Ibid. [↑](#footnote-ref-47)
48. http://www.icann.org/en/general/lynn-reform-proposal-24feb02.htm [↑](#footnote-ref-48)
49. <http://www.icann.org/en/correspondence/pritz-to-goodlatte-07jun11-en.pdf> [↑](#footnote-ref-49)
50. <http://www.icann.org/en/reviews/alac/final-tor-20jun07.pdf> [↑](#footnote-ref-50)
51. <http://www.icann.org/en/general/bylaws.htm> [↑](#footnote-ref-51)
52. <http://forum.icann.org/lists/alac-mid-consult/msg00003.html> [↑](#footnote-ref-52)
53. <http://www.icann.org/en/correspondence/lynn-testimony-12jun02.htm> [↑](#footnote-ref-53)
54. <https://community.icann.org/display/Improve/At-Large+Improvements+Work+Team+B> [↑](#footnote-ref-54)
55. <http://www.icann.org/en/financials/so-ac-sg-requests-summary-fy12-en.pdf> [↑](#footnote-ref-55)
56. <http://www.icann.org/en/committees/at-large/final-report-05nov01.htm> [↑](#footnote-ref-56)
57. <https://community.icann.org/display/Improve/At-Large+Improvements+Recommendations> [↑](#footnote-ref-57)
58. <http://www.icann.org/en/financials/proposed-opplan-budget-v1-fy12-17may11-en.pdf> [↑](#footnote-ref-58)
59. <http://www.icann.org/en/general/lynn-reform-proposal-24feb02.htm> [↑](#footnote-ref-59)
60. <http://singapore41.icann.org/meetings/singapore2011/transcripts-board-meeting-1-24jun11-en.txt> [↑](#footnote-ref-60)
61. Ibid. [↑](#footnote-ref-61)
62. “We've been used to giving comments that get ignored” -- <https://community.icann.org/download/attachments/2262849/ALAC-21-06-2009-Transcription-EN-3.pdf?version=1&modificationDate=1283970693000> [↑](#footnote-ref-62)