

# GNSO Initial Report on Domain Tasting

## STATUS OF THIS DOCUMENT

This is the Initial Report on Domain Tasting, prepared by ICANN staff for submission to the GNSO Council on 7 January 2008. A Final Report will be prepared by ICANN staff following public comment.

## SUMMARY

This report is submitted to the GNSO Council and posted for public comment as a required step in this GNSO Policy Development Process on Domain Tasting.

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# 1 Executive summary

## 1.1 Background

The practice of domain tasting (using the add grace period to register domain names in order to test their profitability) has escalated significantly in the last two years.

ICANN community stakeholders are increasingly concerned about the negative effects of domain tasting and in the spring of 2007 the At Large Advisory Committee (ALAC) asked that the domain tasting issue be studied further by the ICANN GNSO.

The ALAC request enumerated five areas of potential concern for Internet users:

1. Potential destabilization of the domain name system through excessive operational load on registry systems;
2. Creation of consumer confusion as names quickly appear and disappear, or as users are redirected to advertising or otherwise confusing sites;
3. Potential increased costs and burdens of legitimate registrants and service providers;
4. Facilitation of trademark abuse, where existing dispute resolution mechanisms may not be sufficiently timely or cost-effective for trademark holders to use against short-term infringement; and
5. Facilitation of criminal activity including phishing and pharming.

Following the request from the At-Large Advisory Committee, the GNSO Council called for an Issues Report on Domain Tasting from ICANN Staff in May 2007. This Issues Report, available at <http://gns0.icann.org/issues/domain-tasting/gns0-domain-tasting-report-14jun07.pdf> was discussed at the ICANN San Juan meeting, where the GNSO Council on 27 June 2007 decided to establish an ad hoc group for further fact-finding. The ad hoc group delivered an Outcomes Report on 4 October 2007, available at <http://gns0.icann.org/drafts/gns0-domain-tasting-adhoc-outcomes-report-final.pdf>. These reports, taken together, provide extensive documentation about the volumes and consequences of domain tasting. They also discuss changes that might be made to discourage domain tasting. Three potential mechanisms were discussed in particular: 1) making changes to the add grace period, such as

eliminating the add grace period entirely; 2) making the ICANN transaction fee apply to deletes within the add grace period (see also 1.3 below); and 3) making contractual changes in individual registry agreements with ICANN, such as imposing an “excessive deletion fee” as was done by PIR effective June 2007. These reports also consider other consequences if such mechanisms were implemented, for example certain benefits of the add grace period such as the ability to correct typographical errors and other benefits. Based on these documents and further discussions at the ICANN Los Angeles meeting, the GNSO Council resolved on 31 October 2007 to launch a policy development process on domain tasting.

## **1.2 Constituency Statements**

ICANN's policy development process invites constituency statements at the initiation of each policy development process. The GNSO constituency statements submitted for this report on domain tasting provide a variety of perspectives on the effects of domain tasting, and important insights regarding the mechanisms that should be considered to discourage the practice. While opinions vary, there is a consensus that measures should be considered to reduce domain tasting. Constituency statements received to-date are discussed in Section 4 of this Report, and are set forth in their entirety in Annex 1.

## **1.3 Other considerations**

In approving the 31 October resolution launching a policy development process on domain tasting, the GNSO Council also encouraged ICANN staff “to apply ICANN's fee collections to names registered and subsequently deregistered during the add-grace period”. ICANN staff is currently pursuing this option in the context of the upcoming budget cycle.

## 2 Objective and Next Steps

This Initial Report on domain tasting is prepared as required by the GNSO Policy Development Process as stated in the ICANN Bylaws, Annex A (see <http://www.icann.org/general/bylaws.htm#AnnexA>). The Initial Report will be posted for public comment for 20 days. The comments received will be analyzed and used for redrafting of the Initial Report into a Final Report to be considered by the GNSO Council for further action.

## 3 Background

### 3.1 Process background

- Following a request from the At-Large Advisory Committee in spring 2007, the GNSO Council called for an Issues Report on Domain Tasting from ICANN Staff in May 2007. This Issues Report, completed on 14 June and available at <http://gns0.icann.org/issues/domain-tasting/gns0-domain-tasting-report-14jun07.pdf> was discussed at the ICANN San Juan meeting, where the GNSO Council on 27 June 2007 (minutes at <http://gns0.icann.org/meetings/minutes-gns0-27jun07.shtml>) resolved to establish an ad hoc group for further fact-finding on the practice of domain tasting.
- The ad hoc group delivered an Outcomes Report on 4 October 2007, available at <http://gns0.icann.org/drafts/gns0-domain-tasting-adhoc-outcomes-report-final.pdf>.
- Further discussions based on the Issues Report and the Outcomes Report during the ICANN LA meeting lead to the Council resolving on 31 October 2007 to launch a PDP on Domain Tasting by passing the resolutions below:

*“Resolution 2.*

*Whereas the issues report on Domain Tasting <http://gns0.icann.org/issues/domain-tasting/gns0-domain-tasting-report-14jun07.pdf> has been released and discussed*

*and*

*Whereas, the GNSO Council acknowledges the Final Outcomes Report of the ad hoc group on Domain Tasting, <http://gns0.icann.org/drafts/gns0-domain-tasting-adhoc-outcomes-report-final.pdf>*

*the Council hereby initiates a Policy Development Process, and pursuant to Sections 4 and 8 of Annex A of the Bylaws,*

*The GNSO council resolves to initiate a PDP to address the issues set forth in the Issues Report by Staff and in the Outcomes Report of the ad hoc group and encourages staff to apply ICANN's fee collections to names registered and subsequently deregistered during the add-grace period.*

*Resolution 3.*

*Whereas, the GNSO Council has resolved to initiate a Policy Development Process on Domain Tasting, and pursuant to Sections 4 and 8 of Annex A of the Bylaws, resolves as follows:*

1. *To request that each constituency appoint a representative to solicit the constituency's views on the issues presented in the Issues Report by Staff and in the Outcomes Report of the ad hoc group. Each such representative is asked to submit a Constituency Statement to the ICANN staff manager within thirty-five (35) calendar days of this resolution.*
2. *To request that ICANN Staff take all Constituency Statements, the two prior reports, and other information and compile (and post on the Comment Site) an Initial Report within fifty (50) calendar days of this resolution.*
3. *Thereafter, the PDP shall follow the provisions of Item 9 of Annex A of the Bylaws, in creating a Final Report for Council."*

- Ample further process background features in the Issues Report at <http://gnso.icann.org/issues/domain-tasting/gnso-domain-tasting-report-14jun07.pdf>

### 3.2 Issue Background

- The 14 June GNSO Issues Report ("Issues Report") details several key concerns regarding domain tasting, <http://gnso.icann.org/issues/domain-tasting/gnso-domain-tasting-report-14jun07.pdf> . These include:
  - Potential impact on the stability of the gTLD name space and potentially on the entire DNS;
  - Potential consumer confusion and other concerns about potential negative affects on the consumer experience;
  - Potential increased costs and burdens to legitimate registrants;
  - Potential for facilitation of trademark infringement;
  - Added difficulty for law enforcement to access records and pursue cases of criminal activity; and
  - Potential for other negative consequences (Issues Report at pages 7-13).
- In the Issues Report, ICANN staff recommended that the GNSO Council move forward on a policy development process, including further fact finding and research. Staff also identified a series of questions that might be addressed as part of a fact finding effort (see Issues Report, p. 30). Staff further recommended that other mechanisms be considered to address the domain tasting issue. Staff noted two potential mechanisms in particular: 1) making changes to the add grace period, such as eliminating the add grace period

entirely (this could be done in the context of the ICANN budget process); and 2) making contractual changes in individual registry agreements with ICANN, for example to impose an “excess deletion fee” as was requested by PIR in September, 2006 and introduced in June 2007 (see Issues Report p. 27, see also [http://www.icann.org/registries/rsep/PIR\\_request.pdf](http://www.icann.org/registries/rsep/PIR_request.pdf)).

- The 4 October Outcomes Report of the GNSO Ad Hoc Group on Domain Name Tasting (“Outcomes Report”) was developed in response to a 27 June GNSO Council request to provide additional data on the practice of domain tasting. The Outcomes Report reflected significant data gathering and information retrieval including a request for information, analysis of monthly registry reports, responses to a questionnaire from UDRP service providers, and a supplemental request for information conducted by the intellectual property constituency.
- The research and analysis reflected in the Outcomes Report provide an array of information about the practice of domain tasting. First, the Outcomes Report found a marked increase in the practice of domain tasting beginning in early 2005 and accelerating in late 2006 (see Outcomes Report at p. 10). Report data also showed that a very small number of registrars were responsible for the overwhelming majority of deletes within the add grace period (Outcomes Report at p. 12, also p. 18).
- Second, the Ad Hoc Group solicited information about the effects of domain tasting on community stakeholders. Some respondents, including many registrars, noted a number of benefits from the current add grace period. For example, registrants have the ability to correct typographical errors. In addition, registrars may derive net increases in registration revenue, may be able to engage in early fraud detection and mitigation, address certain customer complaints and other related benefits (Outcomes Report, p. 14, pp. 24-28). That said, a clear majority of respondents view the disadvantages of domain tasting to outweigh any benefits, pointing to consumer confusion and potential fraud, trademark infringement and use in furtherance of criminal activity (Outcomes Report at p. 14, 21). A majority of respondents also see domain tasting as a potential threat to the security and stability of the Internet

(Outcomes Report at p. 15). Some view domain tasting as a threat to Internet stability based on the tie between some domain tasting and criminal activity. Others suggest a threat to Internet stability based on the increased transaction load that might result from the rapid turnover of registered names.

- Lastly, the Ad Hoc Group solicited views from community stakeholders about steps that might be taken to reduce the practice of domain tasting, including changes to the add grace period. A majority of respondents support eliminating the add grace period, though there is also some support for imposing a charge on registrars for excessive deletions and for making the ICANN fee apply to names deleted within the add grace period. Those respondents who voiced support for the benefits of an add grace period also emphasized the negative impacts if the add grace period were eliminated (Outcomes Report, p. 28). Most respondents participating in the study also view existing enforcement mechanisms such as the Uniform Dispute Resolution Procedure and judicial proceedings as ineffective against domain tasting (Outcomes Report at p. 22).
- The Outcomes Report also set forth draft Terms of Reference to be considered if the GNSO Council initiates a policy development process on domain tasting. Specifically, the following three terms of reference were suggested:
  1. Review and assess all the effects of domain tasting activities that have been identified.
  2. Judge whether the overall effects justify measures to be taken to impede domain tasting.
  3. If the answer to #2 is affirmative, then consider the potential impacts of various measures on the Constituencies, and recommend measures designed to impede domain tasting.
- The Outcomes Report notes in particular that the Public Interest Registry (PIR), the operator of the registry for .org, introduced an “excess deletion fee”. Registrars that delete more than 90% of their registrations within the add grace period are charged a 0.05 USD fee for each domain deleted. Monthly registry statistics show that this measure has reduced such deletes substantially, from 2.4 million in May 2007 to 152,700 in June. Furthermore, at the ICANN meeting

in San Juan, a PIR representative stated that most of the domain tasting was performed by two entities, both of which discontinued the practice as a consequence of PIR's implementation of the fee.

## 4 Discussion of issues

This section features issues and aspects of domain tasting reflected in the statements from the GNSO constituencies and the ALAC for this PDP. These entities are abbreviated in the text as follows (in the order of submission of the constituency statements):

BC - Business and Commercial Users' Constituency

RyC - gTLD Registry Constituency

IPC - Intellectual Property Interests Constituency

ALAC - At-Large Advisory Committee

NCUC - Non-Commercial Users Constituency

ISPC - Internet Service Providers and Connectivity Providers Constituency

RrC - Registrar's Constituency (no statement supplied as of publication date)

Annex A of this report contains the full text of those constituency statements that have been submitted. These should be read in their entirety. While the constituency statements vary considerably as to themes covered and highlighted, the following section attempts to summarize key constituency views on the effects of domain tasting and whether changes to the add grace period should be made. This section also summarizes further work recommended by the various constituencies, possible actions recommended to curb domain tasting, and the impact of potential measures on the GNSO constituencies. Lastly, this section summarizes public comments reflected in the Outcomes Report. Other information from the Outcomes Report has also been considered in this effort.

### 4.1 Constituency Views on the Effects of Domain Tasting

The BC notes that domain tasting makes up the majority of domain transactions today and states that the practice is abusive and contrary to goals of creating a fair and open Internet that encourages competition and delivers relevant experiences for all users. The BC states that domain tasting only benefits a small number of registrars and registrants while causing harm to the vast majority of Internet users. Restriction of choice is another adverse effect

noted by the BC, as tens of millions of domain names are caught up in the 5-day AGP at any given time, making them unavailable to interested parties.

The BC notes that the increase in domain tasting is correlated to the increase in domain registrations, and also that too many of those registrations are infringing or otherwise being made in bad faith. The BC adds that examining domain names owned by serial domain tasters shows that the objective is to monetize traffic via PPC advertising. While recognizing that domain name monetization is not illegal, the BC asserts that the combination of tasting and monetization has created an Internet environment that is counterproductive to providing all users with relevant and tailored experiences, and that is conducive to cybersquatting.

The BC emphasizes the potential risks of domain tasting to end users. The BC describes a typical example, in which an unsuspecting user who mis-types a variation of a brand name into a browser bar is linked to irrelevant content, or to a competitor's products, or to other advertisements of the infringed brand owner itself. The BC is also concerned that domain tasting ties up millions of domain names at any given time, leading to fewer choices of domain names as users find that names they want are unavailable. Moreover, noting that domain tasting has primarily taken place in .com, the BC predicts growth of the practice into other TLDs if left unchecked.

The RyC notes that new policies to curb domain tasting could impose new requirements on registries and registrars. Thus the RyC finds it essential to take the following steps before making any policy recommendations: i) clearly define any problems to be solved and validate their existence with accurate data; ii) test proposed solutions to make sure that they have reasonable chances of solving identified problems; iii) minimize the possibility of creating new problems; iv) make best efforts to ensure that anticipated benefits are worth the implementation costs; v) where possible, take advantage of existing mechanisms to solve problems before creating new policy.

The IPC states numerous harmful effects on IPR holders, as the tasted domain names frequently are registered intentionally because they are typographical errors of trademarks, and quotes a recent report identifying domain tasting as a major factor in the recent growth

in “typosquatting”, which causes consumer confusion and erodes brand reputation. According to the IPC, large IPR holders with famous or well-known brands are more likely to be exposed to domain tasting and incur costs for action against the practice, while smaller IPR holders often do not have the resources needed to take such actions. As registrants, IPR holders subsidize domain tasting when any increased costs attributable to domain tasting are passed on by registrars and registries. Harmful effects for IPR holders include lost advertising and sales revenues from parked pages associated with the tasted names, and misdirection of potential customers to competitors, exploiting the goodwill of established brands. Domain tasting also prevents IPR holders from registering and using for legitimate purposes the domain names that are being tasted. Costs for IPR holders are increased by domain tasting as they pay once when “purchasing” the keyword from an advertiser as part of its advertising efforts and pay a second time to the domain taster for directing Internet users via links from parking pages to the IPR holder’s site. IPR holders incur further costs to police tasted domain names, although efforts to police are often unsuccessful. The IPC finds that UDRP and remedies under national law are ineffective against the ephemeral nature of domain tasting. In addition, domain tasting increases IPR holders’ costs for defensive domain registrations, for enforcement and litigation against domain tasters.

The IPC further finds that domain tasting forces Internet users to sort through numerous false hits when searching for legitimate sites, leading to confusion, frustration and waste of time. Users may inadvertently end up doing business with someone other than an intended supplier, be exposed to inferior goods or services, become disappointed and lose confidence in Internet-based commerce. Users may also be diverted to potentially harmful sites, as bad actors may exploit the anonymity facilitated by the temporary nature of tasted names. Individual registrants must also bear costs passed on both by registrars and registries, and by businesses. Domain tasting harms businesses and users by restricting the selection of domain names available to registrants at any point in time. The IPC finds that all the effects of domain tasting combine to reduce the user trust in the DNS and in Internet navigation generally. In the view of the IPC, domain tasting risks turning the DNS into a mostly speculative market. Domain names, intended to be identifiers of businesses and other entities, may become mere commodities of speculative gain.

The ALAC also notes the tremendous growth in the volume of domain tasting since early 2005. The ALAC is concerned that the volume of domain tasting could destabilize the domain name system due to the volume and rate of domain name adds and deletes. The ALAC is also very concerned that domain tasting undermines consumer confidence in the DNS. Domain tasting results in increased costs and burdens to legitimate registrants and facilitates trademark abuse which also leads to consumer confusion. The position of the ALAC is that domain tasting is both inappropriate and harmful and should be eliminated.

The NCUC is concerned that some registrants are exploiting the add grace period to avoid paying registration costs, thereby forcing registries to subsidize them. The NCUC notes that this was clearly not the intent of the add grace period, and suggests that action by ICANN may be appropriate to counter the practice. The NCUC also takes note of the benefits that the add grace period may provide to both registrants and registrars and suggests that the implications of eliminating the add grace period be studied further before implementing such a change. The NCUC statement also examines the relationship between domain tasting and trademark infringement, particularly in light of trademark concerns raised by other constituencies. The NCUC notes that existing trademark protection mechanisms remain fully valid in cases of domain tasting that do infringe trademarks, even when the period of infringement is very brief, but that the problem is one of enforcement. This distinction should be kept in mind by the GNSO and by any subsequent working group established to consider policy changes. Many of the responses to the RFI listed problems such as “erosion of brand names,” “erosion of reputation” and “loss of revenues [through] diversion of traffic” as disadvantages of domain tasting. These are problems with infringement, not with domain tasting. While it may be appropriate for ICANN to consider whether its policies unduly encourage infringement or impede enforcement of intellectual property rights, the NCUC cautions against assuming that a revised domain tasting policy will eliminate short term infringement or that all domain tasting necessarily infringes. Insofar as the add grace period allows a registrant to use a domain for a very short time at no cost, it does provide an incentive to a prospective infringer to operate in a manner that frustrates enforcement of trademark rights. The NCUC suggests that this incentive can be removed by implementing a modest restocking fee where no corrective motive can be shown for the deletion. The NCUC recommends that because the bulk of deletions come from a handful of registrars

and because registration fees are only likely to deter an infringer who operates a large number of sites, the approach adopted by PIR is particularly worthy of further consideration.

The ISPC states that domain tasting is deleterious to the stability and security of the Internet and sees the following harmful effects:

1. Domain tasting facilitates the practice of short-term infringement on and dilution of trade marks, as well as phishing. It allows criminals to employ a hit and run strategy wherein domain names may be held at no cost to the registrant for up to 5 days. By dynamically changing registrations, these malefactors can defeat the existing dispute resolution mechanisms which were not designed to deal with such short time frames.
2. The rampant use of domain tasting, and particularly its abuses, gives rise to a huge number of complaints to ISPs, both from individual consumers and businesses. It significantly weakens our customers' trust and faith in the validity of domains and the DNS. This is a stability issue.
3. At any given time millions of domain names are being tasted and there is a high turnover from week to week. This added operational load potentially threatens the stability of the DNS. And, since all but an insignificant percentage of domain name resolutions are performed by ISP domain name servers, the burden of this excess falls on ISP members.

#### **4.2 Constituency Views Regarding the Add Grace Period**

As summarized below, constituency statements considered at length whether changes should be made to the add grace period to discourage domain tasting. Staff notes in the Issues Report that the add grace period was instituted by registries into the registry contracts for .BIZ, .COM, .INFO, .NAME, .NET, .ORG and .PRO, to allow registrars to recover fees to registries if domain names were mistyped during registration. Thus, the grace period did not arise from an ICANN policy process, and its use for domain tasting was not envisioned when the add grace period was implemented.

The BC states that domain tasting is an unforeseen abuse of the add grace period, that the main volume of domain tasting is performed by a select few registrars and/or their customers, and that such registrars are operating outside the guidelines of the RAA. The BC further states that the add grace period provides registrars with an unfair competitive advantage over all other potential registrants since they have the technological capability to quickly add, drop, and identify names of value without incurring any cost, whether on their own account or on behalf of their customers. Domain tasters are able to register very large numbers of names, while only paying for names which apparently will deliver a positive ROI over a paid registration period.

The RyC raises concerns about adopting any single “one size fits all” approach to discouraging domain tasting, and recommends that registries and their sponsors consider a variety of approaches that might be uniquely appropriate to each gTLD.

The IPC states that non-speculating registrars have come to rely on the add grace period for purposes that should be better addressed through other mechanisms. The IPC notes that several ccTLD registries do not have an add grace period and suggests that registrars for these ccTLDs be consulted about such alternative mechanisms. The IPC expects any losses through non-payment by registrants to be more than offset by reduced registrar costs for tasting and kiting transactions. The IPC suggests that registrars could require registrants to double-verify information and domain name spelling during the registration procedure to reduce the likelihood of typographical errors. Such double-verification is widely used elsewhere in Internet commerce. The IPC further notes that registration agreements for a number of large ICANN-accredited registrars either state that all registration fees are non-refundable or do not identify misspelled domain names as a refundable event. When the add grace period was introduced, domain name registrations were significantly more expensive than they are today. With the current low cost of domain name registration, registrants could well expect no refunds for misspelled domain names. The IPC finds no reason to require the equivalent of an add grace period to address fraud. Many traditional and online businesses provide immediate activation of service with a credit card payment, and do not rely on a 5-day grace period, as exemplified by long distance telephone service providers and Apple's iTUNES® services. The IPC finds that registrars using the add grace

period as a “cart hold to provide access to domain names” calls into question whether this is in compliance with Section 3.7.4 of the RAA.

The ALAC finds that while the add grace period was created for the legitimate purpose of enabling the cancellation of accidentally registered domain names, the reduction in domain name registration prices combined with better registrar software eliminates the need for the add grace period in the future. Moreover, the ALAC notes that many registrars and resellers do not even pass this benefit on to registrants. The position of the ALAC is that the domain tasting enabled by the add grace period is both inappropriate and harmful and should be eliminated. The ALAC also highlights other means by which domain tasting might be discouraged, such as fees for excessive deletions and other related options, and notes that some mechanisms could be adopted by individual service providers without any ICANN-initiated policy change. However, the ALAC encourages ICANN to proceed with a policy development process to discourage domain tasting until those actions are actually taken and proven effective.

The NCUC statement also acknowledges the growing problem of domain tasting, caused by exploitation of the add grace period but notes that eliminating the add grace period could also eliminate related benefits to both registrants and registrars. The NCUC encourages the community to consider the option of a modest “excessive delete fee” or “restocking fee” as alternatives to eliminating the add grace period, noting that this approach gives registrars flexibility to adopt effective practices tailored to their customers and business model, which would also preserve the other advantages of the add grace period.

The ISPCP is concerned that the add grace period is being exploited to test the profitability of domain names and strongly recommends that new policies be adopted to curtail or eliminate this practice.

#### **4.3 Further Work Suggested by Constituencies**

Several constituencies suggest that further work be conducted either prior to or in the course of a policy development process.

The RyC states that further work is needed before policy changes should be made, as follows:

- i) clearly define any problems to be solved and validate their existence with accurate data;
- ii) test proposed solutions to make sure that they have reasonable chances of solving identified problems;
- iii) minimize the possibility of creating new problems;
- iv) make best efforts to ensure that anticipated benefits are worth the implementation costs;
- v) where possible, take advantage of existing mechanisms to solve problems before creating new policy.

The IPC suggests that further information is needed regarding the mechanisms that are used today by ccTLD registrars (without an add grace period) to monitor, test and develop systems, about mechanisms that might have been used by gTLD registrars before implementation of the add grace period, and what other potential mechanisms might be considered for such purposes.

The NCUC advises strongly against launching a “zone file data study”, an approach mentioned in the Outcomes Report to determine to what extent domain tasting infringes upon trademarks by comparing a sample of add grace period deletes to a list of registered trademarks. The NCUC states that this method would result in excessive findings of infringement based on an erroneous assumption that any unauthorized use of a registered trademark is unlawful. The NCUC notes that trademark law does not categorically ban use of a trademark without the permission of the owner but prohibits uses of trademarks which deceive or confuse consumers, emphasizing that where there is no confusion, there is no infringement. Thus, trademark law does not prohibit the use of the same name or symbol by companies in different fields of commerce, and trademark protections are also limited in geographic reach. Therefore a test for infringement based solely on the fact that a word has been registered with a government trademark office would erroneously conclude that many lawful entities are infringing. ICANN should not take it upon itself to decide these issues for the courts and legislatures of every country. The delicate balance of competing public policies inherent in intellectual property law should instead be left to the courts and political processes to work out.

#### 4.4 Constituency Views Regarding Proposed Actions

The BC recommends a new policy that either removes the add grace period completely, or substantially changes the economics associated with the add grace period so that registrants cannot commercially “test” large quantities of names for free. The BC advocates immediate action to rectify this problem which has been rapidly growing for more than two years. Furthermore, BC states that a practice that allows for the testing and subsequent return of non-profitable purchases is unheard of in nearly every other marketplace and that policies for domain names must become more closely aligned with those of other marketplaces. The BC proposes the following actions, in order of preference:

- 1) Eliminate the AGP, but provide accredited registrars with the ability to test their domain fulfilment systems via a number of test adds/changes/deletes without cost. The number agreed upon should be derived from research on registrars that are not involved in domain tasting. Or,
- 2) Change the economics of domain tasting – The portion of every domain registration fee due to ICANN should be non-refundable, and excess deletes (based on an agreed ratio in a given time period) should result in full payment of all registration fees for the period.

The RyC recommends that further work be done to identify the scope of the problem and that other means to reduce domain tasting be exhausted before introducing new policy. The RyC furthermore expresses support for the suggested terms of reference in the Outcomes Report, although qualified with a minority statement that one policy affecting all registries may not be appropriate.

The RyC suggests pursuing the option of making the ICANN transaction fee apply to domain names deleted during the add grace period and encourages ICANN staff to further explore this option with members of the community with particular focus on registrars and registrants. The RyC adds that it is important to identify other uses of the add grace period not related to tasting and to make sure that registrants are not unduly harmed if the transaction fee is applied to all names deleted during the add grace period. This is tempered by a minority statement within the RyC, stating that it is useful to explore the issue, as long as the option is not projected as a “one size fits all” solution affecting all registries.

Considering the option of introducing excess deletion fees, the RyC notes that one of its members, PIR (.org), has already implemented this approach, but the RyC believes that a one-size-fits-all approach will not work for all registries and sponsors. The RyC therefore suggests that consideration of variations of this approach should be evaluated by individual registries and sponsors, while stating that the results may differ among gTLDs.

The IPC views favourably the option of making the ICANN fee apply to all add grace period deletes, stating that domain tasting reduces ICANN revenues as tasted domains are not subject to this fee. The IPC notes that had the 0.20 USD been levied on each domain name deleted during the add grace period in July 2007 alone, it would have resulted in over 12.5 million USD in revenue, over 25% of the projected revenues in ICANN's FY 2007-2008 budget. The IPC states that ICANN could put such additional revenues to good use by, for example, expediting rollout of IDNs and the introduction of gTLDs. The IPC recognizes that imposing a fee could reduce the number of registrations and the associated additional revenue, thus achieving a decrease in the incidence of domain tasting.

The ALAC supports any and all actions to eliminate domain tasting. There has been much discussion on this issue among the regional at-large organizations (RALOs) and on the general At Large discussion list. Although not all regions have been similarly active, most views to date favour complete elimination of the add grace period. The ALAC further states that opinions within the user communities range from the North American RALO position that the add grace period is not beneficial to the public good and should be abolished, to the Latin American and Caribbean RALO and the Asia Pacific RALO positions stating, respectively, that action to control domain tasting may be necessary and that the effectiveness of economic tools should be investigated, such as has been successfully used by PIR. The ALAC does recognize that there are other actions which may also be helpful in eliminating domain tasting, including:

- A registry-charged fee for all add grace period uses. The fee would need to be set to effectively eliminate tasting and not just change the dynamics of it.
- A registry-charged fee if add grace period uses exceed some pre-determined threshold per month. The fee could be as much as the full cost of the domain. The threshold would need to be set to catch domain tasters but not work to the detriment of registrars that

use the add grace period for legitimate, non-tasting purposes. Similarly, the fee would need to be set to effectively eliminate tasting and not just change the dynamics of it.

- ICANN currently charges registrars 0.20 USD per domain added excluding add grace period deletes. This exclusion could be removed as part of an upcoming ICANN budget process (or perhaps even sooner). Alternately, the exclusion could be removed only if a certain threshold of add grace period uses were reached (there is already an add grace period threshold used in a different registrar fee, so the mechanism exists today). It is unclear if this fee would be sufficient to eliminate domain tasting, but could curtail current levels of tasting activity.
- The RAA currently requires registrars to activate a domain if they have a reasonable expectancy of being paid (3.7.4). This clause could be altered to allow registrars to restrict activation of a domain unless they have a reasonable expectancy of being paid AND retain the fee.

Recognizing that some actions to reduce domain tasting may not require a change to ICANN policy, the ALAC encourages such actions while advocating further GNSO policy development work until such actions are actually taken and prove effective.

The NCUC expresses reservations about whether the add grace period should be removed entirely, noting that the add grace period may provide benefits to both registrants and registrars. However, any reported benefits of the AGP are disputed and further elaboration is needed before recommending specific action. The NCUC encourages consideration of a modest 'excess deletion' fee as an alternative that could penalize registrars with excessive deletes and force them to adopt policies that prevent registrants from exploiting the add grace period. Since registrants looking to avoid paying registration costs will naturally flock to those registrars that are least vigilant against this abuse, registrars would have a substantial incentive to be vigilant against creative disguises of these practices. Unlike direct imposition of a fee on all short-term registrations, this approach gives registrars flexibility to adopt effective practices tailored to their customer base and business model, and preserves the other advantages of the add grace period.

The NCUC concludes that further investigation by the GNSO is needed and action may be required to curb abusive domain name tasting. The issue should remain properly framed rather than assuming that ICANN is responsible for or capable of preventing all short-duration trademark infringement on the web.

The ISPC opposes the exploitation of the add grace period for domain name tasting and urges the GNSO to create new policy to curtail or eliminate this practice.

#### **4.5 Impact of Potential Measures on the Constituencies**

Constituency statements described the possible effects on the constituencies of implementing changes to discourage domain tasting. The RyC states that if a consensus policy is implemented, registries and sponsors would be required to implement the policy, which may call for amendments to existing registry agreements. Registries and sponsors would likely have to coordinate implementation efforts with registrars. To estimate financial impact on registries and sponsors would require details of a consensus policy and the RyC will cooperate in estimating the financial impact if and when a possible consensus policy is more clearly defined.

Relating to making the ICANN fee apply to deletes within the add grace period, the RyC finds that the impact on registries and sponsors would be minimal as the transaction fee is an issue between ICANN and registrars. Most registries and sponsors already report the names deleted during the add grace period so no new reporting requirements are expected. Any financial impact on registries and sponsors is expected to be minimal.

Concerning introduction of excess deletion fees, the RyC states that the impacts of such an approach, financially or otherwise, would need to be determined individually and that the impacts will probably vary across gTLDs.

The IPC states that taking action to effectively prohibit tasting would negatively impact only a small class of domain name speculators, some of which are ICANN-accredited registrars. The impact of any such measure on the IPC would depend upon the measure chosen, but

the IPC expects that elimination of domain tasting should eliminate its harmful effects as experienced by the IPC.

#### **4.6 Summary of Public Comments from the Outcomes Report**

The Ad Hoc Group received over 200 responses to the RFI conducted as part of the Outcomes Report. Most of the respondents represented the interests of intellectual property rights owners and registrants/users. A clear majority of respondents expressed the view that the disadvantages with domain tasting significantly outweigh the benefits. Most respondents are in favour of discouraging domain tasting by eliminating the add grace period, although a number of respondents recommended alternative mechanisms, a number of which are also highlighted in the constituency statements summarized above. Allowing domain name registrations at no cost is regarded by most as facilitating domain tasting and a majority of respondents suggest that ICANN should stipulate minimum registration fees, while some state that such action is outside of ICANN's mandate. A number of respondents provide examples, statistics and suggested sources of additional information.

Graphs based on data from monthly registry reports, mainly from .com and .net, show a marked increase in total number of deletes in recent years and also an increase in the fluctuation of net additions over time. Recent data on deletes within the add grace period show that a small number of registrars are responsible for the overwhelming majority of such deletes.

Input from a group of ccTLD registry operators show that domain tasting is a comparatively rare phenomenon for most in this group. The different main factors put forward for this state of affairs are absence of AGP, monthly pricing modes and provisions for activation on payment. A few have experienced domain tasting and acted against it, while at least one has introduced domain tasting as a service, for a fee.

A submission from a group of registrars indicates several other uses of the AGP unrelated to domain tasting.

## 5 Conclusions and Next Steps

The practice of domain tasting is of significant concern to many constituencies and community stakeholders. These concerns have been explored for the past several months, as reflected in the Issues Report prepared by ICANN staff, and by the extensive research and data gathering conducted by the Ad Hoc Group of the GNSO Council and reflected in the Outcomes Report. Based on these reports, the GNSO Council has voted to initiate a policy development process to explore the specific policy changes that should be made to curb domain tasting. This initial report is an early step in this process, and will be posted for public comment for 20 days as prescribed by the ICANN bylaws (see <http://www.icann.org/general/bylaws.htm#AnnexA>). Public comments will then be incorporated into a “Final Report” by ICANN staff and submitted to the GNSO Council Chair within ten calendar days following the end of the public comment period. The Final Report (along with the preceding Issues Report and Outcomes Report) become the underlying foundation for subsequent actions taken by the GNSO Council in formulating recommendations to the ICANN Board regarding policy changes that should be made to address domain tasting.

In addition, the resolution approved by the GNSO Council in Los Angeles on 31 October 2007 also encouraged ICANN staff to apply the ICANN registration fee to names registered and subsequently deregistered during the add-grace period (see text of resolution, Sec. 3.1 above). ICANN staff is currently pursuing this option in the context of the upcoming budget cycle.

## Annex 1 - Constituency Statements

### Business Constituency

Statement of the Business Users Constituency, regarding the Domain Tasting PDP, November – 2007

#### Background

On 31 October 2007, the GNSO Council launched a Policy Development Process (PDP) on domain tasting based upon the Final Outcomes Report of the ad hoc group on Domain Tasting and the ICANN Staff's prior Issues Report on Domain Tasting.

The BC provides this statement in accordance with Council's request for Constituency Impact Statements by 5 December 2007.

#### Summary

Domain tasting, the practice whereby would-be registrants leverage the 5-day Add Grace Period (AGP) to register domain names free of charge and test their value before deciding whether or not to keep them, is an unforeseen abuse of the AGP. Domain tasting, as is evident from the Verisign .COM monthly add/drop reports, now makes up the majority of domain transactions. While tasting appears to have led to an increase in the number of registered domain names, we believe that the practice is unfair, abusive, and contrary to our collective goals of creating a fair and open Internet that encourages competition and delivers all users relevant and tailored experiences.

Furthermore, based upon the Final Outcomes Report of the ad hoc group on Domain Tasting, we believe that the current practice benefits only a small number of registrars and registrants while causing harm to the vast majority of Internet Users. As such, the BC encourages and supports policy reform aimed at curbing abusive domain name tasting. In line with this, we recommend a new policy that either removes the AGP completely, or substantially changes the economics associated with this grace period so that one cannot commercially "test" large quantities of names for free.

## Statement

As demonstrated by the Final Outcomes Report and other research performed to date, domain tasting is harmful and is an unfair business practice. Since accredited registrars have the unique ability to add and drop domains quickly and easily, the abuse of the AGP and the greatest volume of domain tasting is generally practiced by a select few domain name registrars and/or their customers. Since ICANN Staff believes these registrars are operating within the guidelines of the RAA, despite fairly clear language apparently to the contrary, they do not face any repercussions for participating in domain name tasting. Immediate corrective action needs to be taken to address the AGP policy and rectify the current problem which has been ongoing and rapidly expanding for more than two years.

Domain tasting is the practice whereby domain names are “tested” over the 5-day AGP. Valuable domains typically are not deleted during the AGP and thus show up as new registrations. Thus, conversation about domain tasting often leads to a conversation about cybersquatting and its subsequent harms such as trademark infringement, customer confusion and other fraudulent activities. The BC understands that analyzing the impact of domain tasting is inherently problematic since the harms it causes are associated with domain name registrations outside of the AGP. Yet there is no doubt that the increase in domain tasting activity directly correlates to the increase in domain registrations over the past several years. Far too many of those registrations are obviously infringing or otherwise in bad faith, to the profit of registrars and registries, and detriment of everyone else in the internet community.

Domain tasting has largely been confined to the .com TLD to date, leading to some 70 million current registrations, a large portion of which were part of a commercial tasting scheme and are blatantly cybersquatting. The BC fears that if the practice goes unchecked, the same experience will occur in other gTLDs. Indeed we have noticed similar problems in various ccTLDs already.

While the BC recognizes the difficulty in quantifying the negative impacts of tasting and tasted domains, it is evident to the BC that tasting is problematic for the following reasons:

1) The most active domain name tasters are concentrated within a small group of accredited registrars, which have been identified in Verisign's April 2007 .COM registry report (see below graph). Yet this graph may not capture some of the most voluminous tasters, who have obtained numerous registrar accreditations and thus are able to spread their activity amongst those separately accredited entities.

The AGP provides domain name registrars with an unfair competitive advantage over all other potential registrants since they have the technological capability to quickly add, drop, and identify names of value without incurring any cost, whether on their own accounts or on behalf of their customers. Domain tasters are able to register very large numbers, in some cases tens of millions, of names with no risk. They only incur cost of those names which apparently will deliver a positive ROI over the paid registration period (usually one year, but some registrars are offering monthly registrations).

A practice that allows for the testing and subsequent return of non-profitable purchases is unheard of in nearly every other marketplace. The BC believes we must advance domain name policies so that they are more closely aligned with those of other marketplaces.

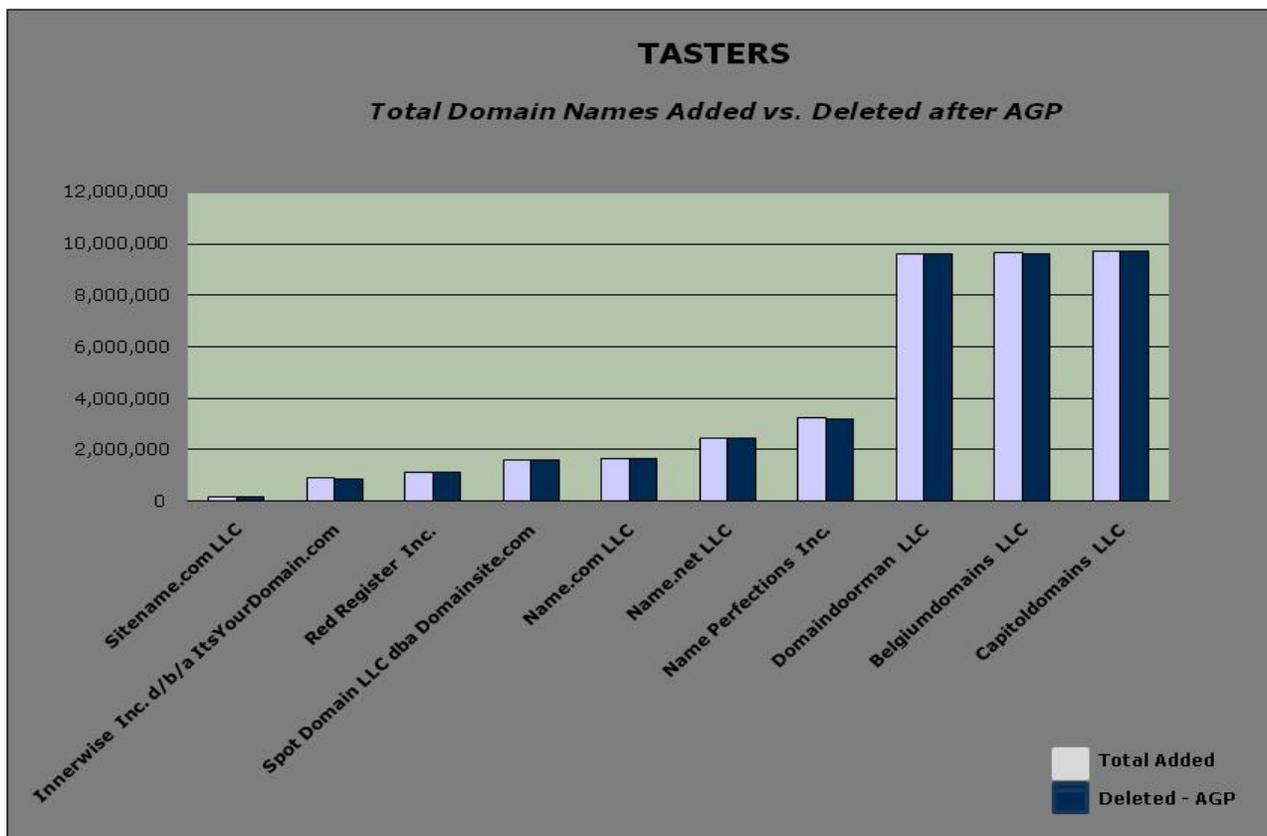


Figure. Created from April 2007 .COM report provided by VeriSign.

2) Domain tasting has led to an environment where tens of millions of domain names are caught up in the 5-day AGP at any given time. Because so many domain names are being added and dropped on a regular basis, domain name tasting has led to restricted choice as interested parties including individual registrants, small business, and corporations often find that the names they want are unavailable.

3) Examining domain names that are owned by the serial domain tasters noted in Figure 2 demonstrates that tasters are registering names to monetize traffic via PPC advertising. The BC recognizes that the practice of domain name monetization is not illegal, but asserts that the combination of tasting and monetization has created an Internet environment that is counterproductive to providing all users with relevant experiences, and conducive to rampant cybersquatting.

There is no doubt that the large tasters are utilizing domains that correlate to well-known brands, as such domains generally garner more traffic than non-branded domains, since they are backed by advertising and consumer trust. The total number of domain names registered is directly correlated to the rise of domain tasting. The large number of domain names that have been registered to profit from the practice of direct navigation has created customer confusion and an increase in trademark infringement.

As noted previously, it is difficult to find concrete proof that tasting is connected to these issues since domain names that impact consumers and cause brand harm are those which garner traffic and are attractive registrations beyond the AGP. That said, the harm created by domain name tasting is aptly demonstrated simply by typing in any variation of a brand, group, event, or nearly any combination of characters and numbers into a browser bar. More often than not, these Web sites deliver users with links to irrelevant content, to relevant parties that are competitors of the brand in question and/or to advertising of the infringed brand owner itself.

For example:

Samesclub.com - REGISTRAR - CAPITOLDOMAINS, LLC – 11.12.07

mycokerewatds.com – REGISTRAR – CAPITOLDOMAINS, LLC – 11.12.07

Again, it is difficult to be certain whether these names that deliver unexpected content were the result of domain tasting. These examples have been included, however, since they are connected to registrars who are among the most active domain tasters and they both receive thousands of visitors per month. There are thousands of other examples known to BC members.

## RECOMMENDATIONS

We propose the following steps, in order of preference, based upon the BC's position that domain tasting is counterproductive, problematic and unfair:

- 1) Eliminate the AGP, but provide accredited registrars with the ability to test their domain fulfillment systems via a number of test adds/changes/deletes without cost. The number agreed upon should be derived from research on registrars that are not involved in domain tasting. Or,
- 2) Change the economics of domain tasting – The portion of every domain registration fee due to ICANN should be non-refundable, and excess deletes (based on an agreed ratio in a given time period) should result in full payment of all registration fees for the period.

### **Domain tasting**

A monetisation practice employed by registrants to use the AGP to register domain names in order to test their profitability. During this period, registrants conduct a cost-benefit analysis to see if the tested domain names return enough traffic to offset the registration fee paid to the registry over the course of the registration period (e.g., currently \$6 US for a .NAME domain name).

### **Domain kiting**

A form of domain tasting which involves continual registration, deletion, and re-registration of the same names in order to avoid paying the registration fees. This practice is sometimes referred to as “domain kiting.” This term has been mistakenly used as being synonymous with domain tasting, but it refers to multiple and often consecutive tasting of the same domain name that avoids paying the registration fee. N.B. there is no guarantee that a registrant who allows a name to drop at the end of the AGP will be successful in re-registering it as other registrants may also compete for the same name.

### **Phishing**

The practice of creating a replica of an existing webpage to fool a user into submitting personal, financial or password data.

### **Pharming**

Re-directing a website’s traffic from the legitimate website to a bogus website for the purpose of stealing personal, financial or other data.

**Type-in traffic**

“Type-in traffic is a term describing visitors landing at a web site by entering a word or phrase (with no spaces or a hyphen in place of a space) in the web browser's address bar (and adding .com or any other gTLD or ccTLD extension)(Presently); rather than following a hyperlink from another web page, using a browser bookmark, or a search-box search.”<sup>1</sup>

**Typo-squatting**

The practice of registering misspellings of known terms as domain names in order to attract type-in traffic.

**UDRP**

The Uniform Domain Name Dispute Resolution Policy;

<http://www.icann.org/dndr/udrp/policy.htm>.

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<sup>1</sup> This is the Wikipedia definition of type-in traffic. Further information is available at [http://en.wikipedia.org/wiki/Type\\_in\\_traffic](http://en.wikipedia.org/wiki/Type_in_traffic)

Registry Constituency

## GNSO gTLD Registry Constituency Statement

Issue: **Domain Tasting**

Date: 5 December 2007

Version: 1.0

### General RyC Information

- Total # of eligible RyC Members<sup>2</sup>: 15
- Total # of RyC Members: 15
- Total # of Active RyC Members<sup>3</sup>: 15
- Minimum requirement for supermajority of Active Members: 10
- Minimum requirement for majority of Active Members: 8
- # of Members that participated in this process: 13
- Names of Members that participated in this process:
  1. DotAsia Organisation (.asia)
  2. DotCooperation (.coop)
  3. Employ Media (.jobs)
  4. Fundació puntCAT (.cat)
  5. Global Name Registry (.name)
  6. mTLD Top Level Domain (.mobi)
  7. Museum Domain Management Association – MuseDoma (.museum)
  8. NeuStar (.biz)

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<sup>2</sup> All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the “effective date” set forth in the operator’s or sponsor’s agreement (Article III, Membership, ¶ 1). The RyC Articles of Operations can be found at [http://www.gldregistries.org/about\\_us/articles](http://www.gldregistries.org/about_us/articles).

<sup>3</sup> Per the RyC Articles of Operations, Article III, Membership, ¶ 4: Members shall be classified as “Active” or “Inactive”. A member shall be classified as “Active” unless it is classified as “Inactive” pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a Constituency meeting or voting process for a total of three consecutive meetings or voting processes or both, or by failing to participate in meetings or voting processes, or both, for six weeks, whichever is shorter. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a Constituency meeting or by voting.

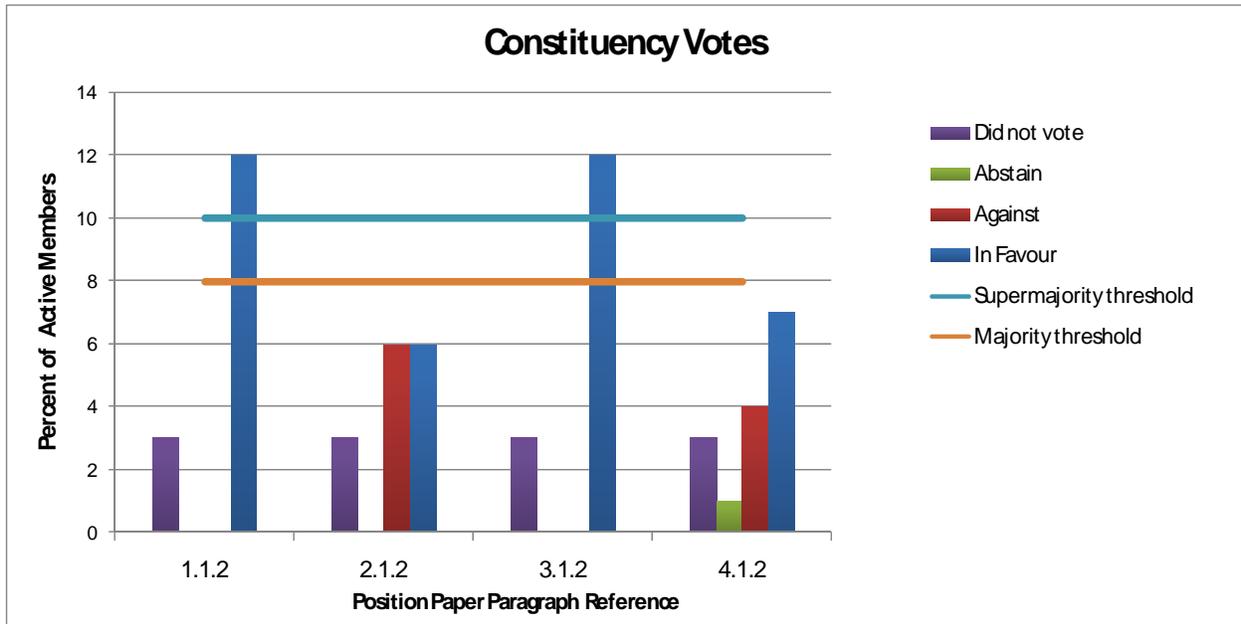
9. Public Interest Registry (.org)
10. RegistryPro (.pro)
11. Societe Internationale de Telecommunication Aeronautiques – SITA (.aero)
12. Telnic (.tel)
13. VeriSign (.com & .net)

- Names & email addresses for points of contact:
  - Chair: David Maher, [dmaher@pir.org](mailto:dmaher@pir.org)
  - Vice Chair: Jeff Neuman, [Jeff.Neuman@Neustar.us](mailto:Jeff.Neuman@Neustar.us)
  - Secretariat: Cherie Stubbs, [Cherstubbs@aol.com](mailto:Cherstubbs@aol.com)
  - RyC rep. for this statement: Hakon Haugnes, [hakon@haugnes.name](mailto:hakon@haugnes.name)

Regarding the issue noted above, the following positions represent the views of the ICANN GNSO gTLD Registry Constituency (RyC) as indicated. Unless indicated otherwise, the RyC positions were arrived at through a combination of RyC email list discussion and RyC meetings (including teleconference meetings).

### Summary of voting:

	<b>Voting Summary</b>			
	<b>Position Paper Paragraph Reference</b>			
	<b>1.1.2</b>	<b>2.1.2</b>	<b>3.1.2</b>	<b>4.1.2</b>
<b>In Favour</b>	12	6	12	7
<b>Against</b>	0	6	0	4
<b>Abstain</b>	0	0	0	1
<b>Did not vote</b>	3	3	3	3



## 1. Position 1

### 1.1. Position Description:

- 1.1.1. The second sentence of Section 4.1 of the GNSO Issues Report on Domain Tasting<sup>4</sup> says, "A policy recommendation on this issue could impose new requirements, or institute new prohibitions applicable to contracted parties, which ICANN staff would then implement and enforce through its contracts with registries and/or registrars."
- 1.1.2. The RyC believes that it is essential to do the following before making any policy recommendations: i) clearly define any problems to be solved and validate their existence with accurate data;<sup>5</sup> ii) test proposed solutions to make sure that they have reasonable chances of solving identified problems; iii) minimize the possibility of creating new problems; iv) make best efforts to ensure that anticipated benefits are worth the implementation costs; v) where possible, take advantage of existing mechanisms to solve problems before creating new policy.

### 1.2. Level of Support of Active Members: Supermajority

- 1.2.1. # of Members in Favor: 12
- 1.2.2. # of Members Opposed: 0
- 1.2.3. # of Members that Abstained: 0
- 1.2.4. # of Members that did not vote: 3

### 1.3. Minority Position(s): none

- 1.4. **General impact on the RyC:** If a consensus policy is implemented, registries and sponsors<sup>6</sup> are required to implement the policy. To the extent that the consensus policy changes existing contractual terms (e.g., the add grace period), there could be a need to amend existing registry agreements. Registries and sponsors that implement

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<sup>4</sup> <http://gns0.icann.org/issues/domain-tasting/gns0-domain-tasting-report-14jun07.pdf>

<sup>5</sup> Note that the GNSO Ad Hoc Group on Domain Tasting collected data and reported it in its Outcomes Report (<http://gns0.icann.org/drafts/gns0-domain-tasting-adhoc-outcomes-report-final.pdf>)

<sup>6</sup> Note that some Sponsored Agreements have some exceptions regarding requirements to implement consensus policies.

the new policy will likely have to coordinate implementation efforts with registrars.

1.5. **Financial impact on the RyC:** It is not possible to estimate financial impact on registries and sponsors without details of a consensus policy. If and when a possible consensus policy is more clearly defined, the RyC will cooperate in estimating the financial impact.

1.6. **Analysis of the period of time that would likely be necessary to implement the policy:** It is not possible to estimate the time required for registries and sponsors to implement a consensus policy before the more details are known about any such policy. If and when a possible consensus policy is more clearly defined, the RyC will cooperate in estimating implementation time.

## 2. Position 2

### 2.1. Position Description:

2.1.1. As a possible means to reduce domain tasting, Section 4.2 of the Issues Report discusses the possibility of extending the ICANN new registration transaction fee to name registrations deleted during the add grace period.

2.1.2. The RyC encourages ICANN staff to further explore this option with members of the community with particular focus on registrars and registrants. In doing this it is very important to identify other uses of the add grace period not related to tasting and make sure that registrants are not unduly harmed if the transaction fee is applied to names deleted during the add grace period.

### 2.2. Level of Support of Active Members: no majority

2.2.1. # of Members in Favor: 6

2.2.2. # of Members Opposed: 6

2.2.3. # of Members that Abstained: 0

2.2.4. # of Members that did not vote: 3

2.3. **Minority Position(s):** To explore the issue is useful, as long as this is not projected as a "one size fits all" solution that would affect all Registries, and there could be other levers than using the add grace period. Members have voted against on this basis.

- 2.4. **General impact on the RyC:** The impact on registries and sponsors would be minimal if any because the transaction fee is an issue between ICANN and registrars. Note that most registries and sponsors already report the names deleted during the add grace period so there probably would be no new reporting requirements.
- 2.5. **Financial impact on the RyC:** If there is any impact on registries and sponsors, it is expected that it would be minimal.
- 2.6. **Analysis of the period of time that would likely be necessary to implement the policy:** It is possible that registries and sponsors would not have any actions if this approach is implemented; even if there are some actions required of registries and sponsors, the time required should be very minimal.

### 3. Position 3

#### 3.1. Position Description:

- 3.1.1. Section 4.3 of the Issues Report notes that “many of the gTLD registries have contractual provisions which enable them to address the issue of domain tasting on an individual basis.” It goes on to point out that one RyC member, PIR (.org), has already implemented an approach in this regard.
- 3.1.2. The RyC believes that a one-size-fits-all approach will not work for all registries and sponsors. The RyC therefore suggests that consideration of variations of this approach should be evaluated by individual registries and sponsors. It should also be noted that what is successful for one gTLD may not have the same results in another gTLD.

#### 3.2. Level of Support of Active Members: Supermajority

- 3.2.1. # of Members in Favor: 12
- 3.2.2. # of Members Opposed: 0
- 3.2.3. # of Members that Abstained: 0
- 3.2.4. # of Members that did not vote: 3

#### 3.3. Minority Position(s): none

- 3.4. **General impact on the RyC:** The impact of this approach needs to be determined by individual registries and sponsors and it seems reasonable to expect that it will vary across gTLDs.

3.5. **Financial impact on the RyC:** Financial impacts of this approach need to be determined by individual registries and sponsors and it seems reasonable to expect that it will vary across gTLDs.

3.6. **Analysis of the period of time that would likely be necessary to implement the policy:** In the case of PIR's implementation, it took several months, part of which was to provide adequate notice to registrars. Each registry or sponsor would need to determine the time needed and it seems reasonable to expect that any that elect to go this route would give plenty of notice to registrars.

#### 4. Position 4

##### 4.1. Position Description:

4.1.1. The GNSO Ad Hoc Group on Domain Tasting recommended the following terms of reference for a possible PDP on domain tasting: 1) Review and assess all the effects of domain tasting activities that have been identified; 2) Judge whether the overall effects justify measures to be taken to impede domain tasting; and 3) If the answer to 2 is affirmative, then consider the potential impacts of various measures on the Constituencies, and recommend measures designed to impede domain tasting. (See the GNSO Ad Hoc Group on Domain Tasting Outcomes Report at <http://gns0.icann.org/drafts/gns0-domain-tasting-adhoc-outcomes-report-final.pdf> )

4.1.2. The RyC supports these terms of reference

##### 4.2. Level of Support of Active Members: no majority

4.2.1. # of Members in Favor: 7

4.2.2. # of Members Opposed: 4

4.2.3. # of Members that Abstained: 1

4.2.4. # of Members that did not vote: 3

4.3. **Minority Position(s):** The terms of reference should include the consideration that one policy affecting all Registries might not be appropriate. One-size may not fit all. Four members voting "Against" have done so on this basis. One member abstained on the basis that this position conflicts with position 2.

4.4. **General impact on the RyC:** Representatives from RyC member registries or sponsors will need to commit time to participate in the PDP

and the RyC itself will need to cooperative with those representatives by reviewing issues and providing feedback throughout the PDP.

- 4.5. **Financial impact on the RyC:** The RyC itself will not incur any add-on costs in supporting the PDP. Volunteer time is supported by individual registries and sponsors as well as by individuals donating their own time.
- 4.6. **Analysis of the period of time that would likely be necessary to implement the policy:** N/A

## IPC Constituency

### Intellectual Property Interests Constituency Constituency Statement on Domain Name Tasting December 5, 2007

Pursuant to GNSO Council Resolution 20071031-2, the Intellectual Property Interests Constituency (“IPC”) submits this Constituency Statement on Domain Tasting. The IPC arrived at the positions below in accordance with the requirements of the GNSO Policy Development Process as outlined in the ICANN bylaws. These positions incorporate by reference Section 4.3 of the Outcomes Report of the GNSO Ad Hoc Group on Domain Tasting, October 4, 2007 (hereinafter “Outcomes Report”), and Annex 5 thereto.

## I. Constituency Position

### A. Domain Tasting Harms Intellectual Property Rights Holders

1. Domain tasting harms holders of intellectual property (“IP”) rights (“IPR”) when, as is often the case, the tasted domain names (“tasted names”) are anticipated typographical errors of trademarks. A recent report by McAfee, Inc. characterizes domain tasting as one of the most significant factors in the recent growth in typosquatting. What’s In a Name: The State of Typosquatting 2007, available at [http://us.mcafee.com/root/identitytheft.asp?id=safe\\_typo&cid=38296#WhatIsDriving](http://us.mcafee.com/root/identitytheft.asp?id=safe_typo&cid=38296#WhatIsDriving). Domain tasting that is also typosquatting causes consumer confusion, erodes brands, and harms the goodwill represented by those brands. See Outcomes Report, page 14 and Annex 2.

2. Domain tasting prevents IPR holders from registering and using for legitimate purposes the tasted domain names (“tasted names”). Outcomes Report, pages 18-19.

3. Large IPR holders and those that own famous or well-known brands are more likely to have their brands/marks be the subject of tasted names. Consequently, they are more likely to incur the greatest costs in preventing and taking action against domain tasting involving typosquatting. On the other hand, smaller IPR holders and those that do not own famous or well-known brands often do not have the resources to take prophylactic measures or aggressively combat domain tasting.

4. Many IPR holders have significant and extensive domain name portfolios. As registrants, IPR holders subsidize domain tasting when any increased costs attributable to domain tasting are passed on by registrars and registries. Outcomes Report, page 15.

5. Many IPR holders suffer the harmful effects of domain tasting on their businesses, including lost advertising and sales revenues from parked landing pages associated with the tasted names, and misdirection of potential customers to direct competitors, who exploit the goodwill of their established brands. Complaint ¶¶ 114-39. *Dell Inc. v. BelgiumDomains, LLC et al.*, Civ 07-22674 (S.D. Fl. filed Oct. 10, 2007); Outcomes Report, pages 135-41.

6. IPR holders are harmed when the tasted names effectively require them to pay twice for keywords. An IPR holder pays once when “purchasing” the keyword from the advertiser as part of its intended advertising efforts. It pays a second time when it pays the taster for directing Internet users via links from parking pages associated with the tasted names to the trademark owner’s site.

7. Domain tasting imposes significant costs on IPR holders to police tasted domain names, and efforts to police are often unsuccessful. The Uniform Domain Name Dispute Resolution Policy (“UDRP”) and remedies under national law are ineffective against domain tasting because of the ephemeral nature of tasted names. Outcomes Report, page 22; Response of the World Intellectual Property Organization to the UDRP Providers RFI in Outcomes Report, pages 113-15.

8. The tremendous incidence of domain tasting increases IPR holders’ costs for prophylactic budgets on defensive domain name registrations, for increased enforcement needs attributable to domain tasting, and for registration of previously tasted names. Outcomes Report, page 22.

9. IPR holders’ responsibility to police their marks will result in increased litigation against those registrants widely known as domain tasters.

## **B. Domain Tasting Harms Internet Users**

1. As a result of tasting, Internet users who seek branded goods, services or information must sort through numerous false hits for tasted names when searching for legitimate sites and suffer confusion, wasted time and frustration: Outcomes Report, pages 14ff.

2. Users sometimes may not be able to navigate through all of the false tasted names and may ultimately do business with someone other than an intended trusted IPR holder or licensee thereof. When the “substitute” entity provides goods or services inferior to those provided by the trusted IPR holder, users are disappointed and consumer confidence in Internet-based commerce is damaged. Outcomes Report, page 14ff; McAfee report.

3. Other times, users seeking goods, services or information may be diverted to unexpected and potentially harmful sites: Outcomes Report, page 14.

4. Embedded viruses, malware, and related illegitimate activity may be associated with sites at tasted names: Outcomes Report, pages 15ff.

5. The temporary nature of tasted names encourages anonymity and discourages identification of registrants of tasted names. Bad actors who seek to do harm on the Internet and decrease their exposure or possible detection by authorities may be attracted to tasting: Outcomes Report, page 15.

6. Individual registrants must also bear those costs passed on both by registrars and registries, and by businesses. See A.4 above.

7. Tasting harms businesses and users because it restricts the choice of available domain names for would be registrants at any point in time: Outcomes Report, page 15.

### **C. Domain Tasting Harms the Domain Name System Generally**

1. All of the foregoing factors combine to reduce the user trust of the domain name system and Internet navigation generally.

2. Domain tasting risks turning the domain name system into a mostly speculative market. Domain names, which are meant to be primarily specific identifiers of businesses and other Internet users, are characterized as becoming mere commodities of speculative gain: Press Release, March 12, 2007, World Intellectual Property Organization, "Cybersquatting Remains on the Rise with Further Risks to Trademarks from New Registration Practices", ([http://www.wipo.int/edocs/prdocs/en/2007/wipo\\_pr\\_2007\\_479.html](http://www.wipo.int/edocs/prdocs/en/2007/wipo_pr_2007_479.html)).

### **D. Only Domain Name Speculators Would be Negatively Impacted by Prohibition of, or Action that Effectively Prohibits, Domain Tasting**

1. Prohibiting domain tasting, or taking action to effectively prohibit tasting, would negatively impact only a small class of domain name speculators. This class of domain name speculators includes some ICANN-accredited registrars. Preliminary Injunction, Verizon California, Inc. v. Ultra RPM, Inc., CV 07-2587 PA (C.D. Cal. entered September 10, 2007); Response of the World Intellectual Property Organization to the UDRP Providers RFI in Outcomes Report, pages 113-15;

2. Non-speculating registrars have come to rely on the Add Grace Period ("AGP") for purposes that can – and should – be better addressed through other mechanisms.

a) Several ccTLD registries are identified as not having an AGP. Outcomes Report, page 4. Registrars of domain names in these ccTLDs have presumably developed mechanisms for achieving the "benefits" identified in Section 4.4 of the Outcomes Report. These registrars should be consulted about such alternative mechanisms.

b) Any losses through non-payment by registrants would be expected to be more than offset by the reduction in registrar costs arising from tasting and kiting transactions.

c) Registrars could require registrants to double verify information, including the spelling of a domain name, during the registration procedure. Such double verification is widely used in Internet commerce.

d) The registration agreements for a number of large ICANN-accredited registrars either state that all registration fees are non-refundable or do not identify misspelled domain names as a refundable event.

e) The AGP was first adopted when domain name registrations were significantly more expensive than they are today. The retail price of a domain name registration is now sufficiently low that it is not unreasonable for registrants to expect – in accordance with the registration agreements noted above – that refunds for misspelled domain names will not be forthcoming.

f) Other industries and business do not require the equivalent of an AGP to address fraud. Many traditional bricks and mortar businesses and online businesses provide immediate activation of services with a credit card payment, and do not rely on a 5-day grace period such as the AGP. Long distance telephone service providers and Apple's iTUNES<sup>®</sup> retail store services are examples of both traditional and online businesses that provide such services.

g) Use of the AGP as a “cart hold to provide access to domain names” calls into question whether the participating registrar is in compliance with Section 3.7.4 of the Registrar Accreditation Agreement.

h) Registrars in ccTLD registries that do not have an AGP presumably find it necessary to monitor, test, and develop systems. Similarly, registrars must have found it necessary to monitor, test, and develop systems before the AGP was widely used. One potential area of fact finding that merits development is what mechanisms are used by registrars in ccTLD registries that do not have an AGP, what mechanisms were used by gTLD registrars before the AGP, and what mechanisms other than the AGP would permit the registrars to monitor, test, and develop systems.

## E. Domain Tasting Harms ICANN

1. Domain tasting adversely impacts ICANN by artificially suppressing its revenues because tasted domains are not subject to ICANN fees. For example, levying the \$0.20 per name fee on all domain names deleted during the AGP in July 2007 alone would have resulted in over \$12.5 million in revenue.

TLD	Number of Deletes Add Grace	Revenue if ICANN had levied USD 0.20 per name fee
.com	57,021,555	11,404,311
.net	5,466,679	1,093,336
.org	84,880	16,976
.biz	37,922	7584
.info	109,000	21,800

.pro	?	?
.jobs	71	14
.museum	no report	n/a
.travel	0	0
.cat	232	46
.aero	no report	n/a
.coop	?	?
.mobi	473	95
.name	?	?
<b>TOTAL</b>	<b>62,720,812</b>	<b>USD 12,544,162</b>

That amount, which represents only one month of lost potential revenue, exceeds 25% of the projected revenues under ICANN's approved FY 2007-2008 budget.

ICANN could certainly put such additional revenues to use by, for example, expediting the rollout of IDNs and the introduction of gTLDs; defraying the gTLD application fee for qualified applicants; increasing the number of ICANN fellowships; expanding the number of languages into which ICANN documents are translated and for which real-time translation is available at the meetings; supporting the expenses for travel to the meetings by GNSO and ccNSO Councilors; and innumerable other projects. In the alternative, even if imposing the fee were to reduce the number of registrations, and thus ICANN did not realize the full sum stated above, the levying of the fee could dramatically decrease the incidence of domain tasting.

[There was not unanimous support within the IPC for the preceding paragraph. A small minority expressed the view that ICANN may financially benefit from domain tasting.]

## II. Methodology for Reaching Position

The issue of domain tasting has been discussed within the IPC on numerous occasions, including the meetings of the IPC held in conjunction with the San Juan and Los Angeles ICANN Meetings. A draft constituency statement was circulated to IPC officers and leadership on November 27, 2007, and was discussed on a teleconference of the IPC membership, including its officers and GNSO Council representatives, on November 28. Revisions and additions proposed by members and officers via email were discussed via email and incorporated as agreed upon. Additional revisions were subsequently circulated and discussed via email.

## III. Impact on Constituency

The impact of the PDP on the IPC depends upon its ultimate outcome. In general, it is expected that elimination of domain tasting should eliminate the harms outlined in Section I above.

## IV. Time Period Necessary to Complete Implementation

This depends on the outcome of the PDP.

Respectfully submitted,

Kristina Rosette, IPC GNSO Council Representative for North America  
Steve Metalitz, IPC President

ALAC

## **ALAC “Constituency” statement regarding the PDP on Domain Tasting**

### **Overview:**

The ALAC advocates any and all actions that will *quickly* eliminate domain tasting. There has been much discussion on this issue in the RALOs and on the general At Large discussion list. Although not all regions have been similarly active, the preponderance of views to date favour the complete elimination of the AGP.

### **Rationale:**

While the AGP had legitimate roots, the reduction in domain name pricing combined with better registrar software eliminates this need.

### **Preamble:**

The At Large Advisory Committee (ALAC) is pleased to have been asked to submit a statement regarding the newly launched GNSO Policy Development Process (PDP) on Domain Tasting. The ALAC is not yet in a position to thoroughly vet such positions through the Regional At large Organizations (RALOs) and At large Structures (ALSs) but this statement has included significant input from the some RALOs, ALAC members and the At Large community. As work proceeds on the PDP, additional input will be sought from these groups.

Domain tasting is the use of legitimate ICANN-approved processes to register a domain, test if there is any substantial traffic (perhaps because it was recently in use by someone else or is similar to another regularly used domain), and if not, cancel the registration within five days at no net cost to the registrant - an Add Grace Period (AGP) delete.

### **Domain Tasting and the PDP:**

The issue of domain tasting has been regularly been discussed since the phenomena began in 2005 – and with good reason. In January 2005, before the practice was common, for .com and .net, there were about 1.7 million domains registered and 0.7 million domains deleted for a net increase of 1.0 million domains. By the end of that month, there were just over 40 million total domains registered.

Two years later, at the end of January 2007, the total number of domains had increased by 78% to 72 million domains. However, in January 2007, there were 51 million domains registered and 48 million domains deleted. That is, there was a net increase of 3 million names, but most of the rest were just being “tasted”.

In the period since January 2007, the practice has grown even more. Although the practice is relatively widely used, the majority of tasting was being done by just three registrars, all of which have the same address, telephone number and formation date.

The AGP was originally created to allow domain names that had been accidentally registered to be cancelled. Although a legitimate requirement at the time, the reduction in domain name pricing and better registrar software eliminates any substantive requirement for the AGP as it was originally envisioned. Moreover, many registrars and resellers do not even pass this benefit on to registrants. It was and is the position of the ALAC that the domain tasting enabled by the AGP is both inappropriate and harmful and should be eliminated with due haste.

To this end, the ALAC initiated the formal investigation of domain tasting by requesting that ICANN develop an Issues Report. This was done with the support of several GNSO constituencies. Ultimately, the Issues Report was delivered to the GNSO and it included staff agreement that this was indeed an ICANN policy issue. At the ICANN meeting in Los Angeles, the GNSO decided to undertake a PDP with

the intent of further understanding the effects of domain tasting and if appropriate, recommend measures to impede domain tasting.

The ALAC is not only pleased that the GNSO has taken this action, but is particularly pleased that the action was taken with a 72% vote where only >33% was required to initiate a PDP. This indicated wide GNSO constituency support for *some* action.

Although each constituency may have different reasons for supporting the process, it is nonetheless encouraging that the end target is the same.

The GNSO has chosen to solicit constituency statements and most likely will create one or more working groups to further investigate domain tasting.

From the ALAC's perspective, our main concerns were raised in the request for the Issues Report and with the possible exception of the reference to Facilitation of Criminal Activity, the positions remain valid. Specifically:

- Destabilization of the Domain Name System due to volume and rate of domain name adds and deletes;
- Creation of consumer confusion undermining confidence in the Domain Name System;
- Increased costs and burdens to legitimate registrants;
- Facilitation of Trademark Abuse which also leads to consumer confusion.

### **ALAC Position:**

The ALAC advocates any and all actions that will *quickly* eliminate domain tasting. Whilst at this stage there is no unilaterally supported view from all the RALOs at least one RALO (North America) and several ALAC members formally and strongly advocate complete elimination of the AGP, as the optimal way forward.

The ALAC and RALOs have taken the opportunity to consult their user communities over the last several weeks. Active discussion resulted and opinions varied ranging from the North American RALO position that the AGP is not beneficial to the public

good and should be abolished, through to the Latin American and Caribbean RALO and the Asia Pacific RALO positions (as given in previous regional statements) where they respectively stated that “action to control the practice [of domain tasting] may be necessary” and that “the effectiveness of economic tools should be investigated, such as has been successfully used in the PIR.”

ALAC does recognize that there are other actions which could lead to the effective elimination of domain tasting including:

- Application of a registry-charged fee for all AGP uses. The fee would need to be set to effectively eliminate tasting and not just change the dynamics of it.
- Application of a registry-charged fee if AGP uses exceed some threshold per month (this is effectively what PIR did). The fee could be as much as the full cost of the domain. The threshold would need to be set to catch domain tasters but to not cause perceived pain to registrars who use the AGP for legitimate, non-tasting purposes. Similarly, the fee would need to be set to effectively eliminate tasting and not just change the dynamics of it.
- ICANN currently charges registrars \$0.20 per domain added excluding AGP deletes (actually \$0.25 decreased this year by \$0.05). The exclusion could be removed in the next budget (or perhaps even sooner). Alternately, it could be removed only if a threshold of AGP uses were reached (there is already an AGP threshold used in a different registrar fee, so the mechanism is there). It is unclear if this fee would be sufficient to eliminate domain tasting, but it would almost surely alter the phenomena.
- The RAA could be altered to change the clause stating that registrars cannot activate a domain unless they have a reasonable expectancy of being paid (3.7.4) to a clause which requires them to have a reasonable expectancy of being paid AND keep the money.

The ALAC recognizes that some of the possible methods of attacking domain tasting may not require GNSO action at all, but rather may be effected by independent action of one or more parties. Such actions are encouraged. However, until such actions are actually taken and prove effective, the GNSO is encouraged to begin policy development on the issue.

The ALAC will support the PDP in whatever ways are most productive to better understand the impacts of domain tasting and to eliminate it in the shortest possible

time-frame. Should working groups be formed, the ALAC would welcome participation.

Endorsed by the ALAC on December 5<sup>th</sup>, 2007

Transmitted on behalf of the ALAC to the GNSO via email by Alan Greenberg  
December 5<sup>th</sup>, 2007

**Statement**  
of the  
**Non-Commercial Users Constituency (NCUC)**  
on  
**Domain Name Tasting**

7 December 2007

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The Final Outcomes Report<sup>7</sup> of the ad hoc group on domain name tasting suggests a growing trend of registrants exploiting ICANN's Add Grace Period (the "AGP") to receive a full refund on the cost of registration by canceling their domain name registrations within five days. The AGP may have been adopted upon the assumption that all commercial uses of a domain name would require registration for a period longer than five days. Certain registrants, however, have discovered that they can profit from repeated use of extremely short-term registrations through the use of pay-per-click advertising or otherwise. A coordinated response by ICANN may be appropriate to close this loophole. This response, however, should not be disproportionate to the problem nor stem from any misconception of the issue.

Insofar as some registrants are exploiting the AGP to operate without paying any registrations costs, they are effectively forcing the registries to subsidize them. This was clearly not the intended use of the AGP, and action by ICANN may be appropriate to counter this growing practice. It remains to be seen, however, if the AGP should be removed in its entirety. The ad hoc group report indicates that the AGP may provide benefits to both registrants and registrars, and so completely eliminating the AGP risks eliminating these benefits as well. However, any reported benefits of the AGP are disputed and further elaboration is needed before recommending specific action.

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<sup>7</sup> Final Outcomes Report available at: <http://gns0.icann.org/drafts/gns0-domain-tasting-adhoc-outcomes-report-final.pdf>

One possible approach may be similar to that adopted by the Public Interest Registries (PIR) — the imposition of a modest ‘excess deletion’ fee. This approach could penalize those registrars with heavy deletions, thus forcing them to adopt policies that prevent registrants from exploiting the AGP. Since registrants looking to avoid paying registration costs will naturally flock to those registrars least vigilant against this abuse, registrars would have a substantial incentive to be vigilant against creative disguises of these practices. Yet unlike directly imposing a fee on all short-term registrations, this approach gives registrars significant flexibility to adopt effective practices tailored to their customer base and business model, and preserves the other advantages of the AGP.

### **Intellectual Property Issues**

The intellectual property issues discussed in the ad-hoc group's final report warrant special attention. In this context, “intellectual property” refers almost exclusively to trade and service marks, which are often referred to collectively as “trademarks.” The vast majority of the respondents to the RFI identified themselves as either intellectual property rights owners (37.93%) or representatives of intellectual property rights owners (51.23%). Consequently, intellectual property rights feature prominently in the responses.

The problem which domain tasting presents to trademark holders is not that the AGP creates a loophole which makes otherwise infringing activity legal. If a registrant makes use of a trademark in a manner that constitutes infringement, the holder of that trademark is protected through international treaty, the laws of various nations, and through ICANN's own Uniform Dispute Resolution Policy. These protections still apply even if the period of registration is very brief. The problem is instead one of enforcement.

This distinction should be kept in mind by the GNSO and by any subsequent working group established to tackle this issue. Many of the responses to the RFI listed problems such as “erosion of brand names,” “erosion of reputation” and “loss of revenues [through] diversion of

traffic” as disadvantages to domain tasting. These are problems with infringement, not with domain tasting. While it may be appropriate for ICANN to consider whether its policies unduly encourage infringement or impede enforcement of intellectual property rights, it would be a mistake to assume that a revised policy on domain tasting will stamp out short term infringement or that all domain tasting necessarily infringes.

Insofar as the AGP allows a registrant to use a domain for a very short time at no cost it does provide an incentive to a prospective infringer to operate in a manner that frustrates enforcement of trademark rights. This incentive can be removed by implementing a modest restocking fee where no corrective motive can be shown for the deletion. Because the bulk of deletions come from a handful of registrars and because registration fees are only likely to deter an infringer who operates a large number of sites, the approach adopted by PIR (option “C” on the RFI), is particularly worth further consideration.

### **The Sample Zone File Data Study**

ICANN should be particularly careful in crafting any test to identify infringing activity. One proposal in the ad hoc group's report was to determine the percentage of domain tasting that infringed upon trademarks by comparing a sample of deletions to a list of trademarks registered with the United States Patent and Trademark Office (the “USPTO”). This method was termed the “sample zone file data study.” This method would result in erroneous and excessive findings of infringement because it stems from a fundamental misconception of trademark law. Specifically, it relies upon an erroneous assumption that any unauthorized use of a registered trademark is unlawful.

Trademark law does not categorically ban use of a trademark without the permission of the owner. Instead, it prohibits uses of a trademark which deceive or confuse the consumer. Where there is no confusion, there is no infringement. Thus, trademark law does not prohibit the use of the same name or symbol by companies in different fields of commerce, and is limited in terms of its geographical reach. Therefore a test for infringement based solely on the

presence of a word that has been registered with any trademark office would erroneously conclude that many lawful business uses are infringing.

This is easily illustrated by examining one registered trademark. The USPTO lists 125 live registered wordmarks which contain the word “Acme.”<sup>8</sup> Many of these are simply the word “Acme” with little or no graphical embellishment. Yet hundreds of Corporations, Limited Partnerships, and Limited Liability Companies with names containing the word “Acme” have been registered with the California Secretary of State,<sup>9</sup> to say nothing of General Partnerships or unincorporated Sole Proprietorships in California or business entities in other jurisdictions. While a few of these businesses may be infringing upon the trademarks of others, the vast majority are undoubtedly operating without any consumer confusion. Moreover, it may be possible to start a new business incorporating the word “Acme” without infringing upon any of those trademarks registered. Under the sample zone data file study, however, any domain incorporating the word “Acme” would be inferred to be infringing merely because this word has been registered with the USPTO.

More significantly, non-commercial uses of a registered trademark would also be determined to be infringing under the test proposed. Under U.S. Law, non-commercial use is particularly unlikely to be found to infringe because there is little chance of confusion. Thus a website critical of Jerry Falwell which used a common misspelling of his domain name (“Fallwell.com” for “Falwell.com”) was ruled to not infringe upon his trademark because the creator intended “only to provide a forum to criticize ideas, not to steal customers.”<sup>10</sup> Since on-line critics of businesses frequently incorporate the name of the criticized business into their domain names (e.g. “paypalsucks.com,” “microsoftsucks.org,” etc.) false findings of infringement are particularly likely under the sample zone file data study discussed in the report.

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8 See <http://www.uspto.gov>

9 See <http://kepler.sos.ca.gov/list.html>

10 See *Lamparello v. Falwell*, 420 F.3d 309 (5<sup>th</sup> Cir. 2005) at 315.

To be sure, an argument can be made that non-infringing domains are less likely to be deleted during the AGP. If that is the case, then it is less likely that these legal uses of registered trademarks would significantly skew the sample zone file data study's conclusions. It would be a mistake, however, to use that argument to justify the proposed test. This test is intended to determine whether infringing use predominates in the practice of domain tasting. To argue that a use of a trademark is probably infringing because it is deleted during the AGP is to assume the outcome the test is intended to determine—a logical fallacy known as “begging the question.”

More importantly, ICANN should be careful not to establish a precedent that this fundamentally flawed test establishes infringement. Given the difficulties inherent in enforcing trademark rights against domain tasters, it is possible that some sort of mechanism to screen-out infringing use will be discussed during the policy development process. The test proposed for the sample zone file data study would be manifestly inadequate for this purpose in that it would prevent a great deal of legitimate use.

This last point is particularly significant in light of the fact that trademark law is still adapting to commerce over the Internet. For example, while some U.S. Courts have held that a bad faith intent to make money from a domain containing a famous trademark is sufficient to establish infringement, others have held that such a use must be in connection with some form of goods or service.<sup>11</sup> ICANN should not take it upon itself to decide these issues for the courts and legislatures of every country. The delicate balance of competing public policies inherent in intellectual property law should instead be left to the courts and political processes to work out.

## Conclusion

Further investigation within the GNSO is needed and action may be required to curb abusive domain name tasting. As the GNSO takes the next step in dealing with this problem it must be careful to ensure that the issue remains properly framed rather than assuming that

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<sup>11</sup> Compare *Ford Motor Co. v. Greatdomains.Com, Inc.*, 177 F.Supp.2d 635 (E.D.Mich. 2001) with *Intermatic Inc. v. Toeppen*, 947 F.Supp 1227(N.D.Ill. 1996).

ICANN is responsible for or capable of preventing all short-term trademark infringement on the web. Moreover, while further investigation, discussion, and action is warranted at this point, the proposed sample zone file data study should not be undertaken because it relies on a fundamental misunderstanding of trademark law and sets a dangerous precedent as to what ICANN will consider to be infringing use.

Statement of the ISPCP Constituency on Domain Name Tasting

5 December 2007

The ISPCP Constituency is concerned that the practice of exploiting the AGP (Add Grace Period) to test profitability of domain names (popularly known as "domain name tasting") is deleterious to the stability and security of the Internet. Our objections to domain name tasting stem from the following issues:

1. Domain tasting facilitates the practice of short-term infringement on and dilution of trade marks, as well as phishing. It allows criminals to employ a hit and run strategy wherein domain names may be held at no cost to the registrant for up to 5 days. By dynamically changing registrations, these malefactors can defeat the existing dispute resolution mechanisms \*which were not designed to deal with such short time frames.\*
2. The rampant use of domain name tasting, and particularly its abuses, gives rise to a huge number of complaints to ISPs, both from individual consumers and businesses. It significantly weakens our customers' trust and faith in the validity of domains and the DNS. This is a stability issue.
3. At any given time millions of domain names are being tasted and there is a high turnover from week to week. This added operational load \*potentially \*threatens the stability of the DNS. And, since all but an insignificant percentage of name resolution is performed by ISP domain name servers, the burden of this excess falls on the members of our constituency.

The ISPCP Constituency opposes the exploitation of the Domain Name AGP for domain name tasting and urges the GNSO to create new policy to curtail or eliminate this practice.

On behalf of the ISPCP Constituency

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