From: Kathy Kleiman
Sent: Thursday, 12 December 2019
To: Maarten Botterman

Subject: A few additional thoughts

Dear ICANN Board:

As you prepare for your vote on EFF's Request for Reconsideration, there are a few final thoughts I would like to share:

EFF's requested edits are surgical and small, yet yield clear and important improvements. Overall, they return .ORG (and its registrants) to the state of .ORG for 15 years with ISOC and 34 years since inception – operation without the Uniform Rapid Suspension and without privately-created content takedown policies.

Those requests are:

-- Remove Clause 2(b), Specification 7, because a bilateral agreement by PIR and ICANN Org should not impose on 10 million registrants an ultra-fast, ultra-cheap "slam dunk" domain name dispute system – the URS – never intended for longtime domain name registrants or the more complicated disputes of trademark owners vs. noncommercial registrants. The URS threatens millions of longstanding, good-faith .ORG registrants with gaming by those who would seek valuable domain names, or seek to shut down legal, yet unpopular speech of .ORG registrants. This adoption threatens priceless NGOs and civil society organizations with the loss of their domains – invaluable web presences – *without any bottom-up, multistakeholder process approval*.

-- Delete Section 2.8 and its express allowance, even encouragement, for PIR and its owners to elect to "implement additional protections of the legal rights of third parties" without Community involvement. In .ORG, in particular, closed creation of content rules already has been a hard-fought issue. In early 2017, PIR and the ORG Community clashed in bitter battles over the unpopular Healthy Domains Initiative – a set of privately proposed content rules. Through the responsiveness of ISOC to the ORG Community, PIR decided not to participate in that initiative. We agreed that the ORG Community should be working with PIR if it sought to move forward with unilateral policies for takedowns of .ORG domain names without court orders.

For we know what you know: the takedowns of domain names for content reasons is complicated in .ORG and implicates lawful but controversial political, personal, religious, ethnic, gender and personal expression. A community-based process (outside of ICANN) is the right approach when PIR decides to change its decades-long policy of *not engaging in content monitoring for intellectual property violations* (holding, as it did for so many years, that copyright and trademark infringement is a legal judgement, and that .ORG's staff and attorneys were not "judge, jury and executioner" of .ORG registrants' content).

If, as you stated in your Draft Determination, page 2, your goal is to apply "ICANN org's base gTLD RA updated on 31 July 2017 (Base RA)" to .ORG's contract renewal "*modified to account for the specific nature of the .ORG gTLD,"* you can do that with the simple, surgical deletions EFF has offered. That is within your power and discretion as members of the ICANN Board.

To a few questions raised at our 25 November meeting with the BAMC, I would add:

1) It is not only policy created for "all gTLDs" which the ICANN Board has the obligation to honor. As the guardian and keeper of the bottom-up, multistakeholder process, the GNSO has the power to determine not only the policy, *but also the limits of its application*. Every rule-maker has this power. *The GNSO Council also has the power to determine when those limits will be reviewed, and if appropriate changed, and that is exactly what the GNSO Council chartered the Review of All Rights Protection Mechanisms Working Group to do right now.*
You have heard the emphatic concerns of two Co-Chairs of the *Review of All Rights Protection Mechanisms Working Group* that the extension of URS to legacy gTLDs is not fair, and that it demeans and diminishes the Working Group and the GNSO process. RPM WG Co-Chair Philip Corwin posted many objections to the extension of URS to older gTLDs, including the one below:

> "**The 2016 launch of the PDP Review of All Rights Protection Mechanisms in All gTLDs**, which is tasked with recommending whether new gTLD RPMs should become Consensus Policy for legacy gTLDs under its GNSO Council-approved Charter, **makes it particularly inappropriate for GDD staff to continue seeking that de facto policy result in non-transparent, bilateral RA negotiations** that contravene the policymaking process set forth in the Bylaws. Letter to ICANN, 2/1/17, https://www.internetcommerce.org/wp-content/uploads/2017/02/ICA-Mobi_RA_revision-comment-FINAL.pdf [internetcommerce.org], page 2.

As a second Co-Chair of the RPM WG, I too have shared my deep concerns with you individually and collectively: the GNSO is charged with making the rules – *and their limits* – in a bottom-up, multistakeholder way. It is disingenuous for ICANN to adopt the policy and *not adopt the limits on its applicability,* especially when those limits are so clearly understood that their review is currently a part of the GNSO's charter for the RPM WG.
For ICANN Org and GDD to pick and choose the pieces of policy agreement they want, and leave behind the heavily-negotiated limits and balances—especially for .ORG which was heavily on volunteers' minds when they were negotiating and limited the URS—is to reject the bottom-up, multistakeholder process – and to send volunteers packing. If their time, their efforts, and their extraordinary commitment can be "cut-and-pasted" piecemeal; they will leave. (This "pick-and-choose" method also undermines the proposed ICANN "Public Interest Framework" for, as so many volunteers have now shared with you, applying URS to legacy gTLDs, particularly .ORG, is not diverse, not respectful and not inclusive of the "open, transparent and bottom-up multistakeholder policy development" process which led to its development *and its limits. ICANN Discussion Paper: Developing a Public Interest Framework*, Sept. 2019, p. 5.)

2) We should set the record straight. Key "facts" shared in the Draft Determination of November and December are incorrect:

- The Base Registry Agreement never came from a "bottom-up, multistakeholder process." It was written and distributed by ICANN Org. A small group of registry attorneys, which I helped to form as a member of the Registry Stakeholder Group (for .ORG), reviewed and commented on ICANN's draft. But that was the most we could do—comment and review resulting in the few "tweaks" to the contract which ICANN Legal would agree to. It was not our document—the Base Registry Agreement was a top-down ICANN Org endeavor.

- The Implementation Recommendation Team (IRT) was not a bottom-up, multistakeholder group or process, and its recommendations never counted as policy. It was an Intellectual Property Constituency-organized group—with a few IPC-selected additional members—which met in closed session under Chatham House rules to write *additional rights protection mechanisms for the New gTLDs* in the interest of the intellectual property community. Its recommendations proved so controversial when introduced at ICANN35 in Sydney that the NCSG & ALAC jointly expressed their deep concerns and the urgent need for change, together with a long line of oppositions by individuals at the microphone in the Public Forum. In response, the Board directed the GNSO to open a bottom-up, multistakeholder model to review and evaluate these proposals in a fair and balanced way. The GNSO Council created an EPDP-type structure, called the "STI," with balanced representation by GNSO stakeholder groups, and including ACs, which then negotiated and wrote the report which became the rules for rights protection mechanisms *in new gTLDs,* then adopted by the GNSO Council and the Board and written into the New gTLD Applicant Guidebook. The IRT had no power to make binding policy of any sort.

- Top-down actions do not become "bottom-up, multistakeholder process" by the addition of a public comment period. Top-down is still top-down and bilateral contracts are still privately negotiated agreements.

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You have the power to provide the .ORG Community with some reassurance about the URS, and about arbitrary takedown and content rules, as it is going through a deeply disturbing time.

You can made a contract renewal *without the URS applied to .ORG* in this post-new gTLD time, as you did with .NET in 2017. [1]

You have the power to honor 10 million .ORG registrants by deleting two select sections with so much potential for damage and producing the .ORG renewal agreement you wanted -- one "*modified to account for the specific nature of the .ORG gTLD."* [Draft Determination, p.2] Many principles and policies stand in the balance on your choice. You can reduce the exposure of .ORG registrants to gaming in an ultra-fast, ultra-cheap dispute system never intended for them, and by not allowing PIR to turn to closed-door policy negotiations for the content rights

of IP owners without the full input and inclusion of the ORG community itself. These two deletions return .ORG to the state of protection for its registrants of pre-July. It is the right thing to do.

In every term, there are deciding votes. This is one for which you will be remembered.

Sincerely,
Kathy Kleiman

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Co-Chair, Review of All Rights Protection Mechanisms Policy Development Process Working Group (writing in a personal capacity)

[1] *URS is MIA [Missing in Action] in .Net Renewal RA* by Philip Corwin, Internet Commerce Association, May 6, 2017,http://www.domainpulse.com/2017/05/06/urs-mia-net-renewal-philip-corwin-internet-commerce-association/ [domainpulse.com]