

05 August 2021

Re: Review of All Rights Protection Mechanisms Policy Development Process

Patricia Aufderheide, American University School of Communication
Mark Bartholomew, University at Buffalo School of Law
Barton Beebe, NYU School of Law
Anupam Chander, Georgetown University Law Center
Margaret Chon, Seattle University School of Law
Christine Haight Farley, American University Washington College of Law
Jim Gibson, University of Richmond School of Law
Mark Lemley, Stanford Law School
David Levine, Elon University School of Law
Yong Liu, Hebei Academy of Social Sciences
Florian Martin-Bariteau, University of Ottawa
Deirdre Mulligan, UC Berkeley School of Information
Srividhya Ragavan, Texas A&M School of Law
Lisa Ramsey, University of San Diego School of Law
Betsy Rosenblatt, University of Tulsa College of Law
Rebecca Tushnet, Harvard Law School

Dear Scholars and Professors of Intellectual Property,

On behalf of the ICANN Board, thank you for your [letter](#) dated 1 June 2021, in which you expressed concerns regarding specific aspects of the Final Report from the Review of All Rights Protection Mechanisms (RPM) Policy Development Process (PDP) that was conducted by ICANN's Generic Names Supporting Organization (GNSO). Before addressing the concerns noted in your letter, I thought it might be helpful to provide some additional background information for context about the policy development process at ICANN, and the roles and responsibilities of the Board, the GNSO, and the Internet community in this multistakeholder process.

Under the ICANN [Bylaws](#), the GNSO is the policymaking body *“responsible for developing and recommending to the Board substantive policies relating to generic top-level domains”* (gTLDs). The GNSO community comprises four stakeholder groups, representing a diversity of stakeholder viewpoints and interests ranging from the registry operators and registrars who contract with ICANN to provide domain name services to internet service providers, business and intellectual property interests, noncommercial users, civil society and not-for-profit entities. These communities elect representatives to the GNSO Council, which has the responsibility of managing the GNSO's policy development work in accordance with the Bylaws and the community-developed GNSO Operating Procedures.

The GNSO Council [initiated](#) the Review of All RPMs PDP in March 2016. The PDP Working Group published its [Initial Report](#) containing its preliminary findings for Public Comment in March 2020 and produced its final recommendations in November 2020. The PDP [Final Report](#) contains a total of thirty-five (35) recommendations, of which thirty-four (34) were designated as having attained Full Consensus in the PDP Working Group, with one designated as Consensus¹. The GNSO Council unanimously [approved](#) the Review of All RPMs PDP Final Report in January 2021 and transmitted its [Recommendations Report](#) to the Board in March. As mandated by the Bylaws, the PDP Final Report was [published](#) for Public Comment between 7 April and 21 May 2021. Consistent with its role as defined in the Bylaws, the Board is currently reviewing these materials in order to determine whether the PDP recommendations are in the best interests of ICANN or the ICANN community.

The gTLD policy development process places emphasis on community consensus and transparency. The Bylaws requirements include the need to obtain and consider public input received through various Public Comment proceedings. These obligations are fundamental to ensuring that ICANN maintains its commitment to accountability and transparency. Consensus Policies that are developed by the community through the various steps of a GNSO PDP, approved by the requisite GNSO supermajority threshold and adopted by the Board, become binding and enforceable commitments on those of ICANN's contracted parties that provide registry and registrar services, without the need for specific contractual amendments.

I mention the above-noted process also because it is directly relevant to the first point you make in your letter. In contrast to Consensus Policies, such as the Uniform Domain Name Dispute Resolution Policy, the RPMs within the scope of the Review of All RPMs Final Report were not developed through the GNSO PDP and therefore do not constitute Consensus Policies. They were created during implementation of the outcomes of a different GNSO PDP - on the [Introduction of New gTLDs](#), initiated in November 2005, approved by the GNSO Council in September 2007 and adopted by the ICANN Board in June 2008 - and were first identified as a topic that required additional community work during implementation of the specific PDP recommendation that *"strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law."* Following a number of community consultations, including the establishment of two community-based teams, several rounds of Public Comments and input from governments represented through ICANN's Governmental Advisory Committee, the final set of RPMs were included in the Applicant Guidebook for the New gTLD Program that launched in January 2012. These are the RPMs that the GNSO reviewed during its recent PDP.

Your letter expresses concern that the process for validating certain marks as part of the New gTLD Program was a *"problem created by ICANN staff"*, that the *"Board and ICANN senior staff have the*

¹ The GNSO [Working Group Guidelines](#), comprising Annex 1 of the GNSO's Operating Procedures, defines various levels of consensus. "Full Consensus" (also known as unanimous consensus) is attained *"when no one in the group speaks against the recommendation in its last readings"* while "Consensus" indicates *"a position where only a small minority disagrees, but most agree"*.

power to direct” an outcome that is different from what was developed in full collaboration with the community for the New gTLD Program, or that the current Trademark Clearinghouse validation provider *“has violated a fundamental rule created by the GNSO, adopted by the GNSO Council, and accepted by the ICANN Board.”* These concerns do not seem to take into account the background noted above about how the rights protection mechanisms at issue were developed, as well as the multistakeholder community involvement in their development.

Also, it is not clear whether this context was taken into account in relation to the second point in your letter. The letter contends that the nature of the Trademark Clearinghouse database is *“another feature created and approved by ICANN staff”* or that this feature can simply be reversed by unilateral action by the Board or ICANN staff. As the Trademark Clearinghouse and the RPMs covered by the Review of All RPMs Final Report were the outcomes of numerous community consultations undertaken throughout the development of the New gTLD Program in implementing the GNSO’s Introduction of New gTLDs PDP, their current status and scope can only be modified or replaced through community consensus following a comprehensive review. The Board therefore looks forward to continuing its consideration of the GNSO’s Final Report on this matter as part of responsibility to ensure that community-developed gTLD policy recommendations have the consensus of multiple and diverse stakeholders, comply with all requisite procedural and other Bylaws requirements, and represent the best interests of ICANN and the ICANN community.

Finally, the Board wishes to thank those intellectual property scholars and attorneys who raised similar comments in a [letter](#) that was submitted to the Public Comment forum for the PDP Final Report. We appreciate the interest that those with expertise in this field have shown in this matter and we hope that this letter has served to clarify a few procedural and contextual points that may assist with your understanding and continued participation in the ICANN policy development process.

Sincerely,



Maarten Botterman
Chair, ICANN Board of Directors