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Five Key Takeaways From ICANN 52 in Singapore

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The Internet Corporation for Assigned Names and Numbers (ICANN) recently concluded its first public meeting of 2015, held February 8–12 in Singapore. Now that the meeting has concluded, Katten's Internet practice has prepared a summary of the following key takeaways, covering a wide variety of important topics relevant to both brand owners and new generic top-level domain (gTLD) applicants, including: two-character names and geographic names; Internet Assigned Numbers Authority (IANA) stewardship transition issues and accountability mechanisms; issues related to WHOIS and registrant data directory systems; contractual compliance transparency, including feedback on abusive registry practices and rights protection mechanism reviews; and registry agreement negotiations. We provide our full review and analysis of each of these subjects below.

1. Two-Character Names and Geographic Names

Discussions surrounding two-character names and geographic names again commanded significant community attention during ICANN 52 in Singapore. With respect to two-character names, just prior to the Singapore meeting, ICANN staff placed an unjustified moratorium on the previously approved streamlined Registry Services Evaluation Procedure (RSEP) for registries to request release of "Letter/Letter" two-character second-level domains (SLDs) (including potential two-letter "country codes" such as IT (Italy); MY (Malaysia); and IN (India)) as a result of a January 26, 2015, letter from the Governmental Advisory Committee (GAC) chair raising certain GAC members' objections to the current process.

Many in the community were outraged by the moratorium, suggesting that ICANN had undermined a legitimate community-driven multistakeholder process by allowing a fragment of GAC members to dictate policy implementation decisions. The Generic Names Supporting Organization (GNSO) Registry Stakeholder Group (RySG), for instance, filed a letter in response to the moratorium, highlighting the potential for ICANN's actions to create disparate and unfair treatment between registry operators who had already received approval for their RSEP requests, registry operators who had submitted requests that had not yet been approved, and registry operators who had not yet submitted their requests. The RySG letter called for the immediate reinstatement of the approved RSEP process or a response from the ICANN Board of Directors addressing their concerns. Ultimately, the RySG received neither.

In its Singapore Communiqué, published on February 11, 2015, the GAC formally advised the ICANN Board to institute two proposed modifications to the Letter/Letter SLD release process, specifically: (1) amend the current process for requests to release two-letter codes to establish an effective notification mechanism so that relevant governments can be alerted as requests are initiated and fully consider comments from relevant

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governments; and (2) extend the public comment period for each request from 30 to 60 days. On February 12, 2015, during its public meeting on the final day of ICANN 52, the ICANN Board passed a resolution adopting wholesale the proposed GAC modifications to the release process. In addition, the resolution clarified that for requests with pending or completed comment periods, the comment periods would be reopened so that each request will undergo 60 days of comment period in total. Thus, the overall process of releasing letter/letter two-character SLDs will be delayed until ICANN staff can implement the ICANN Board resolution. It is also unclear how the resolution might affect registry operators who already obtained permission from ICANN to release these SLDs, or who may have already actually allocated some of these names.

With respect to geographic names, ICANN 52 provided a second, more robust opportunity for formal community discussion of the so-called "Argentina proposal" after the closing of the public comment period on the proposal on December 31, 2014. The GAC sub-working group driving the proposal held a "community session" on February 11, 2015, to discuss the proposal and community feedback, which overwhelmingly was negative, citing serious concerns that the proposal is impractical, lacked basis in national or international law, conflicted with national and international trademark rights, and would chill free expression, among other issues. Despite these strong community concerns, the GAC sub-working group appears poised to plow ahead with the proposal, having expressed its plans to simply prepare a new version of the document, which it expects to distribute during the Buenos Aires ICANN meeting in June 2015.

In addition to discussion regarding the Argentina proposal, the GAC Singapore Communiqué formally advised the ICANN Board that "ICANN should work with the GAC to develop a public database to streamline the process for the release of country and territory names at the second level," per Specification Five of the Registry Agreement. "The database will inform whether individual GAC members intend to agree to all requests, review them case by case, or not agree to any," according to the Communiqué, and, importantly, "the absence of input from a government will not be considered as agreement." This development is particularly worrisome, as such a database would no doubt facilitate the ability of individual GAC members to block an expanded scope of geographic or culturally sensitive names at its discretion. Aside from reticence or mild opposition from GAC members, including Australia, the United Kingdom and the United States, many GAC representatives have remained in silent non-opposition to these ideas, which does not bode well as this proposal is carried forward by its supporters.

2. IANA Stewardship Transition and ICANN Accountability

Unsurprisingly, discussions surrounding the IANA stewardship transition, and more broadly ICANN accountability issues, dominated the Singapore meeting. Since the last ICANN meeting in Los Angeles in October 2014, the community has made significant strides in developing an IANA stewardship transition proposal. Both the Internet protocol community and the numbers community have already provided their proposals to the IANA Stewardship Transition Coordination Group (ICG), the body tasked with overseeing the transition proposal drafting process. The naming community, on the other hand, continues to develop its proposal, taking a much more in-depth and comprehensive approach than the other (more technical) communities. The Cross-Community Working Group on the Naming Related Functions of the IANA Stewardship Transition (CWG-IANA), the working group developing the naming community proposal, published a draft proposal on December 1, 2014, and solicited public comments until December 22, 2014. In light of significant public input on the draft proposal, as well as informal yet harsh criticism from the US National Telecommunications and Information Administration, the CWG-IANA had no choice but to reconsider its plan and, as a result, adjust the timeline for its delivery to the ICG, which it now expects to take place in June 2015.

The original CWG-IANA draft transition proposal envisioned the creation of a "Contract Co." along with several other community-based structures to carry out oversight of the IANA functions. After many in the community expressed a variety of concerns about the proposed structures, and in particular the Contract Co., the CWG-IANA devised several additional possible transition models. Currently, four models have been set forth by the CWG-IANA as possible options: (1) the aforementioned Contract Co. model; (2) an "External Trust" model; (3) an "Internal Bylaw" model; and (4) an "Internal Trust" model. The models are described in a "Discussion Document" published by the CWG-IANA just prior to the Singapore meeting. As a result of these numerous changes in direction, the community has just begun to review and consider the pros and cons of each model and which would be the best option to recommend in the final naming community transition proposal. The CWG-IANA is also in the process of retaining independent legal counsel to provide advice as to the feasibility of each model, which will likely further guide community discussions.

In addition to discussions focused on the IANA stewardship transition, the community engaged in significant dialogue regarding ICANN accountability more broadly, led by the Cross-Community Working Group on Enhancing ICANN Accountability (CWG-Accountability). The CWG-Accountability continues to work at a feverish pace, in coordination with the CWG-IANA, to develop an enhanced accountability architecture to govern ICANN. During the Singapore meeting, the CWG presented several key updates on its work progress, including identifying fundamental purposes of accountability—such as due process, compliance with applicable law and operational performance—as well as various key components and goals of accountability, such as transparency, checks and balances, review and redress, and decision-making independence. The CWG's ultimate goal is to design new accountability mechanisms or improve or incorporate current mechanisms so as to achieve a satisfactory level of accountability of ICANN decision-makers to the community and the public that ICANN is designed to serve.

In addition, the CWG-Accountability is focusing its current efforts on those accountability mechanisms that must be implemented prior to the IANA stewardship transition. This work includes a focus on issues of community empowerment (i.e., enabling the community to have the ultimate right concerning decisions of the ICANN Board with limited, strictly enumerated last resort powers), as well as issues of review and redress processes. Like the CWG-IANA, the CWG-Accountability is also in the process of obtaining independent legal counsel to provide advice on various accountability proposals. The CWG-Accountability hopes to provide a draft Work Stream 1 proposal for public comment by early April 2015.

3. WHOIS and Registrant Directory Services

Numerous initiatives related to WHOIS data remain ongoing within ICANN, including most notably efforts to develop a new Registrant Directory Service (RDS) to replace WHOIS stemming from the Expert Working Group (EWG) on gTLD Directory Services [Final Report](), published in June 2014. As a result of that report, a group of ICANN Board members and GNSO members, dubbed the "EWG Process Working Group" (EP-WG), is collaborating to devise how to use the report as input into a GNSO Policy Development Process (PDP) to develop an overhaul to the current WHOIS registrant data directory services system.

ICANN staff is currently working with the EP-WG to draft an Issue Report outlining the proposed PDP and providing a draft charter for the proposed PDP. The proposed PDP will examine numerous issues related to gTLD registrant data and directory access to that data, including the purposes, uses and users of registrant data; gated versus public access to registrant data; data accuracy and validation needs; data elements, both at the collection and access stages; and privacy issues, including use of privacy and proxy services and compliance with data protection and privacy laws. The draft Issue Report is expected to be published in March 2015, public comments are expected to be solicited through May 2015, and a Final Issue Report is expected to be published in July 2015 for consideration by the GNSO Council. As key users of registrant data for purposes of enforcement, brand owners will need to play a key role in any PDP involving registrant directory services and WHOIS issues.

4. Contractual Compliance Transparency and the Rights Protection Mechanism Review

Many in the community, including brand owners, as well as registry operators and domain name registrars, raised concerns with ICANN regarding the lack of transparency surrounding the ICANN contractual compliance process and, in particular, contract interpretation and enforcement. For example, during its meeting with the ICANN Board, the Intellectual Property Constituency (IPC) provided several examples of where the lack of compliance process transparency had a detrimental impact for brand owners, as well as contracted parties (e.g., registry operators and registrars) and other members of the community. One example involved the provisions in the 2013 Registrar Accreditation Agreement (RAA) that oblige registrars to respond to complaints of illegal or abusive activity involving domain names under the registrar's management. The IPC noted significant difficulty understanding what ICANN's Compliance Department believes those provisions require. In some cases, ICANN has issued breach notices but has not explained the criteria for issuing such notices. In other cases, no notices were issued despite apparent similarities in circumstances to those cases where notices were issued. This lack of transparency surrounding the decision-making process impairs predictability and impedes brand owners from using the RAA to combat infringing and other abusive uses of domain names. Registry stakeholders raised similar concerns with respect to predictability and transparency in the compliance process, highlighting that ICANN should provide greater clarity on issues of contract interpretation during communications with the registry, raising compliance matters prior to issuing any breach notice. In response to these concerns, members of the ICANN Board, as well as Allen Grogan, head of the Compliance Department, agreed that it should be an ICANN priority to engage with interested stakeholders to clarify contract language and to develop a better understanding of interpretations of various contract provisions.

In addition, brand owners, business stakeholders and government representatives also raised concerns regarding conduct by contracted parties not strictly prohibited under the express language of the Registry Agreement (RA) or RAA, but which is nonetheless harmful to consumers and contrary to the public interest. For example, brand owners have identified several abusive practices by new gTLD registry operators that, while not in direct contravention of any provision of the RA, clearly run afoul of the spirit of new gTLD rights protection requirements, resulting in harm to brand owners and by extension consumers and the public at large. These include extortionate pricing for Sunrise registrations, reservation of trademarked names as premium names, and pre-registration and allocation of trademarked names prior to Sunrise, among other abusive practices. In response to these concerns, Mr. Grogan indicated that his department was working to expand expertise with respect to consumer protection law and other national laws pertaining to consumer safety, and noted that national law would always override ICANN contracts. Brand owners and other business stakeholders will have to continue to provide additional evidence of these bad practices and their negative consequences for consumers and, as a result, the new gTLD program as a whole; such efforts should feed into the upcoming reviews of the new gTLD program, including, in particular, the planned Rights Protection Mechanism (RPM) Review and the Competition, Consumer Choice and Consumer Trust Review.

Days before the Singapore meeting, ICANN published an extensive staff paper outlining the forthcoming RPM Review. The paper will remain open for public comment until April 3, 2015, and is intended to provide an outline to inform an issue-scoping report that will be prepared for delivery to the GNSO Council in October 2015. Specifically, it attempts to provide a statistical analysis covering usage of the Trademark Clearinghouse, associated Sunrise and Trademark Claims services, the Uniform Rapid Suspension System (URS), and the Post-Delegation Dispute Resolution Procedure (PDDRP). Initial observations within the paper suggest that the URS has proven less helpful than originally anticipated, given the lack of any transfer remedy, which has resulted in many brand owners continuing to rely on the UDRP; also that many issues regarding abusive registry practices in terms of implementation of the RPMs persist to harm brand owners in violation of the spirit, rather than the specific letter, of the final ICANN RPM requirements.

5. Registry Agreement Negotiations

Public reports from Registry Stakeholder Group (RySG) representatives in Singapore confirmed that ongoing negotiations with ICANN to amend the new gTLD Registry Agreement for all new gTLD registry operators now concern purely benign or technical provisions. Although the negotiations originally touched upon several rather controversial amendments, for example imposing mutual indemnification or carving out public policy exceptions to limitations on liability, those provisions are apparently no longer on the negotiation table. This result is not surprising given that many RySG representatives involved in the process remain in a rush to obtain and monetize open gTLDs, or are otherwise comfortable tolerating the risks imposed by the standard Registry Agreement. Meanwhile, discrete hallway talks focused on the formation of a "coalition of the unwilling" composed of new gTLD applicants who simply cannot make accommodations and sign such a one-sided agreement. Indeed, strength in numbers has always been a hard lesson in dealing with ICANN, which prides itself on dividing and conquering.

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As always, we hope that our guidance and legal analyses prove useful and informative to you, whether protecting your brands amidst an ever-expanding Internet naming system or navigating the new gTLD contracting and launch process. If you have any questions or concerns regarding our analyses and advice, or if you wish to discuss any of these or any other ICANN advocacy matters in greater detail, please contact Brian Winterfeldt at +1.202.625.3562 or brian.winterfeldt@kattenlaw.com.

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