AT-LARGE ADVISORY COMMITTEE
ALAC Statement on the Trademark Clearinghouse "Strawman Solution"

Introduction
By the Staff of ICANN

An initial draft of this Statement was composed by the following individuals after discussion of the topic within At-Large and on the Mailing Lists:

* Evan Leibovitch, ALAC member from the North-American Regional At-Large Organization (NARALO) and ALAC Executive Committee (ExCom) member; and
* Alan Greenberg, ALAC member from the NARALO and the ALAC Liaison to the Generic Names Supporting Organization (GNSO).

On 05 January 2013, this Statement was posted on the At-Large Trademark Clearinghouse "Strawman Solution" Workspace.

On that same day, a call for comments on the draft Statement was sent to At-Large members via the ALAC Working List.

On 10 January 2013, a version incorporating the comments received was posted on the Workspace.

On that same day, Olivier Crépin-Leblond, the Chair of the ALAC, requested that Staff open a five-day ALAC ratification on the Statement.

On 15 January 2013, Staff confirmed that the online vote resulted in the ALAC endorsing the Statement with 14 votes in favor, 0 votes against, and 1 abstention. You may review the result independently under: https://www.bigpulse.com/pollresults?code=2885qBED6XLuksam2kaVV28W

The Chair then requested that the Statement be transmitted to the Public Comment process, copying the ICANN Staff member responsible for this Public Comment topic.

[End of Introduction]

ALAC Statement on the Trademark Clearinghouse
"Strawman Solution"

The ALAC wishes to comment on the Trademark Clearinghouse "Strawman Solution" from a number of different perspectives.

Was this the right time for re-opening Rights Protection Mechanisms (RPMs)?

As the RPMs outlined in the Applicant Guidebook for the first round of new gTLDs were arrived at through an extremely difficult but successful consensus process, the ALAC's first preference would be to not re-open this sensitive issue at this point. However, the ALAC also acknowledges that the concerns of the IPC/BC do have some basis, as demonstrated by the significant level of defensive registrations within existing TLDs as well as ongoing UDRP activity. Given that, the ALAC is prepared to comment on the specific RPMs being proposed on their individual merits.

Was the process followed to re-open the RPM discussion reasonable?

The ALAC finds the process followed by both the IPC/BC and by ICANN staff significantly flawed.

The IPC/BC presented a very brief and very fuzzy set of requirements worded in such a way as to create more questions than they answered. Although the IPC/BC (according to their own statements) spend a lot of time refining these requirements between the time of the Toronto ICANN meeting and the ad hoc meeting held in Los Angeles, they provided the rest of the participants in the Los Angeles meeting with none of this until after the conclusion of that meeting. The lack of early disclosure and sharing significantly impacted the ensuing discussions and served to cripple the concept of the Multi-*Equal*-Stakeholder Model.

ICANN staff failed to include At-Large in the initial discussions held in Brussels, and only after a suggestion from the NCSG were we even thought to be included in the LA meeting. The ALAC was only formally notified of the meeting a few days before it was to be held, and was refused any travel funding to attend in person. We were assured that we would not be disadvantaged by remote participation, which turned out to not be the case. At-Large representatives (and other members participating remotely) considered themselves to be at a substantial disadvantage compared to the physically-present BC/IPC and contracted parties. As a result, we do not believe that the point of view of Internet end-users fairly represented in this process.

The lack of clarity over how the participants were selected, how balanced the various stakeholder participation was, and whether these participants in fact "represented" their parent bodies is troubling. Moreover, there was no single understanding of what would happen with the outcomes of the meeting.

The decision to try to identify what differentiates implementation and policy was an important one, and one that should have been addressed by ICANN long before now in a more comprehensive fashion. The lack of clarity of this even now is one of the root sources for disagreement among the various parties.

All of that notwithstanding, this kind of brain-storming and cooperative problem solving is an important innovation - one that the ALAC believes will be absolutely mandatory if ICANN is to rationally address some of the difficult problems ahead and come out with anything more than the least-common denominator solution that the standard PDP WG tends to result in. The STI Review Team was in fact a very similar body and arguably one of the more successful ICANN efforts to find common ground among very diverse initial positions. The challenge will be how to use such a process as a prelude to or part of the GNSO policy processes. Included in this challenge will be how to successfully run such discussion groups without the direct involvement of the CEO or the threat of Board action if the discussions fail - conditions which the ALAC believes were critical to the outcomes of the LA Consultation and to the STI.

As stated above, the specific process used in the Brussels and LA meetings was severely flawed and demands significant revision. Nonetheless, the effort to use innovative (for ICANN) methodology is a positive constructive step that is to be encouraged. The ALAC welcomes the opportunity to take part in a decision-making process that is effective, efficient and inclusive.

Evaluation of the Strawman components

30 days pre-sunrise notice period: The ALAC agrees that this is an implementation issue and supports the change.

Extension of minimum Trademark Claims service to 90 days: The STI recommendation was for no Trademark Claims (TMC) post launch, and the Applicant Guidebook required TMC for 60 days post-general registration availability. The exact relationship is between these two reference points (launch and general registration) is still unclear, but it is obvious that this period was "adjusted" during the overall new gTLD design process. This process implies that the community has accepted that this is an implementation issue, since the deliberations that resulted in 60 days could well have resulted in 90, and the ALAC agrees that this can and should be considered implementation. On the substance, the ALAC, in its minority statement to the STI, has already supported the concept of longer or ongoing TMC, and so the ALAC does support this change.

Lightweight "Claims 2" period of 6-12 – fee-based: Although a modification of the original TMC, this is a new mechanism that departs significantly from the STI recommendations. ICANN staff have said that they believe that this is an implementation issue, but to date have not provided a detailed analysis to justify this conclusion. In the absence of such a convincing rationale, the ALAC must consider this matter to be a policy issue that requires GNSO attention. The ALAC, in its minority statement to the STI, advocated an ongoing TMC but had some reservation about the chilling effects of such an extension. This new "light" TMC seems a reasonable balance - extending the TMC yet reducing the chilling effect - and the ALAC supports it. The ALAC encourages the GNSO to evaluate the impact of this mechanism on stakeholders and if applicable, recommend its implementation.

Inclusion of domain names previously determined to have been abusively registered or used in both Trademark Claims services: This is a totally new mechanism that has not been the subject of previous extensive discussion and investigation. As such it is clearly policy and cannot be judged simply implementation. This new mechanism would give a TM holder first refusal at registering a limited number of strings related to a TM during sunrise, or generate TMC notices for other prospective registrants. The ALAC is aware, just as are brand-owners, that such abuse can cause user confusion and possibly fraud. In fact, the ALAC supported the concept of allowing TM Clearinghouse registration of "marks-contained" strings in its minority statement to the STI. Given the limited nature of this protection and its reliance on past abuse, the ALAC supports this change. The ALAC encourages the GNSO to fairly investigate the benefits and impacts of this mechanism and to recommend its adoption.

Limited Preventative Registration: This is not part of the Strawman proposal, and differs from anything previously accepted by the community. As such it is clearly policy. It is a form of blocking without (to date) any practical method of over-riding it to account for fair-use situations. The ALAC cannot support any form of such a change at this time.