

August 29, 2021

RE: Comment with deep concern RVCs from Founding ICANN Leaders and Independent Scholars

Mr. Maarten Botterman  
Chair, ICANN Board of Directors

Dear Maarten, Gören, Tripti, Matthew, Kaveh, Nigel, Ihab, Sarah, Patricio, Mandla, Merike, Manal, Akinori, Lito, Danko, Ron, Avri, Harald, Leon and Becky,

I write this letter to share information about the Final Report of the New Generic Top-Level Domain (gTLD) Subsequent Procedures Policy Development Process (PDP) Working Group.

You received a letter of import signed by founding leaders of ICANN, Esther Dyson (1<sup>st</sup> Chair) and Michael Roberts (1<sup>st</sup> CEO/President), and a score of independent scholars who work hard to provide a “public interest” voice in intellectual property and Internet law.

They are very concerned about “the lack of proper action to address the dangers posed by Registry Voluntary Commitments (RVCs)” and the “significant challenge” of these unbounded RVCs “not only to the integrity of the Final Report, but to ICANN’s mission as a whole.” They write of the danger of “ICANN’s quiet drift into the politically charged world of content moderation.” [Full comment and signatories below.]

As a member of the SubPro WG, I am dismayed that the WG never requested a comprehensive analysis of the private PICs thrown into the registry agreements late in Round I and never requested/received any independent legal analysis from ICANN Legal or outside law firm of problems future RVCs might raise for ICANN under our Bylaws or to the Multistakeholder Model under our “consensus model” for policy. Since Staff did not share this comment in detail or the extensive names of ICANN founders and senior professors in their summary report, I do so here.

The SubPro WG was so divided on the issue of RVCs (previously called voluntary or private Public Interest Commitments) that we could not even finish a letter to responding to your letter and questions in the Spring.

I share the Comment and its Signatories below. The Community looks forward to your review of this controversial issue!

Best regards,

Kathy Kleiman, Longtime ICANN Participant

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To the ICANN Board and ICANN Community:

As outside observers of the operations of the Subsequent Procedures PDP Working Group, we write to express our concern at the shape of the final recommendations, and particularly with regard to ICANN's quiet drift into the politically charged world of content moderation. Specifically, we are concerned that the lack of proper action to address the dangers posed by Registry Voluntary Commitments (RVCs), which represent a significant challenge not only to the integrity of the Final Report, but to ICANN's mission as a whole.

Regulating the content of online speech has long been the third rail of ICANN's operations, and for good reason. ICANN's status as the steward of key technical Internet functions depends, in large part, on its ability to chart a neutral course through areas of political controversy, in order to maintain the trust of all of its diverse stakeholders. An essential part of this is that ICANN must interpret its technical mission narrowly, in terms of facilitating universal resolvability, and without regard to the content being communicated. The bounds of permissible speech are a matter for elected governments to address, not for ICANN.

The lack of clear definitions around the appropriate scope of Registry Voluntary Commitments poses a danger to this function, insofar as it places ICANN as an enforcer over rules which have the potential to drag the organization into any number of controversial political areas. Around the world, online platforms like Facebook and Twitter are under fire from all sides as a result of their involvement in content questions. **Delegating the decision-making to a third-party arbiter would not absolve ICANN over responsibility for the outcomes of these decisions any more than the Facebook Oversight Board has relieved Facebook of the intense scrutiny that follows its decisions.** Is this really the future that ICANN wants?

While neutrality in the content debates is not a practical option for the platforms, it is absolutely a position which ICANN can adopt. The alternative would be to open ICANN up to a flood of new legislation around the world targeting entities that are responsible for moderating content. Given ICANN's recent experience with California's Attorney General examining the sale of Public Interest Registry, it is difficult to see why the organization would voluntarily subject itself to similar scrutiny from global governments over decisions to ban (or not to ban) particular domain names for alleged violations of content moderation commitments that have been incorporated into contracts with ICANN. These moves open up an entirely new attack surface for governments, and threaten to undercut one of the organization's main claims to universal legitimacy: the idea that it stays out of such controversial debates.

By submitting their report without addressing these problems, or examining problematic existing Public Interest Commitments (now called RVCs) and closely evaluating ICANN's limited scope and authority, the Working Group is essentially endorsing registries' ability to continue and expand this practice, writing new terms into their contracts with ICANN, and expecting the organization to support their enforcement. This is anathema not only to ICANN's role in the global Internet, but to the multistakeholder-driven contracting process under which it is meant to operate. It is simply unacceptable for the Working Group to ignore these concerns, or to kick

them down the road, to be addressed by an indeterminate process at some indeterminate time.

We write to you, the ICANN Board, with the hope that you will carefully consider the implications of this decision on ICANN's mission and future operations and create proper scope for what you will accept and enforce as future Registry Voluntary Commitments.

Yours Sincerely,

**Michael Karanicolas**, Executive Director, UCLA Institute for Technology, Law & Policy

**Rebecca Tushnet**, Frank Stanton Professor of the First Amendment, Harvard Law School

**Patricia Aufderheide**, University Professor, School of Communication, American University, and Fellow, American University Internet Governance Lab

**Mitch Stoltz**, Senior Staff Attorney, Electronic Frontier Foundation

**Esther Dyson**, founding chair, ICANN (1998-2000); currently long-time tech investor and executive founder, Wellville

**Michael Roberts**, Founding President and CEO, ICANN, 1998-2001; President, The Darwin Group, Inc.

**Eric Goldman**, Professor, Santa Clara University School of Law

**Dave Levine**, Professor, Elon University School of Law

**Kate Klonick**, Assistant Professor, St. John's University Law School

**Scott Patterson**, Professor, San Francisco State University

**Srividhya Ragavan**, Professor of Law, Texas A&M School of Law

**Dr. Eric J. Novotny**, SIS Faculty Vice-President and Director, CRS/GGPS/USFP School of International Service, American University

**Abhishek Gupta**, Founder and Principal Researcher, Montreal AI Ethics Institute

**Yong Liu**, Associate Research Fellow, Hebei Academy of Social Sciences, China

**Annette Markham**, Co-Director of Digital Ethnography Research Center and Professor of Media and Communication at RMIT University, Melbourne Australia.

**Dr. Richard Forno**, Senior Lecturer, CSEE and Director, Graduate Cybersecurity Program,  
Assistant Director, UMBC Center for Cybersecurity

**Dr. Aram Sinnreich**, Professor and Chair, Communication Studies, American University School  
of Communication

**Dr. Jeremy Hunsinger**, Associate Professor, Communication Studies, Wilfrid Laurier  
University, Ontario, Canada

**Yvette Joy Liebesman**, Professor of Law, Saint Louis University School of Law

**Rob Frieden**, Pioneers Chair and Professor of Telecommunications and Law, Penn State  
University

**Kurt M. Saunders**, Chair & Professor, Department of Business Law, California State University,  
Northridge

**Michael W. Carroll**, Professor of Law and Faculty Director, Program on Information Justice and  
Intellectual Property American University Washington College of Law

**Noura Howell**, Assistant Professor, Georgia Institute of Technology, U.S.

**Sandra Braman**, John Paul Abbott Professor of Liberal Arts, Texas A&M University

**Sean Flynn**, Director of the Program on Information Justice and Intellectual Property, American  
University Washington College of Law

**Bill Woodcock**, Executive Director, Packet Clearing House

**Alicia Takaoka**, Lecturer, University of Hawaii at Hilo

**Melissa Levine**, Director, University of Michigan Library Copyright Office

**A. Michael Fromkin**, Laurie Silvers & Mitchell Rubenstein Distinguished Professor of Law,  
University of Miami School of Law

(Institutional reference is for affiliation purposes only.)

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<https://mm.icann.org/pipermail/comments-gnso-gtld-subsequent-procedures-final-outputs-22apr21/2021q2/000008.html>

<https://mm.icann.org/pipermail/comments-gnso-gtld-subsequent-procedures-final-outputs-22apr21/attachments/20210601/d007c2fb/SubProRVCsComment-0001.pdf>

Attachment: Letter and Comment & Multiple Signatories of April 22, 2021, in PDF form.