DRAFT
Controversial Names Reserved Names Report for RN-WG

Revised 6 March 2007

1. Background

The concept of a category of 'controversial names/disputed names' developed for the first time in discussion among the members of the PDP-Dec05 in their face to face meeting in Amsterdam. While there is not a specific reserved name category in any gTLD registry agreement that is called "controversial names", several ccTLDs registration policies prohibit 'controversial names at the second level' (or third level) in some manner.

1.1 Recommendations in the Current Report

The current draft recommendations state:

> Term of Reference Two: 2.v. Strings should not be contrary to public policy principles (as set out in the Governmental Advisory Committee's draft set of principles)

The GAC's relevant Draft Public Policy Principles include: [5.6]:

> Principle 2.1 - No new gTLD string shall promote hatred, racism, discrimination of any sort, criminal activity, or any abuse of specific religions or cultures.

> Principle 2.6 - Terms of national, cultural or religious significance should only be considered for the codes of new gTLDs where there is a clear and legitimate candidate "sponsor" for such an application and subject to no major objections from the community concerned.

> Principle 2.11 - The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

> Principle 2.13 - If there is doubt about the interpretation of these provisions for specific applications, ICANN should consult the GAC, the relevant government(s) directly, and/or the responsible services of the UN. If the GAC or individual GAC members express formal concerns about a specific new gTLD application, ICANN should defer from proceeding with the said application until GAC concerns have been addressed to the new GAC's or the respective government's satisfaction.

1.2 The basis for the draft principles

The PDP-Dec05 draft final report [5.5] states as follows, in support of the principles:

> "20. There was detailed discussion about a general category of potential strings which may have public policy impacts of interest to national governments. In response to correspondence from the GNSO Council Chair, the Governmental Advisory Committee [20] have responded to a request to provide guidance on public policy issues. The 17 October 2006 draft is found in full at Annex Three. It is expected that these principles will be finalised at the ICANN meeting in March 2007. After those guidelines are formalised,

the ICANN staff proposed implementation plan may be modified to take into account ways to address the public policy concerns of governments in relation to the introduction of new top level domains.

21. The Committee discussed proposed text to address the concerns of governments that was based on existing international law with respect to strings that may be contrary to public policy or accepted principles of morality or be of such a nature to deceive the public.

22. The Committee spent considerable time considering the public policy aspects of new top-level domains [21]. In particular, concerns about "public policy and morality" were raised. This phrasing is consistent with international laws including Article 3 (1) (f) of the 1988 European Union Trade Mark Directive 89/104/EEC and within Article 7 (1) (f) of the 1993 European Union Trade Mark Regulation 40/94. In addition, the phrasing "contrary to morality or public order and in particular of such a nature as to deceive the public" comes from Article 6quinques (B)(3) of the 1883 Paris Convention. The reference to the Paris Convention remains relevant to domain names even though, when it was drafted, domain names were completely unheard of.

23. The concept of "morality" is captured in Article 19 United Nations Convention on Human Rights (http://www.unhchr.ch/udhr/lang/eng.htm) says "…Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 29 continues by saying that "…In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

24. The EU Trade Mark Office's Examiner's guidelines provides assistance on how to interpret morality and deceit. "…Contrary to morality or public order. Words or images which are offensive, such as swear words or racially derogatory images, or which are blasphemous are not acceptable. There is a dividing line between this and words which might be considered in poor taste. The latter do not offend against this provision." The further element is deception of the public which is treated in the following way. "…Deceive the public. To deceive the public, is for instance as to the nature, quality or geographical origin. For example, a word may give rise to a real expectation of a particular locality which is untrue." For more information, see Sections 8.7 and 8.8 at http://oami.europa.eu/en/mark/marque/direc.htm

25. The UK Trade Mark office provides similar guidance in its Examiner's Guidance Manual. "Marks which offend fall broadly into three types: those with criminal connotations, those with religious connotations and explicit/taboo signs. Marks offending public policy are likely to offend accepted principles of morality, e.g. illegal drug terminology, although the question of public policy may not arise against marks offending accepted principles of morality, for example, taboo swear words. If a mark is merely distasteful, an objection is unlikely to be justified, whereas if it would cause outrage or would be likely significantly to undermine religious, family or social values, then an objection will be appropriate. Offence may be caused on matters of race, sex, religious belief or general matters of taste and decency. Care should be taken when words have a religious significance and which may provoke greater offence than mere distaste, or even outrage, if used to parody a religion or its values. Where a sign has a very sacred status to members of a religion, mere use may be enough to cause outrage." For more information, see http://www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm*)*

1.3 Discussion of Issues by Sub-Group Members

Comments of Avri Doria (In consultation with Victoria Mcevedy, Solicitor, International Dispute Resolution Practice Consultant.):

This report is concerned to identify comprehensively the issues raised by the principles and to examine them.

Trade Mark Laws and ccTLDs as models

a) It should be noted that both Nation States' trade mark laws, which are territorially limited and ccTLDs are premised on the assumption that a Nation is monocultural with a unitary legal system and a generally accepted standard of morality and taste often with only one or two dominant religions. Issues arise from attempts to extrapolate standards globally in a multicultural context is clearly problematic. These analogies must be considered with this limit in mind.

b) Trade mark laws also give inadequate weight to Freedom of Expression concerns which are relevant in an internet context given that much of the use is non-commercial. Consideration must also be given to the special considerations arising from the government sanction and exclusivity involved in trade marks which may not be applicable to the internet.

International Law

c) The draft cites Arts 19 and 29 of the UN Convention on Human Rights which together subject Freedom of Expression to only such limitations as are determined by law. The ECHR provides similarly at Art. 10. Considerations arise as to the desirability of improving on such standards and questions as to the availability of other options.

d)   Most nations have some restrictions on speech and inciting racial hatred or discrimination and crime tend to be included. It may be that common standards can be extracted after a review. Criticism of other religions is a tenant of Freedom of Expression in the West but prohibited in the Middle East. A full and proper study of the appropriateness of imposing the Eastern standards on the West should be considered.

e) Content v Strings

Another issue that arises is the possibility that no action should be taken as to the strings on the basis that content is regulated by all nations so that for example, while .Nazi itself would not infringe French or German laws against glorification of the Nazi – the issue would be content related and depend on the content. See for example the Yahoo litigation.

The Veto

f) The ability of any one nation to block an application requires serious consideration.

Comments of Marilyn Cade:

[Place holder for Marilyn's discussion comments]

Comments of Tim Ruiz:

The basis for my support of the straw recommendation is this statement in the GAC Principle 2.11, "All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process." I agree with that principle but the application of the other GAC principles will make this impossible. Take GAC Principle 2.6 for example – it is clearly not possible for ICANN to pre-determine all terms of national, cultural or religious significance for all of the world's cultures and create predictable criteria for applicants.

It is my view that 2.v. of TOR two in the draft final report should be applied more as a warning to applicants, not as a criteria that ICANN can actually proactively apply when considering applications. The warning is that any string applied for may be contested as something contrary to public policy. If contested, the application will be moved to a holding status as 'controversial' until the public policy claims can be further investigated.

The only exception might be the seven words banned by the US Federal Communication Commission. While I have not asked that this be added to the straw recommendation, it is my belief that the US Department of Commerce, who has ultimate approval of all additions to the root, would never allow a gTLD string that exactly matches one of the seven banned words into the root.

1.4 Controversial Names in ccTLDs

a) This report will address examples of the concept of controversial names' where examples exist, largely in the country code TLDs.

b) Although there is no specific prohibition in an RFC that governs the issue or topic of controversial names, some ccTLDs' registration policies prohibit controversial names at the second level (or third level) in some manner although many do not. Examples of some of the more extreme policies are included below, but are by no means exhaustive. The sub group will undertake to quickly review a limited number of ccTLD policies including .us, .im, and .cn, and .se.

c) There does not appear to be any such rules within any sponsored or unsponsored gTLD but review of relevant rules is not yet complete; the sub group will also email the gTLD Registry Constituency Chair to invite comments from all existing gTLD Registry representatives on current practice within their gTLD registry.

d) The outcome of this report will be considered by the full Working Group on Reserved Names and reported into the PDP-Dec05 [5.5] process before the face to face meeting in Lisbon.

e) "Controversy" has developed in the consideration of a few of the allocated gTLDs, but has generally been related to whether a string had support from a sponsoring community. One string applicant proposed a name that has been deemed to be very controversial largely with governments, and according to the review of the public forum lists, to some members of the community. .XXX TLD could also be discussed merely as an example of a string that has been found to be controversial and how the process followed by ICANN to address the questions and issues raised by various parties. If addressed by the WG, we would propose to review the history of events around its approval and subsequent agreement negotiations..

f) Controversial Second Level Names – Example Practices/Rules of Various ccTLDs:

i. usTLD [5.1] - Policy Statement by usTLD Administrator
The usTLD Administrator will follow a policy to preserve and enhance the value of the .US Internet address to all users, including, in particular, state and local

governments, libraries and K-12 schools. Given the importance of .US as a national public resource, certain guidelines must apply. Therefore, the usTLD Administrator will review, for possible deletion by the Registry, all registered second-level and locality domain names that contain, within the characters of the domain name registration, any of the seven words identified in *Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978),* the "Seven Words**"**.

ii. imTLD [5.2] - The following is taken verbatim from IM Rules of Registration and Use of Domain Names.

"5. Content restrictions on Domain Names and maintenance of the restricted word lists.

1 An application for a domain name may be rejected for one of the following reasons:
• It is included on the .im Black List;
• Is on the Reserved Domain List and is unavailable for registration;
• Upon review by the Designated Official if the domain name is deemed to be profane or otherwise undesirable it may be withdrawn and added to the Black List retrospectively.
.2 An application for a domain may be referred for approval if it includes words or terms which are in the list for referral. This includes words which are connected to regulated activities on the Isle of Man.
.3 The lists of undesirable words and words for referral are maintained by us in consultation with the Isle of Man Government and are not in the public domain.
.4 The lists are subject to change without notice.
.5 An application sent for referral does not mean that the application will be rejected or is likely to be rejected. It is however likely that additional information will be requested to support the application.

11. Suspension of a .im Domain
11.2 The Designated Official may request suspension or withdrawal of a domain name should it consider for any reason the domain name is being used for an improper purpose to include anything illegal, considered defamatory or detrimental to the good name of the Isle of Man."

iii. cnTLD [5.3] - China Internet Domain Name Regulations
Chapter III Domain Name Registration
Article 25

In order to maintain the interests of the nation and the civil society, the Domain Name Registry may take necessary measures to protect certain words, and put it on record to MII before implementation.

Article 27

Any of the following contents shall not be included in any domain name registered and used by any organization or individual:

1) Those that are against the basic principles prescribed in the Constitution;
2) Those jeopardize national security, leak state secrets, intend to overturn the government, or disrupt of state integrity;
3) Those harm national honor and national interests;
4) Those instigate hostility or discrimination between different nationalities, or disrupt the national solidarity;

5) Those violate the state religion policies or propagate cult and feudal superstition;
6) Those spread rumors, disturb public order or disrupt social stability;
7) Those spread pornography, obscenity, gambling, violence, homicide, terror or instigate crimes;
8) Those insult, libel against others and infringe other people's legal rights and interests; or
9) Other contents prohibited in laws, rules and administrative regulations.

iv. seTLD [5.4] - Regulations | Blocked/Reserved domains
There are a number of categories of domain names that are barred or reserved by .SE.

Some domain names are completely barred for registration while other are reserved for the rightful applicant. As an example, counties can register the reserved geographical names. Barred and reserved domains have been divided into the two categories.

Barred domain names:
SE Blocked, Country codes
SE Blocked, Example and test domains
SE Blocked, Misleading
SE Blocked, Second level domains
SE Blocked, Sub-domains
SE Blocked, Swedish law

Reserved domain names:
SE Reserved, Countries
SE Reserved, Geographical words
SE Reserved, Numerical domains
SE Reserved, The court

The following combinations are also barred:
o   All number combinations in the format xxxxxx-xxxx which constitutes or could in the future constitute social security number
o   The number series 900 000 - 909 000 with the format 90xxxx-x and 90x-xxxx respectively
o   90 000 for emergency calls
o   For technical reasons domain names beginning with two characters followed by two dashes are also barred.

Here you can down load a text file with all barred and reserved domains. The data file is created once every 24 hours (at night):
http://www.iis.se/external_pages/datafiles/barred_domains.txt

2. Role of Controversial Reserved Names

There is no apparent role for controversial names among the existing categories of names reserved at the second level within gTLDs. The role of controversial second level names within several ccTLDs varies and includes an array of concepts such as the protection of national interests, illegal activities, obscenity, and social disorder.

3. Straw Recommendations

Definition of Controversial Names used in this report.			
a) Qualifies as a TLD under the then prevailing String Criteria. b) Does not fall under any other Reserved Name category. c) Is disputed for reasons other than that it falls under any other Reserved Name category.			
Level	**Type**	**More Work?**	**Recommendations**
Top	ASCII	Yes	1. Propose creating a category called 'controversial names' for use at the top level only. A process is also proposed to deal with either reserving or un-reserving these controversial names during the application process/launch of new gTLDs. 2. proposed by Marilyn Cade and Tim Ruiz: [Such a process would be time limited and should not result in the development of new categories of reserved names. It is possible that a name may emerge that is so controversial, that it would end up in a category of 'highly controversial names.' For example, the approach would allow a string that is proposed and appears to have controversy or significant questions to be put into a 'hold status' while the areas of dispute or controversy are addressed. This 'hold status' should have a finite time frame associated. If the disputed area is 'fixed', then the application may reenter the processing queue.] 2. alternate proposed by Avri Doria: [It is recommended that no new process for handling controversial names be instituted. The current process that allows for open comment and advice by advisory bodies already is sufficient. In cases where there is a National law that prohibits certain labels, when understood as words from a language[1], that National law should apply to any applicant within that jurisdiction. In cases where the processes of international law allow enforcement of one nation's law on applicants from a different jurisdiction, those processes should apply.] 3. The process [or lack thereof] described in 2 above could also be applied to new or existing strings that fall under other reserved name categories, for example, geographic and geopolitical names. The process may apply equally well to names at the second level.
Top	IDN	Yes	These recommendations may apply equally well to IDNs at the top level, but more work needs to done.
2nd	ASCII	No	Processes, if any, to deal with controversial names at the second level should be left to the discretion of the gTLD Registry Operator with the exception that Registry Operators must comply with applicable local laws and regulations.

2nd	IDN	No	Processes, if any, to deal with controversial IDN names at the second level should be left to the discretion of the gTLD Registry Operator with the exception that Registry Operators must comply with applicable local laws and regulations.
3rd	ASCII	No	Same as for the 2nd-level for any gTLDs for which registrations occur at the 3rd-level.
3rd	IDN	No	Same as for the 2nd-level for any gTLDs for which registrations occur at the 3rd-level.

4. Recommendation for Experts

Questions will be developed only if the RN-WG decides consultation with experts is needed.

Experts may include relevant contacts at various ccTLD registries. It is recommended that experts on processes in International law be consulted on how similar issues regarding controversial terms are treated, e.g., the French government's issues on the use of the word 'Nazi'.

5. Summary of Relevant Documents

5.1 Policy Statement by usTLD Administrator:
http://www.neustar.us/policies/docs/Policy_Statement_usTLD_Admin.pdf

5.2 IM Rules of Registration and Use of Domain Names:
https://www.nic.im/pdfs/IMRules.pdf

5.3 China Internet Domain Name Regulations:
http://www.cnnic.net.cn/html/Dir/2005/03/24/2861.htm

5.4 SE Regulations – Blocked/Reserved Domains
http://www.iis.se/english/nydoman/barred_domains.shtml?lang=en

5.5 New gTLDs (PDP-Dec05) DRAFT GNSO Recommendation Summary:
http://gnso.icann.org/issues/new-gtlds/recom-summary-14sep06.htm

5.6 GAC Principles and Guidelines on Public Policy Issues - Implementation of New gTLDs.