
BEIJING – ALAC & NCSG Meeting

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ICANN – Beijing, People’s Republic of China

OLIVIER CRÉPIN-LEBLOND: Okay. Good afternoon everyone, and welcome to the session of the ALAC meeting with the NCSG. We have an interesting agenda today, which centers primarily around the strong and proposals of the Trademark Clearing House plus 50 derivations policy by ICANN staff.

We have Robin Gross with us, and the members of the NCSG are around the table as well, and some ALAC members as well. And so I’m not quite sure, do you wish to start? Okay. I think that going through a full description of what the TMCH Trademark Clearinghouse plus 50 derivations might be wasting a bit of time.

I gather that we’re all well aware of the implications of what this is about. We have noticed that there has been a lot of discussion on the GNSO, the GNSO counsel, about this. There has also been some discussion in At-Large. I’ve noticed also there on the mailing lists, the NCSG mailing list, there are some ALAC positions where assumed, and I thought it might be, at first, a good thing to give you a better idea of what the ALAC thinks about the proposals.

And I hope that one of my colleagues, either Alan or Evan, would be able to take us through that view.

EVAN LEIBOVITCH: I’m sure... I’m sorry, this is Evan Leibovitch for the record. And by the way, this is being transcribed and it’s also being translated and

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interpreted into French, Spanish, and Chinese. So if you prefer to talk in a language besides English, that is available to you in this room.

Similarly, there are also, I believe, translation devices, interpretation devices if you want to listen in another language. Alan will probably have more details than I do, but I believe it's safe to say that At-Large is not happy with the plus 50. This is something that took us by surprise.

And although we had made comments before on some of the straw man proposals, and not all of them we're distasteful, that one certainly was. We've made positions on the straw man, we did participate in the LA meeting. There were four of us that were involved in participating remotely. Unfortunately, we couldn't be there in person.

But there were certainly some parts of that, the result of that that surprised us as much as it surprised you. Alan, do you want to offer some detail on it?

ALAN GREENBERG:

I think we have to separate function from process. In the original STI report, the ALAC supported, with some further investigation, the concept of trademarks plus associated product services. So Exxon Gas, or whatever. So part of what the 50 plus could allow, because it allows other things also, includes that kind of concept.

I believe if you look at our statement on the straw man itself, we basically said, we are not particularly objecting to the net result, but we do believe it's a policy issue that should go through a policy process. And I think we even said something like, and we encourage the GNSO to seriously consider it.

And I think that's where we stand to this day. I will say that, especially given the fact that the extended trademark – extended claims notice is not included in the package, I'm not sure the impact of this overall thing is very large in that it applies to sunrise and 90 days after launch, and after that, effectively disappears until the second round.

Now admittedly, it is a foot in the door, a thin edge of the wedge, and we don't know how it gets expanded in the future. But I also don't really see the impact as all that large. There are things that have gone to a dispute, that is for a particular usage of it, and all it generates is a claims notice. You can still say, "Yes, what I'm doing is fair use."

And assuming it's really fair use and you're not trying to prey on the name and create a fishing site or something like that, that there is still usage of it. We're certainly not objecting to the concept, but it's clearly something very different than what has been agreed to before. And the process by which it was approved is something that we find troublesome.

OLIVIER CRÉPIN-LEBLOND: Thank you very much Alan. This is Olivier for the transcript record. Indeed the ALAC in its statement has mentioned that if there was a plus something to be agreed, it believes that the GNSO BPD process would be the right location to develop it or design it. Policy process [CROSSTALK 0:06:06]....

Because policy process was the right way to move forward. Staff, it appears, has taken this as being implementation from the discussions between policy and implementation, and so this is where we are at

today. It would be interesting to hear the point of view of the NCSG with regards to this before them going further. Thank you.

ROBIN GROSS:

Thanks. Yeah I just wanted to... My name is Robin Gross for the record. I'm the chair of the NCSG and was the participant from the non-commercial stakeholder group that was allowed to come to the Trademark Clearing House meeting.

I think we have somewhat of a different position than Alan on some of these issues. I realize this is about a notice, he says it's only sending out a notice, but that notice actually has really significant consequences. For one thing, it creates a very chilling effect on speech. Somebody who receives this notice is going to think twice about registering that domain.

So that's a very important aspect. And then a second aspect is that it also creates... And the thing that it also creates knowledge that there may be infringement such that you can now be found criminally liable. So because you received one of these notices, you have been put on notice that this is going to be an infringement, and the way the laws are interpreted, this will be then use to create criminal sanctions against you.

So these are, it's not just, "Oh, it's a notice," but this is a notice with very serious consequences. And I also think it's worth pointing out that it doesn't match trademark law, just because somebody, somewhere once infringed Microsoft's trademark does not mean that my use is going to be an infringement of that trademark at all.

It doesn't take into account the facts, or the circumstances, or the parties that were involved in the earlier dispute. So it has really nothing to do whatsoever with the way trademark law works. And I think it's also worth pointing out that we say trademark plus 50, but you have to read the fine print.

It's 50 per trademark identifier. So there actually could be unlimited number of derivations because, let's take an example. Apple has a trademark in say 30 countries on the word Apple. They're going to be able to use that registration, they registered that trademark in 30 countries.

They are going to be able to use that registration, each one of them, to get 50 derivations of that. So they are going to end up with 1,500 derivations when they've got 30 registrations.

When you actually read the fine print of these things, it's much, much worse than staff and others will tell you. And I also think it's very important to realize, staff, including [Fad-hi 0:09:07], admitted this was a policy decision. I realize they're going around now and saying it's implementation, it's implementation.

At the Trademark Clearinghouse meeting, they admitted it was policy. When the blog post was put on their website by staff, they had to admit there that it was a policy matter, not an implementation matter. So these are very important things to realize. That even though it has been decided that this is a policy decision, staff still thinks they're able to go do this.

This needs to be explained because they say, “Oh we’re only doing implementation.” But they admitted this was policy. They’re still doing it. Why? How? So those were just a few of the clarifications that I wanted to raise on the issue. Thanks.

OLIVIER CRÉPIN-LEBLOND: Thank you very much Robin. Alan?

ALAN GREENBERG: Just one clarification. Robin, you started off by saying NCSG, or NSUC, I don’t remember which, has a different position than Alan. Alan was stating the ALAC position. So. Thank you.

OLIVIER CRÉPIN-LEBLOND: So I think that there is... It’s Olivier here for the transcript. I think that there is some common ground [AUDIO MALFUNCTION 0:10:23]... the ALAC’s statement that was made a while ago.

And with regards to inclusion of the domain names, previously determined to have been abusively registered or used in both trademark claims services, there is a whole paragraph on that. I’m not going to read through the whole paragraph, but the last sentence of that paragraph is, “The ALAC encourages the GNSO to fairly investigate the benefits and impacts of this [? 0:10:50] and to recommend its adoption.”

But it would need to investigate this. And, of course, there have benefits and inconvenience, we both know that. The question now is, where do we go from here?

ROBIN GROSS: So if I can make a proposal. I think there are a lot of issues that we share, views that we share here. So I think we should work to have a crafted joint statement about those things, those issues that we share and that we can find some agreement on, that we can then publish and deliver in the public forum and try to lend some support to overturning that decision by staff, to make that policy proposal.

So that would be my proposal.

OLIVIER CRÉPIN-LEBLOND: Okay thank you. Any comment from ALAC members? Alan?

ALAN GREENBERG: No problem at all, as long as we do limit to the things that we have in common and not each of us preach on the other things.

OLIVIER CRÉPIN-LEBLOND: Well. David?

DAVID CAKE: We should be able to... There are always things which both the GNSO and ALAC agree are policy, and yet were implemented, of which the trademark plus 50 is just the most egregious example. We should have no problem having a joint statement condemning the process.

I should think that would be pretty straightforward. A lot of things that ALAC said were policy, and yet were – several things were put ahead. I can't see any reason why ALAC should have any issue with that.

And as far, like I said, the majority of the NSO counsel have clearly stated the same thing. So the common ground should be, here, we may disagree on the specifics of just how appalling the – just how bad the proposals are. Personally, I think the plus 50... I mean, Alan thinks it's a minor problem, I think it's pretty dreadful.

It pretty much completely ignores trademark law, completely ignores what the UDLP is, and is an example of the... If you read the letter, the memo from the... The memo that came out when they announced it, it says, we agree that – it actually mentions the GNSO, it says this is a policy issues and then it straight goes and goes, "Having reviewed and balanced all feedback, it appears to be okay. So we're going to do it."

There was no policy process, and a vague positive, feelings whether they be Alan's positive feelings, or anyone else's positive feelings, or ALAC's positive feelings, positive feelings is not a substitute for a policy process. And the staff have taken it as such. People seem to think it's kind of alright, so big tick just throw it out without looking at it.

There are really big problems with the detail, and that's why we have a policy process. We should have no problem conveying.

OLIVIER CRÉPIN-LEBLOND: Thank you. And for the transcript, this was David Cake. My name is Olivier Crépin-Leblond. I have been asked to remind people to say their

full name before starting to speak due to the interpretation plus the transcribing.

Next is [? 0:13:51].

WOMAN:

[? 0:13:55] for the transcript. I'd like to thank Robin for the excellent considerations. I must admit that hearing some of the things, some of the issues that you raised, I hadn't quite factored that in. And I think the nature of the issue at hand is quite significant, and I think that the ALAC should really reconsider perhaps...

Or if not reconsider, but perhaps hear them in terms of some of the issues that are sort of teasing out. And I agree with the proposal in terms of putting out a June statement on the very important issue, because looking to the future, there are going to be some mess of implications. Thank you.

OLIVIER CRÉPIN-LEBLOND:

Thank you very much [? 0:14:41]. Alan Greenberg.

ALAN GREENBERG:

Just to instill, I won't say a bit of humor into this, but a bit of history. I would be interested in taking a survey around the table of those who were involved in STI, whether it was deemed to be policy or implementation.

Olivier's and my recollections are opposite. But regardless, if STI for instance, had supported the 50 plus one, or whatever the thing is, it

would have been implemented regardless of whether STI was deemed to be a policy or implementation.

So I'm just reminding us that we have a long history of fudging the line and calling it what we want to make it convenient at the time. Doesn't alter the facts of it, but it does put it a little bit into perspective.

OLIVIER CRÉPIN-LEBLOND: Thank you very much Alan. And if I could just add to what Alan has said before I give the floor to David Cake. There have been some people coming to me and letting me know, through various discussions, that often the committee produces policy and then, with no regards to the implementation or implement-ability of it, and that perhaps the committee should be thinking about the implementation as well of what policies it was working on.

And so my recollection with the SDI was that we were told specifically not to deal with implementation. But Alan's recollection was that we were told to look at implementation as well. So [laughs]...

ALAN GREENBERG: No, no. My recollection is this was still in the wake of the approval of the PDP on new GTLDs, and the policy was set. All we could do was talk about the implementation details.

OLIVIER CRÉPIN-LEBLOND: So perhaps David Cake could help us on this one.

DAVID CAKE: Yes. David Cake speaking. I was not, of course, on the STI, but the... Whether we call it policy or implementation, and we do need to... It has become obvious everyone that we need to perhaps whether or not it's a question of drawing the line clearly, or not, or simply handling the transition from one to the other better.

The important thing with the STI was a multi-stakeholder process that everyone was involved in, and there was not here. I mean, the STI MEN worked pretty well, and no one was unhappy. People are unhappy.

OLIVIER CRÉPIN-LEBLOND: Thank you very much David. Some people were unhappy about the STI [laughs]. Maybe we weren't. Alan?

ALAN GREENBERG: Yeah. I think the same can be said with the whole straw man. When the ALAC [AUDIO MALFUNCTION 0:17:25]... straw man, we again supported most of the issues because they were very much in line with our minority report for the STI, which we did file a minor report.

And it said things like continued claims process, modification of trademarks, and a variety of things like that. On the other hand, we also issued what I thought was a pretty strong indictment against the process that had been followed, and the fact that we were not treated equitably in the process, invited early, provided with travel support, and that kind of thing.

So I think we agree on those issues. We do necessarily agree on the outcomes, but the process is certainly not one in which we want to

encourage in that exact form. Although we were accordingly pleased with the process of the actual discussions, in that it was one of the rare times in ICANN where you see someone trying to really bridge differences instead of people being on opposite sides and refusing to give an inch.

And I think it's the kind of process we are going to need more and more in ICANN to solve some of the really difficult problems that the current PDP work group simply cannot address. But it can't be done isolated from the [ball-si 0:18:45] process, it should be part of the [ball-si] process.

OLIVIER CRÉPIN-LEBLOND:

Thank you very much Alan. It's Olivier for the transcript. I can see a few people frantically looking through their computer trying to find what STI was. It was the Special Trademark Interest working group which was setup in response to the rejection by some parts of the community of the implementation recommendation teams, the IRTs work.

There was some statement, joint statements, made at Sydney, if I recall correctly, and that gave rise to the Special Trademark Interest working group to be put together, led by David [Mahar 0:19:21] if I remember correctly. Goodness, that was a while ago.

Just a bit more humor, the initials were STI, the meaning of the S changed over a period of time. When it was originally charted by the GNSO, it had a completely different meaning, everyone forgot it, and we used a different one. But that's okay.

MAN: Just as a point of order, could we focus on the action item and stop reminiscing?

OLIVIER CRÉPIN-LEBLOND: Robin.

ROBIN GROSS: I just wanted to point out while we're talking about the process and the way that this proposal got put on the table in the first place at this meeting. The CEO explicitly told me that non-commercial users may not participate at the same level as the commercial users, at this meeting.

So there were 14 people from the commercial stakeholder group at this meeting, and one, me, who was in the room from the non-commercial stakeholder group. Now we had Kathy [Kleiman 0:20:21] on the phone, but she had a hard time getting their attention, and being able to speak, and I'm sure the other people on the phone can talk to that as well.

And it was the middle of the night. I mean, the point is, this was a process in which they said it's perfectly acceptable to have 14 representatives from the CSG, while there is only one from the NCSG in the room.

How could they possibly defend a process? Obviously what comes out of those discussion is going to be one sided. I mean, the environment in which that proposal was discussed in the first place didn't allow for hearing all of the interests and all of the perspectives.

It was so one sided that of course the outcome... And it wasn't even something that the group in the room supported because the registries

and the registrars didn't support it. It was only the CSG that supported it, and it was the staff's decision what went in the straw man proposal.

This was not something that the community cooked up in this meeting, it was staff said, "I'm going to do this, I'm going to do that, and I'm going to put this in the proposal." This was not a bottom-up, it came from the community sort of policy process by any stretch.

It was like at 11:00 at night, and they had the beer and the wine and the pizza since five PM. I'm serious. This is how they were discussing these proposals. The idea that you can make policy in this fashion, I mean it was just shocking to me. It was a farce of a meeting to even be participate in.

Sorry I also have to rant.

[Laughter]

OLIVIER CRÉPIN-LEBLOND: Thank you very much Robin.

MAN: I think that falls under the category of reminiscing.

OLIVIER CRÉPIN-LEBLOND: Alan. Evan Leibovitch.

EVAN LEIBOVITCH:

Having said all of that... Sorry, this is Evan for the record. And frankly I think that sometimes beer and pizza is a reasonable way to help clear one's mind to write policy. But maybe that is just me.

I would backup what Robin said in terms of how badly that meeting was from a point of view of non-commercial and At-Large. We had a back channel going that had Robin, Alan, Kathy, and myself desperately trying to figure out what was going on, and the whispering that was going on, and so on.

And it was a real disappointment in terms of [Fa-dhi's 0:22:45] original comments about not only multi-stakeholders but multi-equal stakeholderism, that all of the sudden we thought we heard good words and this appeared to be something that backtracked on that.

The other thing that sort of struck me was the relent-nesses of the way this was being done. We thought that we had closure of this on the STI, and all of the sudden, poof, for reasons we couldn't comprehend, this was brought back on the table in a way that I didn't understand why it was being done.

Why did we not have closure? Do we have one party, or one series of parties that can keep coming back again, and again, and again if it doesn't get what it likes, until it finally beats everyone else down? That's what really disappointed me about the way this was done.

And I don't know if there is something we can say about it, but I'm just saying that's what struck me about the way that this all went down. Thanks.

OLIVIER CRÉPIN-LEBLOND: Thank you very much Evan. We have a question from a remote participant. Or do you wish to respond to... Okay. I'll put you in the queue. Well, you don't need the queue, you're a co-chair, you can jump in any time that you want.

[Laughter]

Matt Ashtiani has got a question from a remote participant.

MATT ASHTIANI: This is Matt Ashtiani for the record. We have a comment from Joley [McFee 0:23:59]. Joley says, "It seems a mockery of the whole [limpy 0:24:03] STI and Town Hall review process. Change the rules so later in the day."

OLIVIER CRÉPIN-LEBLOND: Thank you very much Matt. And thank you Joley for your comment. Next is Garth Bruen.

GARTH BRUEN: Thank you. Garth Bruen, chair of NARLO. For the benefit of the uninformed internet users who are not IP attorneys or attorneys what so ever, speaking for myself also, how does the 50 plus policy violate trademark law?

OLIVIER CRÉPIN-LEBLOND: Robin?

ROBIN GROSS: Thanks. Well that was one of the points that I talked about earlier, was under trademark law it's between two parties. The dispute is between two parties. It's [AUDIO MALFUNCTION 0:24:49] ...because somebody, some time, somewhere, infringed a trademark, the law does not presume every other subsequent use by all other people will be an infringement. This policy does. That's very important, huge disruption between trademark law and what this policy does.

OLIVIER CRÉPIN-LEBLOND: Thank you very much Robin. David Cake.

DAVID CAKE: And just to briefly expand on what Robin said also the idea – it totally ignores the idea of product classes entirely. Classes of product, which are very fundamental part of trademark law.

OLIVIER CRÉPIN-LEBLOND: Thank you very much David. Garth, does this answer your question?

GARTH BRUEN: Not being an attorney, I'm not sure. I have to think about it. Thank you.

OLIVIER CRÉPIN-LEBLOND: Does it answer the question for people around in the room? David Cake.

DAVID CAKE: And also not being an attorney, the product classes reference, for example, is that selling computers called Apple is an infringement, selling fruit calling apples is not.

OLIVIER CRÉPIN-LEBLOND: Okay. Thank. So we've done some reminiscing and we found out many of us are not lawyers, that's a great first thing. Maybe we should move to the next part, which is basically to see where do we go from here, looking at the future.

I think that I can hear that there is support for a joint statement. We need somebody to hold the pen, and we need a group to work with that somebody. Is that something that's flying?

ROBIN GROSS: I think that's right. I think we can start from the process issue, we can say, tell me if I'm wrong, if you disagree. But I think we can say jointly we believe this was a flawed process, no wonder there is a flawed outcome.

I think we can agree to that much. And then... In addition to the process issue, I think we can say additionally that this particular proposal, the trademark plus 50 is problematic, that we don't support that and we want that reconsidered.

I mean, we can flesh out the language, but I think these are the two points that I would propose.

OLIVIER CRÉPIN-LEBLOND: Okay. Thank you very much Robin. It's Olivier for the transcript. Alan?

ALAN GREENBERG: I would point out the second one is not what we said in no previous statement. And the ALAC would need to seriously consider whether we would want to say that at this time.

OLIVIER CRÉPIN-LEBLOND: Okay. Thank you very much Alan. So the process on the ALAC side to remind you, is that there would be people who would be contributing to the statement. But before the statement is presented to the Board, it would need to be ratified by the 15 member ALAC.

We have several statement that we will ratify on Thursday, so it would go to a vote on Thursday. But of course, the earlier the statement gets drafted, the better. So as for our members to be able to read through it and maybe even discuss it between themselves, and see if there are any parts that they can't agree to.

And if at that point, they would have to prune those parts off. But that's the process. So I'm not telling you today that we're going to be releasing a joint statement, but certainly there is interest in drafting one. And I think we just need to ask for, if there are any pen holders and volunteers.

So Robin? Alan Greenberg?

ALAN GREENBERG: I won't be a pen holder, but I would be glad to be an editor. And I'll point out that I think we can pretty well say, guarantee 100%, it will be ratified if it's in line with previous ALAC statements. If it's different than that, than that's a different issue.

OLIVIER CRÉPIN-LEBLOND: Thank you very much Alan. Could I ask At-Large staff to find the previous statement, perhaps put it on the Adobe Connect? So for everyone to be able to access it. That would be really helpful.

And other people who would be interested in taking part of the drafting? Evan Leibovitch. It's great to see so many people jump up and down. David Cake? Anyone in the audience? [? 0:29:08]

I'm starting to get a neck ache looking behind me. Alan Greenberg.

ALAN GREENBERG: It's Alan speaking. Since it hasn't been mentioned today, I think I will recall that one of the places where ALAC is often aligned with the Intellectual Property people is, we're not particularly worried about protecting their brands, we are worried about how users perceive domain names which are masquerading as their brands.

And potentially confusing them, and opening up the frog and stuff like that. And that's the rationale for supporting the trademark plus in its various forms. It's really an user issue, not as such supporting a trademark position, but they are aligned in that way.

And that's one of the reasons that I am cautious about saying, changing the intent of what we have said before is something we need to consider carefully.

OLIVIER CRÉPIN-LEBLOND: Thank you very much Alan. Okay. So we have a drafting group. Robin would you be able to lead that? That's fantastic. All right. Next part, I think we pretty much touched on everything here. Next part is AOB, Any Other Business?

Goodness gracious, that was fast, that was efficient, I can't believe it. I must be dreaming. Right. Until I zap myself and wakeup, with one of these microphones, thank you very much to everyone. Thank you very much to the NCSG.

WOMAN: Thank you Olivier. Thank you At-Large. Thank you.

[Applause]

OLIVIER CRÉPIN-LEBLOND: Perhaps one action item is to open the curtains a little bit, and see that there is light outside.

MAN: I think we need to celebrate the lack of smog, there is actually blue sky out there.