

To: ICANN Board Governance Committee < Reconsider@ICANN.org >

From: IP Justice, Robin Gross

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SUPPORT FOR RECONSIDERATION REQUEST IN .DOCTOR TOP-LEVEL DOMAIN SPACE

Dear ICANN Board Governance Committee:

I am writing to draw the attention of the Committee to the crucial protections for freedom of expression rights that were originally built into ICANN's New GTLD Policy by ICANN's community in 2007.¹ ICANN's NGPC has failed to adequately take freedom of expression principles into account in its recent decision to ban 99% of the world's Internet users from using the word "doctor" in the .DOCTOR top-level domain name space.

NGPC's decision to restrict Internet users' freedom of expression rights by preventing numerous lawful uses of the word "doctor" on the Internet should be reversed for a variety of reasons including ICANN's obligation to respect freedom of expression principles in its policies.

Public governance responsibilities include protecting the lawful rights of those the institution seeks to govern in its policies and operations. Legitimate public governance institutions are required to the subjects' free speech rights. ICANN's unwillingness to respect freedom of expression in its policies and operations continues to call the organization's accountability and legitimacy into question.

ICANN serves as a global governance institution that purports to act in the public interest. There can be no question that upholding free expression principles is acting in the public interest. ICANN's Articles of Incorporation require the organization to carry out its activities in conformity with principles of international law and international conventions.² Thus ICANN is legally bound under California law to protect free expression in its policies in accordance with relevant treaties such as the Universal Declaration of Human Rights, which guarantees freedom of expression "in any media

¹ ICANN Final Approved New GTLD Policy (2007):
<http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

² ICANN's Articles of Incorporation (Article 4): "The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions..."

and regardless of frontiers”. It would be odd for ICANN to claim this promise did not apply to it or the Internet (although it would demonstrate ICANN’s lack of fitness to govern). Public governance duties should be contracted to private companies like ICANN in order to avoid complying with free expression guarantees.

In addition to ICANN’s obligation as a public governance institution to protect free speech, and its legal requirement to uphold international principles of law in its Articles of Incorporation, ICANN is further required to protect free expression in new GTLD policy because the bottom-up community baked free speech protections into its final policy.³

The GNSO community and its elected Council sought to protect freedom of expression rights in ICANN’s new gTLD program by including free speech principles and recommendations in its final policy, which was approved by a super-majority of the GNSO Council in 2007. ICANN’s Board of Directors subsequently approved all of the GNSO’s final principles and recommendations for new GTLD policy in June 2008.

Specifically, the following New GTLD Policy Principles and Recommendations provide explicit protection for freedom of expression rights in ICANN’s new GTLD program:

- New GTLD Policy Principle G:
“The string evaluation process must not infringe the applicant’s freedom of expression rights that are protected under internationally recognized principles of law.”
- New GTLD Policy Recommendation 3:
“Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law... Examples of these legal rights include ... the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (*in particular freedom of expression rights*).”
- New GTLD Policy Recommendation 6:
“Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.” Recommendation 6 goes on to cite as examples of these legal norms, rights provided by the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, both of which guarantee freedom of expression in any media and regardless of frontiers.

The GNSO’s final policy was the result of many years of community work, including difficult compromises on the part of all stakeholders to reach a final policy. ICANN’s bylaws require it to implement the policy that was approved by the GNSO Council and its Board, which have already balanced the legitimate interests pursuant to the policy

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

development process -- and in this case, chose to provide protection for free expression. Unfortunately, the GNSO community's hard fought free expression protections have not been implemented into the new gTLD policy ICANN carries out today. The NGPC decision regarding .DOCTOR highlights this disregard for Internet users' free expression rights and the bottom-up policy developed by the community.

Violating community-developed policy at the request of the GAC for a laudable goal (consumer protection) does not change the fact that the community-developed policy, which ICANN is legally required to implement pursuant to its bylaws, has been violated. Nor does labeling the policy violation a "Public Interest Commitment" or "PIC" change the fact that the bottom-up policy has been circumvented, in violation of ICANN's bylaws (Annex A).

The unintended, but harmful, consequences of this policy are enormous and worthy of reconsideration, particularly given the precedent-setting nature of this decision. With this policy, ICANN is violating the free expression rights of countless Internet citizens to use the .DOCTOR TLD for entirely lawful purposes – including criticizing doctors, discussing doctors, and all the numerous types of doctors, and products using the word doctor.

In summary, the amount of lawful speech that is prevented by this single policy choice does not comport with international principles of free expression nor GNSO-approved policy. ICANN should respect the bottom-up community's policy that sought to protect freedom of expression rights to use domain names and reverse its decision to unfairly restrict the .DOCTOR name space.

Thank you,
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