



April 11, 2016

Dr. Stephen Crocker
Chair, ICANN Board of Directors
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Dear Dr. Crocker:

I write to you on behalf of the Intellectual Property Constituency (IPC) of the GNSO, to express IPC's concerns about one aspect of the ICANN board's reply to the Governmental Advisory Committee (GAC) dated February 19, 2016, concerning certain GAC Advice. See <https://www.icann.org/en/system/files/correspondence/crocker-to-schneider-19feb16-en.pdf>

The GAC, in a letter dated January 29, 2016, had called the Board's attention to its previous Advice regarding "reporting on the levels and persistence of ... a wide range of [abusive] conduct" in new gTLD registries, listing nine examples of such conduct. See <https://www.icann.org/en/system/files/correspondence/schneider-to-crocker-29jan16-en.pdf>.

The Board's reply described the steps it had taken regarding "implementation of ... reporting requirements and safeguards against abusive conduct in the new gTLD namespace," then referencing from the GAC's list four examples of "security threats." The Board response then continued:

"Some of the items in the GAC's list (e.g., piracy, copyright infringement, counterfeiting and fraudulent or deceptive practices unrelated to domain name registrations) appear to be outside our mandate. The Board will discuss this issue at the next available opportunity and will respond to the specific items in this piece of the advice."

As you know, each of the hundreds of new gTLD registries that have entered into registry agreements with ICANN have taken on contractual obligations dealing explicitly with the four forms of abuse listed in the quoted parenthetical in the Board's response. In particular, these registries must require their registrars to prohibit registered name holders in the new gTLDs from using their registered domain names to engage in "piracy, trademark or copyright infringement, fraudulent or deceptive practices, [or] counterfeiting," and must provide "consequences for such activities including suspension of the domain name."

<http://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.htm>, Spec. 11 (Public Interest Commitments), section 3(a).

IPC considers these particular PIC obligations to be critical safeguards that must be vigorously enforced in order to promote the healthy development of the new gTLD namespace. Additionally, we note the conclusion of the CCWG-Accountability report, directing the drafters of revised ICANN by-laws to "grandfather" "the language of existing registry agreements..... including PICs" against any challenges that such provisions might otherwise "exceed the scope of [ICANN's]

Mission,” and specifically stressing that “neither a contracting party nor anyone else should be able to bring a case alleging that any provisions of such agreements on their face are *ultra vires*.” CCWG-A ¶ 147.3, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-workstream-1-recs-23feb16-en.pdf>. The Board accepted and transmitted this report to NTIA on March 10. <https://www.icann.org/en/system/files/files/ccwg-accountability-proposal-resolutions-excerpts-10mar16-en.pdf>

We were thus surprised and concerned to see you publicly state on behalf of the Board that these four issues (piracy, copyright infringement, fraudulent or deceptive practices, and counterfeiting) “appear to be outside our mandate,” and also by the letter’s silence regarding trademark infringement, which the GAC Advice also listed. Since the Board has entered into hundreds of new gTLD registry agreements that specifically address these five issues, and has approved accountability recommendations that appear to bar ICANN from characterizing the PIC provisions that address these issues as *ultra vires*, such a statement raises serious questions about the Board’s intentions.

Accordingly, we ask you to explain the statement that the Board included in the February 19 response to the GAC. Specifically, we would like to know:

(1) Has the further discussion among the Board regarding this issue which was referenced in the February 19 letter already taken place? If so, what was the outcome?

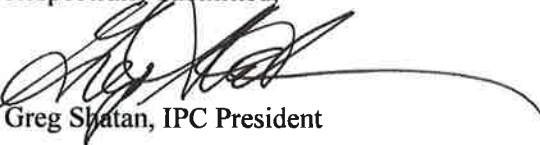
(2) If that discussion has not yet taken place, when and where will it happen, and will IPC be allowed to participate in the discussion?

(3) How can IPC and its members best contribute to the development of the methodology requested by the GAC Advice for reporting on — and more importantly, for responding effectively to — the “levels and persistence of [these forms of] abusive conduct ... that have occurred in the rollout of the new gTLD program”?

(4) How does the Board reconcile its statement that the listed issues “appear to be outside our mandate” with the entry into force of hundreds of registry agreements which address these issues, and with the Board’s approval of the CCWG-A recommendation that *ultra vires* challenges to these provisions on their face should be ruled out in revised ICANN by-laws?

We look forward to your response.

Respectfully submitted,


Greg Shatan, IPC President

cc: Bruce Tonkin
Markus Kummer
Thomas Schneider