



21 February 2013

Re: "Policy Versus Implementation – Draft Framework"

We welcome ICANN's initiation of a dialogue on the question of what constitutes "policy versus implementation". We believe that answering this question is at the heart of ICANN's future as a self-regulating organization.

As many comments are likely to affirm, it is more or less self-evident that it would be difficult to develop a bright-line rule as to what might be considered policy or implementation. This underscores the fact that the non-linear relationship between policy recommendations and their implementation requires a flexible and iterative dialogue aimed at refining agreed-on principles. Indeed, such a dialogue is required irrespective of whether something is a "big p" policy, a "little p" policy, or something in between. And when dialogue fails to reach consensus, rather than chasing after "consensus by attrition", it becomes incumbent on leadership to weigh whatever options are available in making a decision in fulfillment of a duty to act in what they reasonably believe are the best interests of ICANN, and in line with its mission and core values.

To take a recent example, a practically unanimous consensus of stakeholders agreed that a core principle of ICANN's New gTLD Program should be that new gTLDs must be introduced in an orderly, timely and predictable way. From the foundation of this core principle, ICANN's GNSO established a series of policy recommendations including 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. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights)...

Since the original GNSO implementation guidelines focused primarily on the actual new gTLD application process, in order to implement the above-noted policy recommendation, it became necessary for ICANN to motivate various efforts aimed at achieving agreement as to how to apply this particular policy recommendation in implementing the New gTLD Program. These included among others, the IRT, STI, GAC Scorecard, and recent Strawman efforts. These efforts provide real-time experiences that we can draw from to inform ICANN's present exploration of achieving a better way of working towards implementation of community-agreed policy recommendations.

Unless and until a change would be required to such agreed core principle and policy recommendation, the question seems not necessarily to be whether to vet any proposed implementation mechanics "using a new PDP", but rather how to go about achieving consensus on their implementation (however, in doing so, the PDP workflow model may indeed be a useful guide). On this subject, little is said in the ICANN bylaws: "The GNSO Council may, but is not required to, direct the creation of an implementation review team to assist in implementation of the policy."

In ICANN's draft framework, it is noted that:

Ideally policy recommendations contain as much detail as possible so that the implementation path is clear. However, experience has [taught] that this is not always the case. This can be the result of various circumstances, e.g. PDP WGs do not necessarily have the legal and technical expertise to anticipate all the possible information that needs to be provided to ensure a smooth implementation; there is only agreement on the high level principles and the details are punted to the implementation phase.

As a starting point, we believe that, absent some compelling documented reason to the contrary, PDPs should include independent subject-matter experts; in the area of intellectual property such as trademarks, this would include bodies such as INTA or WIPO. Indeed, we have long questioned why ICANN has not seen fit to empanel an IP Advisory Committee to provide Advice to the Board. To be clear, it is not enough to merely encourage such subject-matter experts to participate in ICANN's open-mic policy development process; rather their views must be given appropriate credence.

And since it will be virtually impossible to create policy recommendations that provide sufficient detail as to their implementation, as one possible way to bridge the implementation gap, we would encourage ICANN to consider what lessons could be learned from the experiences employed by the ccNSO of "a Permanent IDN ccTLD Advisory Panel [which] is appointed to assist and provide guidance to ICANN Staff and the Board on the interpretation of the overall policy in the event the overall policy does not provide sufficient guidance and/or the impact of the policy is considered to be unreasonable or unfair for a particular class of cases."

We note that as a step in this direction, a recent ICANN development includes the formation of Implementation Review Teams for pending and future PDPs. We support this model and view it as a positive move towards providing ICANN Staff with the tools required to implement ICANN policies.

With appropriate independent expertise to assist the policy-making process in the first place, and a review team (including those subject-matter experts) to guide Staff's implementation of PDP-ratified policy recommendations, Staff should no longer be left to guess whether a proposed implementation detail is aligned with the original policy recommendation.

This still leaves the question of how to deal with questions of interpretation of *existing* policy recommendations, such as that of avoiding rights infringement in new gTLDs, and what to do when members of the community are not satisfied with a proposed implementation plan.

One way of trying to address this present and pressing issue could be to form an interim Implementation Review Team to guide Staff's policy implementation; such a group would necessarily include independent subject-matter experts and representatives of, or at least liaisons to/from, SOs and/or ACs. Experience has shown however that when such iterative policy implementation has been attempted in the past, consensus on what the implementation details should look like can be difficult to come by. The Strawman and LPR are two recent examples.¹

However, as was the case with the GNSO's formation of the STI, ICANN prompted GNSO action by making it clear that if the GNSO Council was unable to provide a timely implementation plan, the Board would direct the implementation of trademark RPMs based on Staff recommendations.

¹ Neither of these amount to "new policy" that would somehow require a PDP; an objective assessment indicates that they are implementation of the GNSO policy recommendation concerning avoiding rights infringement in new gTLDs.

If and when contained iterative dialogue between and amongst subject-matter experts, Implementation Review Teams, and if necessary SOs and/or ACs, reflecting back to the core policy recommendations would prove unable to provide positive direction as to policy implementation mechanics without becoming an endless recycling of entrenched positions, then as was the case with the genesis of the STI, it would be incumbent on leadership to step in and assess the situation with a view to directing Staff's work.

Finally, as to the proposed flow chart of when a PDP would be required, we do not think that the anticipated duration of a policy recommendation would necessarily be a relevant guide in all cases; this may be difficult to predict in advance. Nor do we think that a simplistic formula such as whether "new obligations" are created will necessarily be suited to determine whether a PDP may be required – the implementation of a policy recommendation will almost certainly bring with it the possibility of creating new obligations. A PDP should be triggered only when a considered analysis of the existing policy recommendation being implemented is judged to be no longer fit for purpose, e.g., owing to changed circumstances.

Thank you for your consideration of the above suggestions; we look forward to continued dialogue aimed at maturing ICANN's decision-making processes.

Yours sincerely,

/s/

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