

Summary

This note is being written in my role as a Nomcom Appointee to the GNSO council since 2005, who was part of the entire new gTLD Policy Development process, who believes in the importance of adhering to that process, and who believes that implementation of the IRT recommendation without subjecting it to the PDP process would severely undermine ICANN's defined processes and in so doing threaten ICANN credibility as an open and accountable public interest corporation.

In part, this note is also in response to a comment made by Peter Dengate Thrush during the ICANN Public Forum held in Sydney on 25 Jun 2009¹

... let me just repeat something that I've said before. If you can point to something, anything in the IRT work that contradicts anything in the policy that was given to us by the GNSO, please draw that explicitly to my attention. I understand the claim there's been additional work and there's been straying into new areas. But if you can find anywhere that supports what you just said, which is that policy that was made in the GNSO has been overturned by the IRT work, that's a very different claim.

This is indeed part of the claim I am making in this comment: the work of the IRT, if it goes directly from the IRT to implementation will not only constitute new top down policy but some parts of it will be new policy that the GNSO specifically decided there was no consensus for making. Going beyond the consensus making purview of the GNSO to create policy as part of the implementation cycle of the program not only directly contradicts the policy made by the GNSO but also endangers the legitimacy of the entire consensus policy process.

Further one of the recommendations, the Uniform Rapid Suspension System, constitutes an entirely new policy mechanism that affects previous policy, the UDRP, without proper policy review. Also, the requirements for requiring a thick Whois service runs counter to any consensus policy reached on Whois policy to date and constitutes an end run on the Whois Policy Development Process. I contend that the IRT polices not only contradict specific elements in the GNSO new gTLD policy recommendations, but also, in creating new policy that goes beyond the GNSO recommendations, contradicts the entire GNSO Policy Development Process.

While arguing that implementation of the IRT is counter to ICANN policy, I want to make clear that I do not, in this intervention, argue either for or against the specific merits of the policies recommended in the IRT report because I believe the proper time to consider such issues is during a properly initiated Policy Development Process. For me, the legitimacy of the ICANN Policy with regard to the primacy of the GNSO PDP is the primary issue, perhaps even the overarching issue, in the implementation of the new gTLD policy.

In making my argument, I will pose a few questions, specifically:

- Do the recommendations of the IRT constitute new policy development?
- Was the policy element of requiring additional Rights Protections Mechanisms (RPM) discussed during the gTLD recommendations and abandoned for lack of consensus?
- What does it mean for such a policy to lack consensus?
- What are the appropriate roles and responsibilities within the PDP process and how do they relate to the IRT report?

I will also make a recommendation based on my understanding of the process to date and on the role and responsibility of the Board in the GNSO PDP process, specifically that if

¹ <http://syd.icann.org/files/meetings/sydney2009/transcript-public-forum-25jun09-en.txt>

the Board believes that the GNSO did not adequately fulfill its role to define Right Protection Mechanisms or other mechanisms as described in the IRT report, it has the responsibility to send the issue back to the GNSO for further consideration, and that such an act is not only completely within the mandate and responsibilities as described in the ICANN By Laws but is the only practical possibility within that mandate.

Question I. Do the recommendations of the IRT constitute new policy development?

As the current New gTLD policy recommendations² do not include any of the recommendations contained in the IRT report and the policy requirements on existing gTLDs also do not contain any such requirements, any policy recommendations contained in the IRT report are by definition new Policy initiatives. Specifically any policy concerning gTLDs that has not already been developed by a proper GNSO Policy Development Process (PDP) is a new policy initiative and as such is subject to the By Laws mandated for PDPs.

It can be argued that the Clearing House mechanism, the Globally Protected Marks List (GPML), as well as new post delegation dispute recommendations, if their use by a registry is completely voluntary, could be considered implementation issues. It is not possible, however, to consider the creation of any of the following as anything other than new policy:

- Mandatory RPMs based on the Clearing House or the GPML
- Creation of the Uniform Rapid Suspension System
- Requirement for Thick Whois

As new policy these items must be subject to the GNSO PDP as there is no other process available for the creation of new policy related to gTLDs.

Question II. Was the policy element of requiring additional Rights Protections Mechanisms (RPM) discussed during the gTLD recommendations and abandoned for lack of consensus?

During the new gTLD process, the GNSO was unable to reach a consensus requiring any new Right Protection Mechanisms (RPM). A working group, the Protecting the Rights of Others (PRO-WG) had been formed, and though the PRO-WG did recommend a possible range of RPMs. Neither the PRO WG nor the GNSO Committee of the Whole was able to reach consensus mandating that any RPMs be required for new gTLDs. Rather, the GNSO suggested that RPMs be considered by the applicants and endorsed an effort by the Intellectual Property Constituency to create a set of possible RPMs that would be included as part of the application package.

In final report it states³:

v) The Committee also benefited from the work of the Protecting the Rights of Others Working Group (PRO-WG). The PRO-WG presented its Final Report to the Committee at the June 2007 San Juan meeting. The Committee agreed that the Working Group could develop some reference implementation guidelines on rights protection mechanisms that may inform potential new TLD applicants during the application process. A small ad-hoc group of interested volunteers are

² <http://gns0.icann.org/issues/new-gTLDs/pdp-dec05-fr-parta-08aug07.htm>

³ <http://gns0.icann.org/issues/new-gTLDs/pdp-dec05-fr-parta-08aug07.htm>

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preparing those materials for consideration by the Council by mid-October 2007.

In response to which the IPC and others produced the very helpful guide: “The Perfect Sunrise - A short guide for new gTLD applicants by the Intellectual Property Constituency. It is interesting to quote from the preface to this guide⁴:

However, there is no consensus on what constitutes “Best Practice” when it comes to measures to protect intellectual property and the rights of others during the launch phase of a new gTLD. (The Uniform Dispute Resolution Policy is a universal curative measure that enables rights owners to tackle bad faith gTLD registration post-launch). As one of ICANN’s goals is to encourage diversity of both registry services and service providers, a wide variety of gTLD registry models will develop. In 2007, the Generic Names Supporting Organization’s “Protecting the Rights of Others” Working Group concluded in a 114 page report for ICANN that Best Practice guidelines that would be suitable for one registry model may not be appropriate for another. It therefore declined to recommend “an approved model Rights Protection Mechanism”.

Despite this, it has been the experience of members of both the Intellectual Property Constituency of ICANN and MARQUES that potential registry operators welcome impartial guidance on measures to protect the rights of others. In both the 2000 and 2004 new gTLD rounds, applicants requested meetings with the IPC to discuss this subject. Individual members of the two organisations have also been consulted by registry operators and government agencies with responsibility for TLD projects.

Therefore the IPC decided to produce this guide to assist potential gTLD applicants and possibly some ccTLD registry operators to identify and assess pre-launch Rights Protection Mechanisms (RPM).

So even the Intellectual Property Constituency admitted in public documents that there was no consensus for mandating rights Protection Mechanisms. To require them now, would run counter to that lack of consensus.

Question III. What does it mean for such a policy to lack of consensus?

In the bottom up process, all legitimate policy must originate in the various Policy Development Processes. When the appropriate SO, in this case the GNSO, cannot reach consensus on developing a policy it means that there is not sufficient bottom up support for that policy. This is equivalent to a decision that there should be no such policy. It should also be noted that there is no other means for policy creation. Thus, the inability to reach consensus on a new policy means there cannot be a policy on that issue until such time as consensus is reached.

This same reasoning applies to issues related to, either existing or new, gTLDs on which there has not yet been a PDP. There is no provision for implementing any policy unless it was first vetted by the bottom up PDP. While there is a By Laws provision⁵ for the Board to direct the GNSO to consider new policy, there is no By Laws provision for the Board to request that such policy be created either by an outside body or by a single constituency within the SO. To do so is to subvert the Policy Development Process that underlies the legitimacy for ALL of ICANN actions with regard to gTLDs.

I repeat, there is NO provision in the By Laws to work around the requirements for PDP consensus processes on policies related to gTLDs, new or existing.

4 <http://www.icann.org/en/topics/new-gTLDs/perfect-sunrise-jun08-en.pdf>

5 <http://www.icann.org/en/general/bylaws.htm#AnnexA>

Question IV. What are the appropriate roles and responsibilities within the PDP process and how do they relate to the IRT report?

The Board's activity in creating the IRT was not necessarily illegitimate. The Board certainly has the ability to request expert opinion and even to create a group to create a recommendation that would then be subjected to the due process of the By Laws mandated PDP process.

What the Board does not have purview for is to actually cause the creation of policy by any body other than the appropriate SO. Board resolution 2009.03.06.06 only called for implementation guidelines, but as argued in this brief note, the IRT went far beyond simple implementation issues in its report by creating several policy recommendations. It would not be legitimate for the ICANN staff to incorporate policy that had not been through the PDP process, nor would it be legitimate for the Board to approve such an action in a top down manner.

The Board does, however, have a legitimate way of resolving the issue of the IRT's recommendations. In cases where the Board does not believe that all of the issues have been properly considered by the GNSO in its policy recommendation, or believes that new considerations have arisen from community comments, it has the ability to mandate a PDP process within the GNSO. From the ICANN By Laws Annex A on the GNSO Policy Development Process:⁶

1. Raising an Issue

An issue may be raised for consideration as part of the PDP by any of the following:

- a. Board Initiation. The Board may initiate the PDP by instructing the GNSO Council ("Council") to begin the process outlined in this Annex.

It can be argued that while some of the issues in the IRT report had already been considered by the GNSO in its new gTLD policy, it can also be argued that some of the elements had not been so considered. In the case of issues already considered, the Board can request a reconsideration in the light of new information and considered community comment, and in the case of new policy considerations, the Board can certainly request that the GNSO consider the policy recommendation from one of its constituencies.

The Intellectual Property Constituency could have requested a PDP on its own initiative for the URS or the requirement for Thick Whois within the GNSO. As they opted to take recourse to the Board instead, the Board is now required to refer the issue back to the GNSO for full bottom-up consideration. What neither the Board nor the ICANN Staff Implementation team can do is implement, or cause to implement, policy that has not gone through the PDP process or which is counter to existing PDP recommendations.

Recommendation

As at least three of the elements in the IRT report constitute new policy, some of which has been specifically countered by a previous inability to reach consensus on that policy, while others parts are completely new policy elements that have never been part of any PDP. Specifically:

- Mandatory RPMS based on the Clearing House concept or the GPML
- Creation of the Uniform Rapid Suspension System

⁶ <http://www.icann.org/en/general/bylaws.htm#AnnexA>

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- Requirements for Thick Whois

I urgently recommended that instead of allowing direct implementation of these new policies, that the Board request the initiation of the Policy Process within the GNSO as required by the By Laws.