



June 30, 2016

Greg Shatan
President
Intellectual Property Constituency

Re: Your letter dated April 11, 2016

Dear Mr. Shatan:

Thank you for your letter dated April 11, 2016 regarding ICANN's authority with respect to piracy, copyright infringement, counterfeiting, and fraudulent or deceptive practices unrelated to domain name registrations. I am responding to the four questions posed in your letter:

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?

This was a topic of discussion during a Board workshop on June 24, 2016 in Helsinki. The outcome of that discussion was to encourage and enable a dialogue with interested stakeholders in the ICANN community regarding the scope of ICANN's responsibilities and remit and to facilitate a clearer understanding among the community of the key provisions in ICANN's contracts, including the ones cited in your letter, and the scope of ICANN's enforcement of those provisions.

One of our Board members, Bruce Tonkin, facilitated a discussion with interested parties at ICANN 56 in Helsinki, during which representatives of the IPC, the GAC Public Safety Working Group, the Registrar and Registry Stakeholder Groups and other stakeholders had a constructive interchange on a variety of topics related to these issues. During that session, it was suggested that interested stakeholders work cooperatively on various matters, including gaining a better understanding of the provisions in ICANN's contracts and ascertaining where there are differences of interpretation, discussing appropriate guidelines for submission of complaints of non-compliance with contracts and recommended responses by contracted parties to such allegations, identifying areas in which additional data and statistics might better inform the community's consideration of these matters, and considering suitable escalation paths and accountability mechanisms where a party believes that ICANN is not properly enforcing contractual commitments.



ICANN will schedule another meeting in Hyderabad to continue this ongoing community discussion. We welcome participation in that dialogue by the IPC as well as other interested parties.

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"?

We welcome input from all stakeholders in the ICANN community and suggest that this should be a topic for community discussion at future ICANN meetings, including ICANN 57 in Hyderabad. We note that the IPC had an opportunity to engage in some discussion on some of these topics during ICANN 56, including at the GNSO Cross Constituency Meeting between the IPC, the RySG and GNSO Cross Constituency Meeting between the IPC and the RrSG and the Meeting between the IPC and the At-Large Advisory Committee. Like other stakeholders, the IPC also has an opportunity to provide information to the Review on Competition, Consumer Trust and Consumer choice (CCT).

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?

The Bylaws adopted by the Board on 27 May 2016 include a "grandfather" provision, so that existing registry agreements and registrar agreements cannot be challenged on the basis that they exceed the scope of ICANN's authority or powers. Those new Bylaws also affirm that ICANN will have the ability in the future to negotiate, enter into, and enforce agreements, including public interest commitments, in service of ICANN's Mission.

We will enforce contractual provisions such as those cited in your letter, which require Registry Operators to include a provision in its Registry-Registrar Agreement that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name. Registrars are also required in their agreements with ICANN to maintain an abuse point of contact to receive reports of abuse involving Registered Names sponsored by Registrar,



including reports of Illegal Activity; to publish an email address to receive such reports on the home page of Registrar's website (or in another standardized place that may be designated by ICANN from time to time); and to take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse.

ICANN will bring enforcement actions against Registries that fail to include the required prohibitions and reservations in its end-user agreements and against Registrars that fail to maintain the required abuse point of contact or to investigate and respond appropriately to reports of abuse. ICANN remains committed to enforce these provisions under the existing Bylaws as well as the New Bylaws adopted in May 2016.

This does not mean, however, that ICANN is required or qualified to make factual and legal determinations as to whether a Registered Name Holder or a website operator is violating applicable laws and governmental regulations, and to assess what would constitute an appropriate remedy for such activities in any particular situation.

As stated in the NTIA Statement of Policy (sometimes referred to as the White Paper) dated June 5, 1998, the U.S. Government policy that led to the delegation to ICANN of certain responsibilities for the management of Internet names and addresses did “not set out a system of Internet ‘governance’” and was “not intended to displace other legal regimes ([including]. . . principles of international . . . intellectual property law. . . that may already apply.” The White Paper endorsed the “continued applicability of these systems.” ICANN was not vested with authority or responsibility that would displace existing legal regimes for intellectual property protection. <https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en>

Registries and Registrars have noted the difficulty of evaluating alleged violations of law. We are aware of initiatives like the Domain Name Association’s Healthy Domains Initiative and other private, voluntary efforts (e.g., “trusted notifier” arrangements) to develop self-governance mechanisms and identify industry best practices. While these initiatives are outside of ICANN’s limited remit, we are hopeful that these voluntary efforts will produce usable tools and mechanisms for use by Registries and Registrars.

With respect to enforcement of the Public Interest Commitments (“PICs”), as we have previously stated, because the PICs are incorporated in Specification 11 of the Registry Agreement, they are part of the contract between ICANN and the Registry Operator, and accordingly, these PICs are subject to enforcement by ICANN’s contractual compliance department in the ordinary course of its enforcement activities. Again, ICANN’s commitment to enforce the PICs remains unchanged under the existing Bylaws and those adopted by the Board in May 2016. The Public Interest Commitments Dispute Resolution Procedure (“PICDRP”) provides a potential alternative or



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parallel mechanism for a harmed party to pursue remedies, but it does not preclude or limit ICANN from enforcing the PICs through its normal contractual compliance process and timetable. It should also be noted that nothing in the PICDRP limits harmed parties, regulatory authorities or law enforcement from pursuing other available remedies against the party causing harm (whether a Registry Operator, Registrar or registrant), including, for example, pursuing remedies through administrative, regulatory or judicial bodies to seek fines, damages, injunctive relief or other remedies available at law.

I hope this information is helpful to you. We look forward to continuing our dialogue with the IPC, and thank you and your colleagues for your active participation in our multistakeholder model.

Sincerely,

Dr. Stephen D. Crocker
Chair, ICANN Board of Directors