21 January 2022

Re: Review of All Rights Protection Mechanisms Policy Development Process

Mitch Stoltz, Electronic Frontier Foundation
Rebecca Tushnet, Harvard Law School
Michael Karanicolas, UCLA School of Law

Dear Professor Tushnet, Mr. Karanicolas, and Mr. Stoltz,

We refer to your letter dated 1 November 2021, which attached the Public Comment that you and five other signatories submitted on the Phase 1 Final Report from the Generic Names Supporting Organization's (GNSO) Policy Development Process (PDP) on a Review of All Rights Protection Mechanisms (RPMs) in All gTLDs (collectively, Phase I PDP on RPMs). In our 5 August 2021 reply to the 1 June 2021 open letter from Professor Tushnet and several other intellectual property scholars and attorneys, the Board sought to clarify how the RPMs that the GNSO reviewed in its Phase 1 PDP were developed and evolved through ICANN's multistakeholder processes. The RPMs that were the subject of the Phase 1 PDP on RPMs were those developed as part of the implementation work conducted for the 2012 round of the New gTLD Program. Those RPMs represent the outcome of a collaborative consultation process between ICANN organization and the ICANN community, wherein they worked together to implement the Board-approved GNSO policy recommendations from 2007 on introducing new gTLDs.

As you know, the respective roles and responsibilities of ICANN organization and the ICANN community change at various points in the policy lifecycle, from the community-led policy development phase to the implementation stage that is managed by ICANN org at the Board's direction, where the community (through an implementation review team) serves as a resource to assist ICANN org with implementing the Board-approved policy recommendations. In this regard, the consultation processes that were used to plan the implementation of the GNSO's policy recommendations from 2007 for the introduction of new gTLDs were eventually formalized, based on significant community input, and are documented in ICANN org's Consensus Policy Implementation Framework and the Implementation Review Team Principles and Guidelines. These frameworks currently apply to all implementation work on GNSO-developed Consensus Policies, and will apply to the implementation of any Board-adopted policy recommendations resulting from the Phase 1 PDP on RPMs.

In addition to the above, we wish to address the points you make in your letter about the Trademark Clearinghouse that you had raised previously, including in your Public Comment of 24 May 2021 as well as the 1 June open letter to the Board, and which are reflected in the minority statement to the Phase 1 PDP final report that you and a few other members of the working group submitted following the conclusion of the consensus policy development process.

In relation to the criteria for accepting entries into the Trademark Clearinghouse, the Board notes that the Phase I PDP on RPMs working group has made a specific consensus recommendation on this point, following lengthy discussions and deliberations that included consideration of Public Comments submitted on the initial Phase I PDP on RPMs report. The Board understands that the minority statement you submitted to the Phase 1 PDP Final Report about this particular recommendation does not oppose the recommendation's primary thrust.[1] In relation to the confidential nature of the Trademark Clearinghouse database, the Board understands that the Phase I PDP on RPMs working group also discussed this topic extensively and invited Public Comments on it but did not reach consensus on a final recommendation. Our understanding is that both outcomes were attained through a thorough, documented, and transparent stakeholder consensus-building process, as demonstrated by the GNSO Council's unanimous approval of the PDP outcomes and its request that the Board adopt all 35 recommendations from the Phase I PDP on RPMs Final Report.

While the Board understands your reasons for proposing alternative ways to review these two issues, adopting your suggestions could result in the very undermining of the multistakeholder model and erosion of public trust that you warn against in your letter. Under the ICANN Bylaws, the Board has the responsibility to consider whether the GNSO's recommendations are in the best interests of ICANN or the ICANN community. The Board cannot unilaterally change the outcomes from the Phase I PDP on RPMs that the GNSO Council has approved in accordance with the Bylaws and the GNSO's own consensus-building processes, nor can we instruct the GNSO Council to modify its recommendations. Instead, the Bylaws set out a clear process that the Board must follow should the Board decide to reject a particular recommendation on the basis that it is not in the best interests of ICANN or the ICANN community. This process involves a discussion with the GNSO Council, which carries the responsibility and authority for determining whether an approved policy recommendation should be affirmed or amended as a result.[2] Notably, at any time prior to Board adoption of policy recommendations, the GNSO Council has the power to modify recommendations it approved, without the need for Board direction and on its own accord.[3]

The Board appreciates your commitment to ensuring that the RPMs represent a balance across issues of fair use, trademarks, and freedom of expression. We encourage you to continue to use your valuable expertise to work with all stakeholders on the new and complex policy issues that are emerging, to help us ensure the continued strength and success of the multistakeholder model.

Best regards,

Maarten Botterman
Chair, ICANN Board of Directors

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[1] As reported to the Board by the GNSO Council in its Recommendations Report concerning the Phase 1 PDP recommendations: see https://gnso.icann.org/sites/default/files/file/field-file-attach/council-recommendations-rpm-pdp-phase-1-report-10feb21-en.pdf (at page 4.)
[2] See Annex A of the ICANN Bylaws: https://www.icann.org/resources/pages/governance/bylaws-en/#annexA.
[3] See Section 16 of the GNSO PDP Manual: https://gnso.icann.org/sites/default/files/file/field-file-attach/annex-2-pdp-manual-24oct19-en.pdf (at page 10.