

Reviews of all Rights Protection Mechanisms (RPMs) PDP Working Group

Section 3.7 Appeal, February 3, 2019

By: George Kirikos

A. INTRODUCTION

This appeal is brought under Section 3.7 of the GNSO Working Group Guidelines ("WGG").¹ In particular, (i) I believe my contributions are being systematically ignored or discounted; (ii) wish to appeal the co-chairs' decided processes/workplan as posted on January 29, 2019;² and (iii) the co-chairs and ICANN staff are not adequately performing their roles as outlined in Section 2.2 of the WGG.

B. REMEDIES SOUGHT

1. The specific remedies sought are:

- (a) extending the time allocated for sub teams to conduct analysis of previously collected data from February 13, 2019 until a date to be determined later (at a minimum, sometime in March);
- (b) extending the deadline for submission of additional data from February 8, 2019 until a date to be determined later (should be at a minimum the week after sub teams complete analysis of the previously collected data);
- (c) reducing the high barriers that have been imposed on submission of additional data;
- (d) extending the deadline for submission of individual WG member proposals from February 20, 2019 until a date to be determined later (should be at a minimum 2 weeks after sub team recommendations have been presented to the working group);
- (e) reducing the high barriers that have been imposed on individual WG member proposals from being published on an equal footing with sub team proposals in the Initial Report;
- (f) improved operational methods be adopted to address extreme workload, and unrealistic timelines;
- (g) greater outreach be conducted to encourage participation from underrepresented stakeholders;

1 See: <https://gnso.icann.org/en/council/annex-1-gnso-wg-guidelines-18jun18-en.pdf>

2 See: <http://mm.icann.org/pipermail/gnso-rpm-wg/2019-January/003619.html> (including the PDF attachment)

(h) the GNSO shall replace the current co-chairs and appoint a completely neutral and independent Chair as allowed for under Section 6.1.3 of the WGG. They should be from outside the domain industry, be familiar with project management principles and act to promote consensus as allowed for under Section 6.1.3; and

(i) ICANN should rotate out from involvement in this working group any staff members who are not completing assigned duties, or are not neutral.

C. DETAILS AND DISCUSSION

2. I have already brought many of the concerns below to the attention of the co-chairs, but they have not been adequately addressed, if they've even been addressed at all (see discussion on main RPM PDP mailing list and on sub team mailing lists).

3. I am an active member of the working group, and am also on both sub teams that are currently analyzing previously collected data. There are 21 individuals in the TM Claims sub team, and 20 individuals in the Sunrise sub team.³ 12 members are on both sub teams (which means that 29 individuals are participating in at least one sub team). Despite this, only a “core” group of 4 to 6 people (most of whom are in both sub teams) are doing most of the “homework” that is assigned each week. We accomplished much in December 2018 and January 2019, though, completing analysis of the survey results against the charter questions.

4. The issue of extreme workload in the sub teams came to the forefront this past week, where essentially no progress was made against the work plan. We were assigned homework that had no reasonable possibility of being completed. As I discussed on the mailing lists⁴, I am prepared to step up and volunteer 8 hours per week to get the work done (4 hours of “homework”, 2 hours for the meetings themselves, and 2 hours of prep to review other people’s input in preparation for the meetings). That is probably on the high side of what others are contributing (I’ve spoken to others who are suggesting 2 hours of homework is more reasonable). Regardless, at last Wednesday’s meetings, we were assigned “homework” that amounts to approximately 27 pages (which need to be read, analyzed, and cross-referenced against 19 charter question documents). There are 250+ pages that will remain after that February 6 meeting. **It will be nearly impossible (unless they became full-time volunteers and gave up their day jobs!) for the sub teams to complete the rest of that work in the time currently provided in the workplan (just 1 more meeting, on February 13, 2019).** ICANN staff themselves said it took 24 working hours for their own review, and I would expect to do the same. For myself, that’s on the order of 5 or 6 weeks (in 4 hour chunks). For others, that might be 12 weeks (in 2 hour chunks). We will need to discuss this as a group, but I think mid-March 2019 is a more reasonable target date for completion of that work. This is the basis for the remedy (a) listed above.

³ See: <https://mm.icann.org/pipermail/gns0-rpm-sunrise/2019-January/000184.html>

⁴ See: <https://mm.icann.org/pipermail/gns0-rpm-sunrise/2019-February/000200.html>

5. I don't want to fall behind in our timeline (which had already been called optimistic), and so I strongly suggest (subject to input from others, especially the "core group" of volunteers) that we add 2 more sub team meetings in our schedule. There is no meeting scheduled the week of March 6 (week before ICANN64), nor is one scheduled for the week of March 20). As our meetings are normally on a Wednesday, I suggest that the extra meeting before ICANN64 be earlier in the week (i.e. Monday or Tuesday), so as not to interfere with travel of those attending ICANN64 in person. Conversely, the extra meeting after ICANN64 should be later in the week (Thursday or Friday), so as to ensure the least disruption to those returning from ICANN64. [I don't think that there should be sub team work at ICANN64 itself; ICANN public meetings are opportunities to engage with the broader community that are not members of the PDP, to do outreach, and to hear from different and underrepresented voices]

6. I also strongly suggest in the future that all homework assignments have explicit expected time estimates included, to ensure that there is no extreme workload in the future. This is an operational improvement (basis for remedy (f) listed above) that should also extend to the main working group. It is quite telling that GNSO Council requires documents 10 days in advance of their meetings, yet routinely documents are dropped on the working group members with short notice (1 or 2 days), requiring extraordinary effort to complete (requiring moving around other work, etc.). I described a current example on the mailing list of just such an issue, and how a co-chairs' request was treated much differently than my own.⁵

7. Expectations need to be set as to what is a reasonable workload (to be discussed with others). We need more people doing the work, rather than overseeing/dictating the work. If the current co-chairs were replaced by a professional facilitator, that would free up more time for those individuals currently occupying those positions to help do the work (part of basis for remedy (h) listed above). [as for costs, the cost savings from not having to subsidize travel/hotel costs for 3 co-chairs to attend 3 annual ICANN meetings per year could cover the costs of hiring someone from outside the domain name industry to act as a professional chair; to ensure neutrality and independence, that chair should not come from this industry; given all the miscalculations of timelines, we need someone with excellent project management skills]

8. Since only a core group within the sub teams is actually doing the work of the sub teams, we need to discuss whether some "members" of sub teams should instead become observers, or whether the workload is too high (and thus is preventing them from making a contribution and becoming more active). This also extends to the sub team co-chairs, none of whom made any submissions to the Google Docs (only 1 of the 3 co-chairs of the main working group, Kathy, made any submissions to the Google Docs). A "member" that doesn't prepare in advance of calls, or doesn't do the homework, is a drag on the rest of the sub team. We've seen this in the main working group as well (and in other groups, including GNSO Council) – documents are sent in advance of the call, but the co-chairs act as

5 See: <https://mm.icann.org/pipermail/gns0-rpm-wg/2019-February/003627.html>

if the members attending haven't read them in advance! The purpose of the calls should be to have real-time interactions that advance the work, in particular reconciling work that is done ahead of the calls. While slides/documents can be put on the Adobe Connect screen, the first thing that should come out of a good chair's mouth should be "I assume everyone has already read the documents before this call, so I won't go over them in any detail. Do you have any questions/concerns?" (of course, this only applies to internal working group calls, not to cross-community "external meetings" where we're doing outreach, and where a topic is "new" to them) Simply reading the documents on screen is wasteful and creates bad incentives, because it says "It's ok to come unprepared." It robs the group of the interaction, which should be the whole point of meetings. If no one had any questions/concerns (having read the documents in advance), then the call should end! Well, a good chair would perhaps also try to reach out to those who've not contributed in a while (here's an idea: keep a list of when members last raised their hands, or last spoke, or last sent an email to the mailing list, etc., and **call on the ones present not heard from in the longest time** to contribute; as an aside, one of the best teachers I ever had in school did this; instead of allowing the smartest and keenest people to dominate the class, she'd seat us all in the back and put those who needed the most help up front, and she'd actively and proactively engage them more, by not allowing them to just be observers). We need to get that greater engagement from all (consider this part of remedies (f) and (g) above, more efficient and more engaged meetings with greater participation from underrepresented groups). A great meeting should be one in which the person presiding (doesn't have to even be the formal "chair", it could be staff, or just rotate amongst members) is acting like the conductor of an orchestra, calling on the horn section or the strings, to get folks engaged with each other (calling on people, switching from one person to the next, keeping it going), and not reading slides or dominating the discussion.

9. Getting back to the timeline, the deadline of February 8, 2019 for submitting additional data is unreasonably short. First of all, as has been discussed on the mailing list in a series of posts⁶, this was a task that was assigned to ICANN staff in August 2017 (more than a year ago), and all indications are that they did absolutely nothing, and simply gave up! (this is the basis for remedy (i) above) When asked to provide what they worked on, nothing was provided by staff. [the work plan even says for February 13, 2019 that sub teams will consider additional data "**if any is submitted**", implying **no other** additional data was compiled by staff!] None of the listed data sources (blogs like CircleID, DomainIncite, TheDomains, etc.) are among the 12 documents that the sub teams are currently reviewing. To me, that is not neutral. Documents in favour of RPMs from "insiders" to ICANN processes (like INTA) are given preferential treatment over those from "outsiders" like bloggers identifying sunrise abuses, who have a much different viewpoint. Since ICANN staff is essentially shifting their assigned tasks back on to the PDP members, sufficient time must be provided to do what they should have already completed (they had more than a year to do it!). The absurdity is that this

⁶ See: "Updated Proposed Process for TMCH Sunrise & Trademark Claims Sub Teams Including Submission of Additional Data" thread at: <https://mm.icann.org/pipermail/gnso-rpm-wg/2019-January/date.html> and <https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/date.html>

issue was raised on January 9, 2019, yet it took the co-chairs and ICANN staff 20 days to respond (and create an online form), leaving 10 days (now just 5 days from the time of this section 3.7 appeal) to actually do the work. Given that the sub teams already need more time to review the “previously collected data” (i.e. paragraph 4 above), the sub teams wouldn’t even start reviewing any “additional data” until that work is complete. So, extending the deadline as requested (basis for remedy (b) above) has no deleterious effects, as the sub teams aren’t going to be in a position to start analyzing it on February 13, 2019 (as is currently scheduled).

10. The co-chairs and staff did not just set an unreasonable deadline for the “additional data” (see paragraph 9 above), but a further barrier was erected, via a form that requires much more work than has ever been required before, and which was not imposed on other data sources/providers (like INTA’s survey). The Google Form⁷ requires the submitter to cross-reference all the elements of their submission against all the Charter questions! Anyone who’s been doing this (really just 4 to 6 core members) in the sub teams knows how time consuming this is (witness the disaster this past week), and what a huge task it can be. INTA never did it – indeed, those in the sub teams are doing that cross-referencing for INTA and others. I posted 10 links I found already in the public mailing list, but the burden to cross-reference all of them (a task that sub teams are doing) shouldn’t fall on the submitter, especially with a short deadline. It’s entirely unreasonable. The WGG talk about ensuring “representational balance” (section 2.2.1) and making “special outreach effort to those groups not represented.” That’s why we’re seeking that data! But, whereas the red carpet is rolled out for INTA, in contrast the current process for getting the “other side of the story” has enormous burdens. That needs to be remedied. Either even more time needs to be added to allow the submitter to cross-reference against the charter questions, or those extra burdens should be dropped, and the form simplified to provide the links and highlights of the salient points, without cross-referencing against every single charter question (the latter task would be left to the sub teams). This is the basis for remedy (c) above.

11. On the topic of the individual WG member proposals, the February 20, 2019 deadline is unreasonable. As we saw in the URS stage of our work, the main reason that individual WG member proposals exist is that members find that the sub team recommendations are insufficient, and so they seek to fill those gaps or shortcomings. Thus, the only time it makes sense to submit individual WG member proposals is after the sub team proposals are completed! Those individual proposals are even more important as the WGG acknowledge that the sub teams might not have representational balance, and thus it falls upon the individual WG members to fill in what the sub teams missed. As an example, for the URS work, there was not a single sub team proposal regarding the language of the dispute (i.e. as we know, it’s at present only in English, which is a huge disadvantage for registrants not fluent in English). We know that Chinese registrants and registrars have more new gTLD domain name registrations than anyone else, so if anything, it would only be fair for the language to be Chinese, not English, if it was just a single language. But, we don’t have many Chinese members of this PDP. It’s

⁷ See: <https://goo.gl/forms/84YtaNDH2Mx3SQVH3>

dominated by those who do understand English, and who might want to gain an advantage if they filed a URS dispute. I was not a member of that sub team (nor am I Chinese), but I then stepped up afterwards with an individual proposal (later combined with a similar one from Zak Muscovitch) to address that shortcoming. This highlights why the individual proposals are so important, and why the deadline needs to be after the sub team proposals are developed and presented to the main working group (and thus provides the basis for remedy (d) above).

12. Individual WG member proposals are put at a severe disadvantage relative to sub team proposals under the current procedures put forth by the co-chairs and staff, one that effectively gives the IPC a de facto “veto” over proposals they don’t like, due to their over-representation in both the sub teams and in the main working group. The procedure treats sub team proposals differently than individual proposals. Here's an illustration as to why this is flawed. Suppose a proposal can reach consensus in the GNSO (or broader community) with 80% support, overcoming any IPC opposition (i.e. IPC has 1/6th of the GNSO votes), with all other constituencies in favour of that proposal. But, suppose those who are sympathetic to the IPC perspective of that 1/6th of the GNSO actually represent 40 to 50% of the sub teams and/or the working group. When that proposal (which would have 80% support with balanced representation) comes before the sub team, it gets shot down under the current proposed process (since 40 or 50% would oppose it in the sub team). Then, to "override" that in the working group itself, it also becomes impossible, because that 40 or 50% continues to oppose it. The only way to overcome that overrepresentation is to have lower barriers for inclusion in the Initial Report (as we did with the URS-related proposals), so that the public can weigh in on things. And that public comment can make a big difference, especially when it's from a broad swath of the community (as it likely would be, given how many are interested in these topics). This is the basis for remedy (e) above. This is intertwined with the issue of capture. Creating an effective veto for any one stakeholder group, which blocks proposals they don’t like, is consistent with capture, and adopted processes should be discouraging capture, not enabling it.

D. CONCLUSION

13. In light of the above, I respectfully request that the aforementioned remedies be provided in an expeditious manner, so that the work of this PDP continues in a more productive manner. I am available to answer any questions you might have, or to discuss further.