



## New gTLD Program Explanatory Memorandum

# Morality and Public Order Objection Considerations in New gTLDs

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### Background - New gTLD Program

Since ICANN was founded ten years ago as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, one of its foundational principles, recognized by the United States and other governments, has been to promote competition in the domain-name marketplace while ensuring Internet security and stability. The expansion will allow for more innovation, choice and change to the Internet's addressing system, now constrained by only 21 generic top-level domain names. In a world with 1.5 billion Internet users—and growing—diversity, choice and competition are key to the continued success and reach of the global network.

The decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community. Representatives from a wide variety of stakeholders—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—completed its policy development work on new gTLDs and approved a set of recommendations. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008 at the ICANN meeting in Paris. A thorough brief to the policy process and outcomes can be found at <http://gnso.icann.org/issues/new-gtlds/>.

This paper is part of a series of papers that will serve as explanatory memoranda published by ICANN to assist the Internet community to better understand the Request for Proposal (RFP), also known as *applicant guidebook*. A public comment period for the RFP will allow for detailed review and input to be made by the Internet community. Those comments will then be used to revise the documents in preparation of a final RFP. ICANN will release the final RFP in the first half of 2009. For current information, timelines and activities related to the New gTLD Program, please go to <http://www.icann.org/en/topics/new-gtld-program.htm>.

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

## Summary of Key Points in this Paper

- Detailed legal research has occurred investigating standards in selected jurisdictions in every region of the world.
- A list of rules that are in place in most jurisdictions (detail provided below) are being considered for inclusion into a possible standard.
- Consultations have been conducted with well-recognized experts in cases involving issues closely related to this topic in order to understand how the rules found in the legal research could be incorporated into a workable standard.
- A set of standards is being finalized for public comment, based on the legal research and consultations described in this paper.

### I. Executive Summary

This paper summarizes the extensive implementation work that has been accomplished in response to the policy recommendation that TLD strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.<sup>1</sup> This recommendation and the dispute resolution process envisioned is to provide a path for governments and others to object to applications using the ICANN process where they might otherwise go outside it.

The work includes:

- Detailed legal research work investigating applicability of these standards in every region of the world. A list of rules in place in many jurisdictions was developed, and three of them that are in place in most jurisdictions are being considered for inclusion into a possible standard.
- Consultation with well-recognized experts in cases involving issues closely related to this in order to understand how the rules found in the legal research could be incorporated into a workable standard. These consultations were conducted with: highly regarded dispute resolution providers, jurists who have heard cases in international tribunals, and attorneys with experience prosecuting and defending cases involving public policy and/or human rights under treaties.

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<sup>1</sup> GNSO Recommendation No. 6 states:

*Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.*

*Examples of such principles of law include, but are not limited to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).*

## II. Introduction

Extensive research has shown that it is difficult to identify existing generally accepted legal norms relating to morality and public order. There are, however, peremptory norms of public international law from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character (*jus cogens*), such as the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting piracy and trade in slaves.<sup>2</sup>

The goal of the legal research and set of consultations undertaken by ICANN was to identify norms relating to morality and public order that could serve as a basis for a dispute resolution panel's expert opinion in response to an objection to a proposed gTLD. There are numerous potential sources of legal norms, but achieving consensus on the appropriate source would be extremely difficult because many are applicable to specific regions of the world.

Law firms in various regions of the world, international arbitration experts, judges from various international tribunals, and attorneys who practice in those tribunals have all been consulted on what dispute resolution panels should look at when deciding objections under the morality and public order recommendation. Virtually all of those consulted recommend that very broad standards, possibly just the recommendation itself, be provided so that the highly esteemed jurists that are the envisioned panelists for this recommendation have the discretion to render their own expert opinions.

In an attempt to identify, at a minimum, certain categories that most, if not all, jurisdictions would consider violations of morality and public order, experts have identified three particular categories. Those categories include incitement to violent lawless action, incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, and incitement to or promotion of child pornography or other sexual abuse of children.

In addition to the three categories enumerated above, some have proposed that panelists be provided significant discretion to find that other categories might also reach to the level of violating generally accepted legal norms of morality and public order and those objections should be sustained.

## III. Legal Research

In light of the GNSO recommendation on morality and public order, staff commissioned research to develop standards to be provided to dispute resolution panels. That research involved analysis in a select but diverse set of jurisdictions including: (i) Brazil; (ii) Egypt; (iii) France; (iv) Hong Kong SAR, China; (v) Japan; (vi) Malaysia; (vii) South Africa; (viii) Switzerland; (ix) the United States. While it is known that these countries provide protections for types of expression, the scope of those protections varies somewhat across the jurisdictions.

Research suggests that dispute resolution panelists be afforded broad discretion in determining what constitutes a violation of internationally recognized norms of morality and public order. But, in an attempt to provide some guidance more than just the GNSO

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<sup>2</sup> See Brownlie, *Principles of International Law*, pp. 488-490 (6<sup>th</sup> ed. 2003).

recommendation itself, the dispute resolution panels might consider the following general principles:

- Everyone has the right to freedom of expression; but
- Such freedom of expression may be subject to certain exceptions that are necessary to protect other important rights.

See the International Covenant on Civil and Political Rights (the “CCPR”).<sup>3</sup>

The CCPR serves as a useful point of reference for the dispute resolution panel. Articles 19 and 20 of the CCPR express the general principles regarding freedom of expression in a clear, concise manner:

### Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (order public), or of public health or morals.

### Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In addition, resulting from the research in the various jurisdictions, the following categories of public policy rules were identified that should be included in the standard as they are widely, if not universally, accepted as grounds for limiting freedom of expression.

- Incitement to violent lawless action: Even under U.S. law, where the First Amendment protects free expression broadly, incitement to lawless action is not protected speech. This limit should be construed as applying only to violent lawless action that is imminent or likely to result from the incitement. Terrorism is, of course, violent and lawless action that would fall within this category. Propaganda for a war that would not be deemed legal under the United Nations Charter could also be considered incitement to lawless action, although this

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<sup>3</sup> The CCPR was opened for signature in 1966 and entered into force in 1976; 160 countries are now parties to the CCPR.

might be more difficult, since determining whether a war is legal is inherently controversial.

- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin: This category is potentially very broad – and therefore likely to raise difficult issues regarding its scope and implementation. However, the incitement to discrimination on these grounds is widely condemned and punished, and thus it should be possible for the dispute resolution panel to consider and resolve objections to proposed TLDs on these grounds.
- Incitement to or promotion of child pornography or other sexual abuse of children: The condemnation of child pornography and other sexual abuse of children is virtually universal. There appears to be a broad consensus that freedom of expression may properly be restricted to bar the incitement or promotion of such abuse.

#### **IV. Consultations**

Having developed the various grounds based on legal research, it was important to determine how these grounds could be incorporated into a standard for dispute resolution panels. Accordingly, with the assistance of international arbitration experts, ICANN conducted and scheduled numerous consultations with jurists from international human rights panels, the International Court of Justice and similar tribunals, and have conducted and scheduled consultations with lawyers who practice in front of them. During these consultations, we have asked whether providing just the recommendation language itself or additional criteria and clarifications would be appropriate.

Several consultations with highly esteemed jurists have been completed. The consultations concluded that ICANN not provide a list of specific categories of public order/morality (such as the three categories identified). Rather, they suggested that dispute resolution panels be given the full scope and flexibility to refer to international jurisprudence when deciding objections under Morality & Public Order.

Additionally, one of those judges recommended that three additional treaties – the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and Peoples Rights – be included in what is provided to the panel for reference. That judge indicated that, while seemingly more regional, these treaties have a closer connection to the subject matter than certain of the treaties that are included in the list developed by the GNSO.

One public international law expert consulted stated that he would have no difficulty in interpreting and applying Morality and Public Order standards as it is described by the policy recommendation. We also have scheduled consultations with additional jurists and attorneys.

#### **V. Conclusion**

The conclusions of this research and consultations are provided for public discussion in order to create an appropriate standard for the new gTLD process. Based on legal research and consultations, a set of standards is being finalized. It is anticipated that the standard will include the three categories of restriction described above. Those

categories include incitement to violent lawless action, incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, and incitement to or promotion of child pornography or other sexual abuse of children. In addition, it may be determined that the panelists should have discretion to sustain objections if the panel determines that a proposed TLD name rises to the level that it would be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law. If this decision were made, only senior level jurists with expertise in international fora hearing cases involving governments and treaty interpretations should be asked to participate as panelists in this process.