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AT-LARGE ADVISORY COMMITTEE

Statement of the ALAC on the
Preliminary Issue Report on the Current State of the UDRP

Introduction
By the Staff of ICANN

José Arce, a member of the Latin American and Caribbean Islands Regional At-Large Organization (LACRALO), composed an initial draft of this statement in Spanish, after discussion of the topic within LACRALO. This draft, along with an English translation, was posted on a wiki workspace on 12 July 2011. Eric Brunner-Williams, an individual member of the North American Regional At-Large Organization (NARALO), composed an alternative, independent draft in English, after discussion of the topic among members of the ALAC and all five Regional At-Large Organizations (RALOs) in Singapore. This alternative draft was posted on the same wiki workspace on 14 July 2011.

On 15 July, At-Large Staff sent a four-day call for comments on both drafts to all At-Large members (using the ALAC-Announce mailing list).

On 16 July, the ALAC requested a 14-day extension of the public comment period on this subject and was granted an extension through 22 July 2011.

On 20 July, ALAC Chair Olivier Crépin-Leblond created the final version of this Statement by combining the two original drafts and the comments received by At-Large members. On 21 July, the ALAC Chair requested that Staff open a five-day ALAC ratification vote on this statement, and the statement was submitted to Margie Milam (Staff person responsible for the public comment period).

[End of Introduction]

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The Preliminary Issue Report has been prepared by Staff at the request of the GNSO Council. Procedurally, production of the Preliminary Issues Report, a public comment period, and a Final Issue Report are predicates to a determination by the GNSO Council of whether or not to commence a policy development process (PDP) on the UDRP.

As a prelude to this ALAC Statement, we want to highlight the complexity of the issue, as it is one of the oldest policy systems that ICANN has used throughout the world and was developed when the practices of "good" and "abusive" domain name registration came to light. This led to the discussion of many topics, such as (a) Whois, (b) Post-Expiration Domain Name Recovery and (c) Abusive Registrations, as well as other similar policies.

The ALAC supports the Staff recommendation that the UDRP can be improved through modest improvements of its implementation, but we believe it to be a highly complex system.

The ALAC also supports the Staff recommendation that a PDP on the UDRP should not be initiated at this time.

However, we consider the Staff recommendation that a *small* group of experts be convened to produce proposals to improve the process or implementation of the UDRP to be cause for concern. The UDRP was drafted by a small group of experts primarily from North America a decade ago. Its clear basis in American law (especially ACPA) actually has plagued its implementation. If the UDRP is to be reviewed or studied, the group doing so should be open to all five geographical regions – especially to experts from the non-Latin-language community and worldwide Internet community, who have no conflicts of interest. In other words, the group should not be limited to the existing elite club known to ICANN.

That said, if the GNSO were, in fact, to adopt the Staff recommendation to convene a small group of experts to produce proposals that would improve the process or implementation of the UDRP, the ALAC recommends that these improvements address the problems identified by Professor Komaitis concerning meritless capture of domains.

Historically speaking, the ALAC does not believe that the UDRP has been addressed in an appropriate way. During 10 years of operation, the process should have been addressed in a multi-stakeholder manner, with follow-up discussions based on experience and research. This issue is of great importance and complexity and should be treated as such. Going forward, a broader approach is needed than has been thus far used.

Therefore, a modification to the UDRP can and should wait until a detailed and thorough analysis of its various policies and practices has been completed. The voices that strongly support an

immediate PDP do not represent the consensus – and do not objectively represent the policies of the past 10 years.

The ALAC has the following comments regarding the Staff recommendations stated in the Preliminary Issue Report:

First, the means by which two or more parties resolve a dispute concerning the status of the registrant of record of a registered domain name is a policy, but it is not a policy that can preserve and enhance the operational stability, reliability, security and interoperability of the Internet.

The determination of the registrant of record of a registered domain name has no relationship to the operational stability, reliability, security and interoperability of the Internet. While the policy has obvious benefits, this simply is not one of them.

Second, while the UDRP "applies uniformly to all registrants of gTLDs and to all registrars" in theory, in practice the utilization of the UDRP concerning domain names registered in .aero, .coop, .museum, .cat and perhaps others is negligible. It is useful to have a uniform policy of uniform applicability, where this policy does not create disproportionate harm and accomplishes the desired ends.

Discussion of the UDRP should be informed as to where it is useful and, in fact, necessary and as to where it is not, since this awareness relates to the market forces that create the problem for which the UDRP is a solution.

Third, while "a review of the UDRP could be instructive as a guide or framework for how to conduct reviews of other policies," other reviews, past and prospective, possess the same potential.

Fourth, it can not be said that any amendment will undermine the current policy, and it is impossible to make predictions on these matters.

Given the current state of discussion, considering that the stakeholders involved hold different views and some of these are in a state of confusion, we conclude that it is not the appropriate time to carry out a PDP process.

But the ALAC does support the implementation of a PDP process in the near future, based on a real "need," well-defined by its stakeholders, after establishing a clear purpose and scope of reform.

Fifth, the ALAC commends Staff for preparing the UDRP Questionnaire and the summary of issues raised by respondents in the community. We also commend the Provider respondents to the UDRP Questionnaire – the World Intellectual Property Organization (WIPO), the National Arbitration Forum (NAF), the Asian Domain Name Dispute Resolution Centre (ADNDRC), and the Czech Arbitration Court (CAC). These work products of Staff and Respondents, along with their presence in the record of the Preliminary Issue Report, constitute effective and informed notice and comment.

Finally, we note that while this policy is one of ICANN's oldest, ICANN has not translated the document on its Web site from English into other languages (see http://www.icann.org/en/udrp/udrp-policy-24oct99.htm). Only its rules are summarized (see http://www.icann.org/es/dndr/udrp/uniform-rules-es.htm), which are not mandatory for providers (bearing in mind that the English version shall prevail in the case of a contradiction). This would need to be fixed as a matter of priority.