

IP JUSTICE

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Internet Corporation for Assigned Names & Numbers (ICANN)
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292

21 July 2009

RE: ICANN Stakeholder Group Charter Injustices

Dear ICANN:

IP Justice appreciates this opportunity to provide public comment. Founded in 2002, IP Justice is an international civil liberties organization that works on intellectual property and Internet law and policy issues. IP Justice is a noncommercial 501(c)(3) public benefit organization based in San Francisco with an international board of directors and members in countries from all corners of the globe (<http://www.ipjustice.org>). IP Justice participates in the Generic Names Supporting Organization (GNSO) as a member of the Noncommercial Users Constituency (NCUC).

ICANN Cannot Ignore the Consensus Charter Created by Noncommercial Users in a Bottom-Up Process

IP Justice is writing to express our deep disappointment with the unjust manner in which previous public comment (period ending 15 April 2009) was discarded by ICANN in the reformulation of the proposed Noncommercial Stakeholder Group Charter¹.

NCUC undertook months of consultations with a diverse range of parties in the creation of its draft charter² proposed for a Noncommercial Stakeholder Group (NCSG). NCUC participated in an extended consensus process that involved global civil society, ICANN board, staff, members of the At-Large community, and other noncommercial actors in the creation of the charter submitted by NCUC in March 2009.

¹ Public Comments Filed in Comment Period Ending 15 April 2009 on Stakeholder Group Charters: <http://forum.icann.org/lists/sg-petitions-charters/> see also “*Is ICANN Accountable to the Global Public Interest?*” at <http://ipjustice.org/ICANN/NCSG/NCUC-ICANN-Injustices.html>

² Consensus charter for noncommercial users developed by civil society and submitted by NCUC: <http://gnso.icann.org/en/improvements/ncsg-petition-charter.pdf> and its Executive Summary: <http://gnso.icann.org/en/improvements/executive-summary-ncsg-proposal.pdf>

Civil society's NCSG charter was explicitly supported by over 80 noncommercial organizations and individuals in the April 2009 Public Comment period. Every single noncommercial organization that submitted a comment during the period supported NCUC's charter and asked ICANN not to force noncommercial users into constituencies for electing leadership positions (the "silo-model").

During discussions at the March 2009 ICANN meeting in Mexico, NCUC specifically asked ICANN if the NCSG charter it was drafting was inconsistent with the report of the ICANN Board Structural Improvements Committee (SIC) and NCUC was told its draft charter was not inconsistent.

Yet in June, without any explanation or regard for democratic or bottom-up processes, ICANN staff and Board SIC threw out the consensus charter that civil society developed and replaced it with an entirely different model -- the silo-model that civil society explicitly said would stranglehold noncommercial users in policy development.³

Why ICANN's Proposed Silo-Model is Bad for Noncommercial Users

NCUC and civil society made numerous efforts in public statements in April to explain why the silo-model of governance being imposed by ICANN harms noncommercial interests in the overall GNSO policy process.⁴ Yet these concerns remain unanswered by ICANN.

In particular, ICANN's attempt to divide the GNSO Council and Executive Committee seats among arbitrary (and board-selected) constituencies within the NCSG encourages competition among constituencies, while an entire stakeholder group wide election (as proposed by civil society) encourages consensus building and cooperation between constituencies to elect NCSG representatives. Noncommercial users will be in a constant stranglehold with each other, competing for scarce resources and representation, and will remain ineffective in the larger GNSO policy negotiations, if the ICANN drafted charter is allowed to replace the consensus charter drafted by noncommercial users.

³ ICANN drafted NCSG Charter: <http://gnso.icann.org/en/improvements/ncsg-proposed-petition-charter-22jun09.pdf> and its intended "mystery" Section 5 at: http://www.ipjustice.org/ICANN/NCSG/Council_Seat_Vacancies_Section_%285.0%29_DRAFT-1.pdf

⁴ For example, see Comment by Adam Peake at <http://forum.icann.org/lists/sg-petitions-charters/msg00013.html>; Joint Civil Society Statement at <http://forum.icann.org/lists/sg-petitions-charters/msg00019.html>; Comment from Milton Mueller at <http://forum.icann.org/lists/sg-petitions-charters/msg00011.html>; Comment from WSIS Civil Society Internet Governance Caucus at <http://forum.icann.org/lists/sg-petitions-charters/msg00009.html> for just a sampling of the many comments making this point.

Noncommercial users understand well what we are up against in the ICANN policy development arena: full-time highly paid lobbyists from the wealthiest industries relentlessly lobby the ICANN Board and staff for preferential advantages for their companies. Noncommercial users understand that if we are to have any chance of influencing ICANN policy it can only happen when we join together and are able to work cooperatively toward our shared objectives. This can be accomplished by stakeholder group wide elections, which encourage candidates to reach beyond their own constituency for support. But the charter drafted by ICANN to keep noncommercial users accountable only to their own focused constituency, rather than the entire stakeholder group, will render all noncommercial interests dead on arrival in the new GNSO. That is exactly what the commercial constituencies want and why they lobbied the board to change the NCSG charter to benefit commercial participants. (Remember the commercial representatives are still angry that noncommercial users are supposed to be given parity to commercial actors on the GNSO Council, and this is one way of keeping noncommercial users less effective on the council).

ICANN's attempt to impose a top-down governance structure on noncommercial users against our will calls into question ICANN's legitimacy to govern; it undermines confidence in ICANN's commitment to democratic values; and it appears ICANN is unable or unwilling to protect the broader public interest against commercial pressures.

Now ICANN should listen to noncommercial users and finally respect our democratic wishes regarding a governance structure that advances noncommercial interests. Thus ICANN should seriously reconsider its attempt to impose a controlling top-down charter on noncommercial users against their expressed will.

Board Gives Commercial Constituencies a VETO Over Any Board Decision to Permit Future Constituencies

Amazingly, the Commercial Stakeholder Group Charter⁵ that was drafted by the 3 existing commercial constituencies and which gives each of those 3 constituencies a VETO over any board vote creating a new commercial constituency to be represented on the GNSO Council was rubber-stamped for approval by the ICANN Board SIC.

In particular see ICANN's proposed Commercial Stakeholder Group Charter:

"4.2. Membership shall also be open to any additional constituency recognised by ICANN's Board under its by-laws, *provided that such constituency, as determined by the unanimous consent of the signatories to this charter, is representative of commercial user interests which for the purposes of definition are distinct from and exclude registry and prospective registry, registrar, re-seller or other domain name supplier interests.*" (italics added)

⁵ Proposed Commercial Stakeholder Group Charter (drafted by existing constituencies and rubber-stamped by ICANN posted to: <http://gns0.icann.org/en/improvements/csg-proposed-petition-charter-22jun09.pdf>).

If commercial constituencies can veto a decision by the Board of Directors, who is running ICANN?

How will giving existing participants a veto to block new participants on the GNSO Council encourage new commercial entrants? If adopted, the CSG charter will ensure that no new commercial perspectives are allowed to take hold in the CSG – only the 3 existing constituencies can hold all power in the future under the CSG charter.

Treatment of Stakeholder Group Charters Shows ICANN Unaccountable to Public Interest

Why did ICANN take all decision making authority away from the noncommercial users, but give total decision making authority (+ veto power) to commercial participants in the draft charters?

The difference in treatment by ICANN between commercial and noncommercial users in the charters is astounding -- but points solidly to one of ICANN's biggest flaws: its subordination of the public interest to select commercial interests engaged in insider-lobbying.

Fixing the SG charters to hold ICANN accountable to the public interest and Internet users (instead of only commercial lobbyists) would be a good start to addressing the pervasive lack of confidence in ICANN's ability to govern fairly.

Respectfully submitted,

Robin D. Gross
Executive Director
IP Justice
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“Is ICANN Accountable to the Global Public Interest?” see: <http://bit.ly/34tmz>