

Joint Civil Society Comments
on the Proposal of the ICANN GAC Sub-Group on
“Geographic Names”

31 December 2014

Introduction and Summary

Thank you for this opportunity to provide comments on the proposal in the document entitled, “The protection of geographic names in the new gTLDs process,” published by ICANN’s Governmental Advisory Committee (GAC) Sub-group on Geographic Names regarding future rounds of gTLDs and dated 29 August 2014.¹ We caution against the adoption of the proposal because it would threaten to chill freedom of expression and other lawful rights to use words in domain names, stifle innovation, and undermine the multi-stakeholder model for Internet governance. The proposal is based on flawed presumptions of law and “the public interest” and is entirely unworkable from a practical standpoint.

The GAC sub-group proposes that “geographic names should not be allowed to be registered as gTLDs, unless requested by the relevant communities where they belong or after a specific authorization given by the government or community to the applicant. The national community and geographic meaning of the requested strings as new gTLDs must prevail above any other interest.”

The proposal asserts that ICANN’s Applicant Guidebook text should be amended to state: “ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.”

The proposal attempts to apply national law pertaining to geographic names to domain names, although it goes much further, and re-asserts the controversial 2007 GAC Principle: “New gTLDs should respect national sensitivities regarding terms with national, cultural, geographic and religious significance.” ICANN’s Board wisely rejected that 2007 GAC Principle, which opens the door for governmental censorship of domain names.

¹ Available at

<https://gacweb.icann.org/download/attachments/27132037/Geo%20names%20in%20new%20gTLDs%20Updated%20%20V3%20%2029%20august%202014%5B4%5D.pdf?version=1&modificationDate=1411549935000&api=v2>

Unfortunately this proposal is based on fundamental misinterpretations of international law around geographic names; it is overbroad, vague, arbitrary, and entirely unworkable in practice. Furthermore, it would severely chill freedom of expression, innovation, and the free flow of information on the Internet should the proposal become global domain name policy.

One of the historical reasons the Internet has flourished is precisely because permission was not required of governments before ideas were allowed to be expressed or otherwise spread in the domain name system. Yet this proposal undermines the principles of permissionless innovation and freedom of expression by creating a “permission-required” domain name system, although permission *from whom* and *for what* is entirely unknowable in advance.

Proposal Based on False Understandings and Misapplications of Law

Despite the document’s labeling of this proposal as pertaining to “geographic names” there is nothing in international law to support the proposal’s creation of new worldwide exclusive rights to control the use of words in the domain name system.

The proposal misapplies trademark law and conflates national regulation of geographic indicators with an exclusive worldwide right to regulate language in domain names. Legal rights regarding geographic indicators only regulate the commercial use of marks in connection with specific goods and services, and in only specific territories – they do not create a blanket right to regulate the use of words in the domain name system in all categories of goods and services, and in all nations of the world.

International law pertaining to the restriction of sovereign names and identifiers does not recognize geographic names outside of a specific country’s borders. The proposal ignores important territorial restrictions and extends protection to the entire world. This proposal would create worldwide exclusive rights for governments to regulate the use of words in domains that are not legitimately based in any law.

“Public Interest” Presumed Prematurely

Besides the fundamental misapplications of law, the proposal also relies upon questionable presumptions of what is in the “public interest” and thus the most appropriate policy for ICANN to pursue.

ICANN domain name policy impacts many diverse stakeholders with a variety of legitimate interests, including freedom of expression rights and other noncommercial interests, commercial interests, and the interests of governments. All of these are supposedly balanced in the policy development process to reach a consensus that takes into account all the stakeholders’ interests.

In contrast, the GAC document boldly asserts: “The national community and geographic meaning of the requested strings as new gTLDs must prevail above any other interest.” No argument is given for this proposition, however.

ICANN’s policy development process was established to balance the various competing legitimate interests, including the interests of governments, so it is not appropriate for a GAC sub-group to presume that in that conversation among all interests that the governments’ specific view would naturally prevail as “the public interest.” Let’s not skip the conversation with all stakeholders about what policy would best reflect the public interest. A discussion about the rights of Internet users to free expression weighed against a government’s interest to regulate words used in domain names would be a good starting point. This proposal presumes that a single stakeholder (the GAC) is the exclusive arbiter of “the global public interest”, a position that significantly undermines ICANN’s multi-stakeholder policy development process.

Undermines Freedom of Expression Rights

One of the biggest concerns with the proposal’s implementation is its chilling impact on freedom of expression in the Internet domain name system. While the document never uses the word, what it proposes in operation is *censorship*. The proposal entirely ignores freedom of expression rights in domain names and makes no mention or consideration for those legitimate interests of Internet users in its analysis.

Since the Internet’s inception, courts of law throughout the world have generally recognized Internet users’ freedom of expression rights to use domain names.² Indeed the World Intellectual Property Organization (WIPO) cites freedom of expression rights as one of the primary reasons that there are so many disputes regarding the use of Internet domain names.³

Article 19 of the Universal Declaration of Human Rights guarantees everyone the right to freedom of opinion and expression including the “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” There is no exception made for exchanging ideas in the Internet domain name space; indeed the guarantee is explicitly clear that free speech rights apply

² See *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Circuit 2003) “the domain name is a type of expression, no different in scope than a billboard or a pulpit”. See also *Shell Trademark Mgmt. BV v. Canadian AMOCO*, No. 02-01365, 2002 U.S. Dist. LEXIS 9597, at *10-11 (N.D. Cal. May 21, 2002) analogizing domain names to road signs. See also *Center for Democracy and Technology v. Pappert*, 337 F. Supp.2nd 606, 651 (E.D. Pa. 2004) holding a statute requiring the blocking of access to particular domain names and IP addresses amounted to an unconstitutional restraint on speech. See also *ACLU v. Reno* which held that the Internet is entitled to the full protection given to media like the print press under freedom of expression rights. 521 U.S. 844 (1997).

³ <http://www.wipo.int/amc/en/center/faq/domains.html>

regardless of the type of media and the breadth of the reach of the communication. Article 19 of the UNDHR speaks directly to the Internet age and global domain name policy, although adopted the UN General Assembly half a century ago. Other international legal instruments such as the International Covenant on Civil and Political Rights create similar free speech obligations, which are binding on nations to protect the rights of Internet users to communicate freely on the Internet.

The GAC proposal ignores the existing new gTLD policy passed by ICANN's GNSO Council, including "Principle G", which states, "The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law." Recommendation 3 of ICANN's "Implementation Guidelines" reinforces the GNSO's intention to respect domain name applicants' freedom of expression rights in domain names.⁴ These initial protections built by the GNSO to protect applicants' free expression rights would be significantly curtailed by the policy change proposed by the GAC sub-group.

Despite longstanding internationally accepted and legally binding obligations to protect freedom of expression and the GNSO's effort to protect free expression in the initial policy, the GAC proposal does not even consider these rights, nor does it consider free expression as furthering the public interest anywhere in its analysis.

Important public governance obligations, such as protection for free expression rights, cannot be avoided simply by outsourcing governance functions to private corporations, such as ICANN. It is no longer an acceptable argument to claim that because ICANN is a private corporation, it owes no obligation to protect Internet users' free expression rights. ICANN undertakes public governance functions and so will have to evolve its understanding of the responsibilities it has to protect the fundamental rights of Internet users in its policies, especially if it wishes to maintain those functions in the future.

Unworkable Practically: Too Broad, Uncertain, and Vague

Another significant concern about the proposal to restrict geographic names is that it is completely unworkable from a practical standpoint. The proffered restriction on entire categories of words in domain names is excessively broad, vague, uncertain, and arbitrary. Given the broad categories of words restricted, the different meanings of words, and the many languages in the world, it would be impossible to predict which words must receive advance permission before ICANN will consider them in a gTLD application.

The proposal reaches too far – it would restrict any and all words that, in a single government's view, are of "national interest" – including names of "regions of countries, regions of continents, sub-regions of countries, rivers, mountains, among others."

⁴ <http://gnso.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>

Although not geographic names per se, the GAC Sub-group's proposed restrictions additionally extend to words that describe *people* or *languages*. How could any applicant realistically be expected to know which words every government (or other relevant authority) in the world lays claim to? Obviously such a policy is unworkable due to the overly broad, vague and uncertain abridgements on expression it would impose. Additionally, the proposal's arbitrariness is ripe for abuse and confusion in the administration of the domain name system.

The proposal is also problematic for its substantial lack of clarity regarding which "relevant governments or public authorities" must provide permissions before a word can be used in a domain name. Take the simple yet illustrative example of the Great Lakes Region and international waterway straddling Canada and the U.S. From whom should an applicant obtain permission before the words "Great Lakes" can be used in a gTLD? Who are the "relevant governments and authorities" that must provide permission before the gTLD can go forward in such case? Is it the government of the United States, Canada or both? Perhaps the State of Michigan or the province of Ontario must be consulted, too. What about the sovereign Indian Nations after which the Great Lakes of Huron, Ontario, Michigan, and Erie were named – would their permission be required also should any application include those words? The lack of clarity as to which relevant authorities must provide advance permission for a gTLD application to go forward and the lack of clarity as to which words require advance permission render the proposal entirely unworkable from a practical standpoint.

Under the GNSO's adopted policy, Recommendation 1 of its New gTLD Implementation Guidelines clearly states that "all applicants...should be evaluated against transparent, and predictable criteria, fully available to the applicants prior to the initiation of the process... No subsequent selection criteria should be used in the selection process." How the GAC Sub-group's proposal on geographic names could be adopted without repealing the GNSO's policy, which requires objectively knowable and predictable criteria, has not been discussed.

A Permission-Required DNS is Anti-Innovation

Another problematic aspect of the GAC Sub-group's proposal on geographic names is the number and complexity of permissions required before gTLDs are allowed to proceed. This will have a stifling effect on innovation. The proposal adds burdensome red-tape, will slow the development of the Internet, and saddles consumers with higher costs and restricted choices. This plan basically creates a veto power that any government or other relevant authority could exercise over any proposed gTLD. It invites politicization into the DNS administration, which is unhealthy to the growth and development of the Internet.

Permissionless innovation is a fundamental characteristic of the Internet that contributed dramatically to its growth and beneficial development. It would be unfortunate for ICANN to move the DNS into a permission-required environment, where any

government in the world can veto any gTLD which contains a word it unilaterally claims invokes national sensitivities.

An analysis of the possible benefits of the proposal weighed against the harms to innovation and free expression would be an important step of any serious consideration of such a policy's adoption.

Inappropriate Forum - Policy Laundering?

ICANN is an inappropriate forum to undertake the creation of new “intellectual property like” global rights to geographic names. As a technical coordinator, ICANN is not an international legal regime and its board has neither the expertise nor the authority to create new exclusive rights to categories of words. If the governments in the GAC Sub-group believe there is a legitimate need for such new rights, those efforts should be directed toward proper lawmaking and treaty channels. International legal regimes such as the World Trade Organization or WIPO were established by governments to harmonize legal rights across borders and similar proposals around geographic names have been debated for years at the WTO and have failed.

Inventing exclusive new global rights to words would seriously undermine ICANN's legitimacy and credibility to manage the domain name system. At a time when many are watching ICANN to see if it has matured enough to be cut loose from the US NTIA, opening itself up to charges of “policy laundering” by inventing new rights to geographic names would not help the organization's credibility. While the proposal's drafters may have some legitimate concerns regarding the use of certain limited geographic names, ICANN is not the appropriate forum for creating such new rights.

Conclusion: An Unbalanced Proposal that Should be Rejected

The GAC Sub-group's proposal to amend ICANN policy to grant governments and other “relevant authorities” a veto over any new gTLD application is very problematic and should be rejected. It is based on a dubious interpretation of international law and questionable conclusions as to what policy best reflects the public interest as a whole.

The proposal is excessively broad in the categories of words that it restricts and excessively vague and burdensome in the permissions it requires to proceed with a gTLD in future rounds. Freedom of expression rights to domain names would be severely abridged and innovation stifled by the ability of any government to veto any gTLD as proposed. Furthermore the proposal re-asserts the controversial 2007 GAC Principle that requires gTLDs to “respect national sensitivities regarding terms with national, cultural, geographic and religious significance.” Thus the proposal sets a dangerous precedent for building government censorship into the DNS. In other words, it is a bad policy for Internet freedom that should not be adopted.

Respectfully submitted,

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Internet Governance Project
Public Knowledge
Article 19
Electronic Frontier Finland
Movimento Mega (Brazil)
Bangladesh NGOs Network for Radio and Communication
Digital Rights Ireland
Bytes For All (Pakistan)
Electronic Frontiers Australia
Open Institute Cambodia
Access Humboldt
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