**ICANN Legal - Briefing Memo**

**Bylaws Coordination Group**

**Discussion Scheduled – 17 April 2016**

**OVERVIEW – “in the Root Zone” as limitation to ICANN’s activities in coordinating the allocation and assignment of names in the Domain Name System.**

The issue being raised is still evolving from the question from the lawyers to the BCG on 2 April 2016 that was submitted relating to the use of the words “in the root zone” -- which is added to the original text defining the scope of ICANN’s activities from it’s current bylaws and other governing documents.

**Following that discussion this is the language that the lawyers subsequently agreed on following the 2 April 2016 question to the BCG:**

Article 1, Section 1.1.a.i describes ICANN’s naming mission as follows: “Coordinates the allocation and assignment of names in the Domain Name System …”

**Proposal Guidance Language** -- This text differs from the conceptual language proposed in Annex 05 – Recommendation #5, which read as follows:

“Coordinates the allocation and assignment of names **in the root zone** of the Domain Name System ….” **[emphasis in bold added]**

**Guidance to the Bylaws Drafters in the Proposal** is contained in the first paragraph of Annex 05 says:

"Note: The language proposed in this recommendation for ICANN Bylaw revisions **is conceptual in nature at this stage. External legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws." [emphasis added in bold]**

Following the second full draft bylaws, discussions occurred at the CCWG level and individual CCWG representatives have asked for the words “in the Root Zone” to added back in.

**ISSUE – Since the scope of activities is now limited to only what is specifically enumerated within the mission –**

**Do we need to remove the term or define the term “root zone” to include the second level?**

If we merely leave the term in, we are concerned that the activities of ICANN at a level other than the “root zone” would be subject to interpretation by an IRP panel as to whether it is within ICANN’s mission.

The words “the root zone of” do not appear in the current ICANN Bylaws, which states that ICANN “Coordinates the allocation and assignment of […] Domain names” (without any qualifier or limitation to “the root zone”).

It is not true that ICANN coordinates assignment ONLY in the root zone, as such term is currently understood.

ICANN’s gTLD registry and registrar agreements and policies deal substantially and primarily with issues relating to assignment of names at the second (and in some cases lower) levels of the DNS.

If “in the root zone” is currently intended to include the second level, that should be clarified in the use of the term.

Regarding reasons for limiting the mission to the “in the root zone”, concerns have been expressed that a party could seek an IRP ruling that might say ICANN’s mission includes coordinating the assignment of all domain names at all levels, and therefore we should have made a policy that restricted registrants from creating their own abusive third-level registrations. Another example might be an IRP if we fail to coordinate assignment of names at the second level in ccTLDs.

For example, the UDRP, the Inter-Registrar Transfer Policy, and the Expired Registration Recovery Policy are all ICANN policies relating to second-level gTLD registrations <https://www.icann.org/resources/pages/registrars/consensus-policies-en>.

**EXAMPLES**

**Examples of current ICANN naming activities that do not relate directly to names at the “root zone”, which is also commonly referred to as the top-level of the DNS:**

1. Current GNSO Policy Activities Relating to Second-Level Registrations in gTLDs:
	1. Inter-Registrar Transfer Policy
	2. Post Expiration
	3. Registrar Accreditation Agreement
	4. Registration Abuse Policies
	5. Rights Protections within Generic Top Level Domains
	6. UDRP
	7. WHOIS
2. Selected Topics for Consensus Policies Applicable to gTLD Registrars (note: the list of topics for gTLD registries are very similar)
	1. functional and performance specifications for the provision of Registrar Services;
	2. resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names, but including where such policies take into account use of the domain names);
	3. restrictions on cross-ownership of registry operators and registrars or Resellers and regulations and restrictions with respect to registrar and registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or Reseller are affiliated.
	4. principles for allocation of registered names in a TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);
	5. prohibitions on warehousing of or speculation in domain names by registries or registrars;
	6. reservation of registered names in a TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration);
	7. maintenance of and access to accurate and up-to-date information concerning Registered Names and name servers;
	8. procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility among continuing registrars of the Registered Names sponsored in a TLD by a registrar losing accreditation; and
	9. the transfer of registration data upon a change in registrar sponsoring one or more Registered Names.
3. Selected Non-“root zone” Naming Activities from ICANN’s Draft 2016 Operating Plan
	1. 2.3.2 Domain Name Services (Domain Name Services ongoing operations and Industry Engagement.)
	2. 2.3.5 Contractual Compliance Functions (Day-to-day activities to ensure compliance by Registrars and Registries with their contractual obligations to ICANN and to report back to the community.)
	3. 2.3.12 Outreach and Relationship Management with Existing and new Registry, Registrar Community (Create outreach and engagement strategies for registry and operators to promote and cultivate a positive and constructive relationship among ICANN staff, registries, registrars and other participants in the domain name industry value chain. Activities include having dedicated account managers, conducting workshops, webinars, and inter-sessional meetings, as well as attending ICANN meetings.)
	4. 2.3.13 Registrar Services (Projects related to managing the contracts, defining new services, and building a strong relationship with current and future registrars.