



Comment of the ICANN Business Constituency on the GNSO Review of All Rights Protection Mechanisms in All gTLDs PDP Phase 1 Final Recommendations for ICANN Board Consideration

21-May-2021

This document conveys the views of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter. The mission of the BC is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. Promotes end-user confidence because it is a safe place to conduct business;
2. Is competitive in the supply of registry and registrar and related services; and
3. Is technically stable, secure and reliable.

The Business Constituency is pleased to comment on the RPM Review WG Phase 1 Final Report and thanks all members of the WG for their hard work over the past five years.

General Comments

The Final Report primarily supports the *status quo* with respect to new gTLD RPMs, and “new policies or procedures” have been recommended to fill in procedural gaps based on lessons learned from the years these RPMs have been in operation. On that basis, the BC maintains the overall support for the WG recommendations, as set forth in our Response to the RPM Review WG Phase 1 Initial Report.¹ Accordingly, the BC respectfully requests that the Board approve the WG’s Phase 1 Final Report.

However, the BC also believes that a Phase 1 post mortem is necessary to assess why it took five years for the WG to issue a Final Report where thirty-four out of thirty-five recommendations received full consensus, and all recommendations were unanimously approved by the GNSO Council. To improve the efficiency of future policy development efforts such as the upcoming RPM Review Phase 2, it may be worth considering whether the WG took on too much responsibility initially, which could have been better handled among two or more separate WGs working concurrently. It should also be considered whether the WG charter questions could have also been drafted with greater direction and specificity.

¹ See May-2020 BC Comment, at https://www.icannbc.org/assets/docs/positions-statements/2020/2020_05May_04%20BC%20response%20to%20PDP%20on%20RPMs%20in%20all%20gTLDs.pdf

Specific Comments

The BC offers for consideration by the Board, and the IRT that will take up the mantle on implementation, a handful of specific comments on WG recommendations where additional clarity or improvement remain necessary.

URS Recommendation #2

The BC maintains qualified support for this recommendation to the extent it does not mandate the redaction of revealed registration data from panel determinations, but instead leaves discretion for redaction to the URS panel. Subject to exceptional circumstances like identity theft or information belonging to minors, the publishing of URS party names is a matter of public record, which much like the identification of litigants in court cases around the world, serves important public policy goals of accountability and transparency.

URS Recommendation #8

While the BC continues to support this recommendation, we maintain our concern about the proposed “compliance mechanism” for URS providers. It must not devolve into a forum for aggrieved parties to challenge panel determinations or attempt to overturn the principles established by prior panel determinations. The metrics and issues for compliance are procedural in nature, such as whether or not adequate rationale is provided by panelists, and not substantive, such as whether the panel correctly applied local law to the policy or inappropriately found RDNH applied.

Sunrise Recommendation #1

The BC continues to support this recommendation, which calls for a contractual prohibition against predatory registry operators “intentionally circumventing the mandatory RPMs ... or restricting brand owner’s reasonable use of the Sunrise RPM.” The BC also cautions against implementation of this recommendation in a way that lacks any contractual teeth for meaningful enforcement. The phrases “*intentionally*” and “*reasonable use*” must not serve as boundaries to prevent notices of non-compliance to registries who formulate their premium names lists using the TMCH database or charge exorbitant sunrise registration fees in comparison to their standard registration fees. Intent is present in such instances, and if the contractual compliance department requires highly specific or explicit language to take action under such circumstances then the Board should instruct staff on the IRT to provide it.

TMCH Recommendation # 1 (Minority Statement)

A minority statement from seven WG members asserts that the phrase “word marks” has not been satisfactorily defined, enabling misapprehension of the scope of the TMCH to “unwarrantedly expand trademark rights” and include textual elements of design trademarks. The BC respectfully disagrees with

this minority statement, because it disregards the legal scope of protection afforded to trademarks, covering a likelihood of confusion with, rather than mere identity to, each mark. Moreover, many small businesses apply to register unique design or stylization elements along with standard character text for their trademarks in a single trademark as a way to save money on filing and prosecution costs. As discussed within the WG, the TMCH should not discriminate against small businesses by defining “word marks” in a way that excludes the textual elements of stylized and design trademarks.

This comment was drafted by Andy Abrams, with edits from Mason Cole, Zak Muscovitch, and David Snead.

It was approved in accord with our charter.