**Freedom of Expression Chilled By ICANN’s Addition of Speech Restrictions in DNS**

**“Public Interest Commitments” Amount to Illegitimate Usurpation of Bottom-Up Policy**

By Robin Gross, IP Justice

Freedom of expression on the Internet is at risk from ICANN’s recent decision to prohibit anyone but one specific type of doctor from using the word within the .doctor new gTLD space. Last month, ICANN’s New GTLD Program Committee decided that only “medical practitioners” would be allowed to register a domain in the .doctor name space. ICANN’s decision to exclude numerous lawful users of the word, including a broad range of individuals who are \_in fact\_ doctors comes at a time when the world is watching ICANN to see if it can adequately protect Internet users’ rights in the absence of US Government supervision. If ICANN’s treatment of free expression in the implementation of its new gTLD program is any indication, ICANN has not yet sufficiently developed to be trusted with protecting Internet users’ rights in the domain name system.

Often overlooked is that ICANN’s community sought to protect freedom of expression rights in the new gTLD program by including free expression principles and recommendations in the GNSO’s final approved new gTLD policy. However, those protections were quietly violated in the staff’s subsequent implementation of the GNSO’s policy, which afforded no protection to Internet users’ free expression rights.

Specifically, after the GNSO approved the community’s policy for new gTLDs, ICANN staff added a new requirement to the policy, called “Public Interest Commitments” or “PICs”, which are contractual terms ICANN imposed on new gTLD registries that add policy requirements and restrictions that were never approved by the community or subject to a bottom-up process. Some PICs actually violate the community’s consensus policy on issues, most notably freedom of expression.

The new gTLD policy approved by the GNSO Council in 2007 and subsequently ICANN’s board included 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.”[[1]](#footnote-1)

Additionally, Recommendation 3 of the GNSO’s final new gTLD policy states:

“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*).”

Furthermore, Recommendation 6 of the GNSO’s New GTLD Policy states:

“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.

These final community-approved principles and recommendations for gTLD policy were approved by ICANN’s board of directors in June 2008 and then passed into the staff’s hands for implementation.

Sadly, these community-approved principles and final recommendations protecting free speech were quickly disregarded, and instead of implementing the bottom-up policy created by the community, ICANN’s staff-board invented PICs to add a slew of additional (or contradictory) policy preferences to the gTLD policy.

Thus PICs became a means to impose top-down policies that can be globally imposed simply by lobbying the staff-board to include them as a “PIC” in a gTLD registry agreement. Governments have been particularly keen to press ICANN into imposing restrictive policies through PICs, a much easier means to achieve global restrictions on Internet speech than passing a treaty or participating in a consensus-based bottom-up policy development process.

As a global governance institution 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]](#footnote-2) Thus ICANN is bound to protect free expression in its policies in accordance with Article 19 of the Universal Declaration of Human Rights and other relevant treaties.[[3]](#footnote-3)

Additionally, the First Amendment to the US Constitution forbids the US Government from engaging in censorship, including Internet censorship. Since the National Telecommunications Information Administration (NTIA), which administers ICANN’s contract, is a part of the US Commerce Department, it is subject to the same legal obligations to protect free expression as the US Government would be. Public governance duties cannot be contracted to private companies like ICANN in order to avoid complying with free expression guarantees. Accountable governance structures understand that they have a role in upholding the legal rights of those they seek to regulate. ICANN owes both an ethical and a legal obligation to protect freedom of expression in its policies and practices.

What is the alleged “harm” that ICANN seeks to prevent in its decision to restrict registrants in .doctor? ICANN believes Internet users are not intelligent enough to understand that there are other types of doctors in this world besides only medical doctors and further that it needs to “protect” us from our own confusion by preventing us from using the word in the DNS. Via PICs, ICANN seeks to become the global consumer protection agency on any number of issues, but such aspirations can have unintended harmful consequences.

Although well-intentioned, the recent decision in the .doctor case is, unfortunately, a classic case of the remedy being worse than the disease it is intended to cure. Overbroad restrictions on speech like this prevent significant lawful speech including critical speech, competing uses of words, and a broad array of legitimate doctors are prevented from being able to identify as such in the DNS. In effect, ICANN is discriminating against entire categories of legitimate users of the word “doctor”. Even Dr. Martin L. King, Jr. would be denied admission to the .doctor domain under ICANN’s overly-restrictive rules since he was not a medical doctor.

ICANN’s decision in .doctor is only one symptom of a much greater disease: organizational empire building and using ICANN’s choice position in the Internet’s domain name system to become global enforcer of its own corporate preferences and values.

The decision sets a dangerous precedent for ICANN’s ability to censor Internet speech and wholly disregards the free expression protections that the GNSO community built into the new gTLD policy years ago. The decision also risks providing the means for ICANN to entirely upend the bottom-up policy development process by incentivizing post-consensus lobbying of the staff-board for policy preferences to be included as PICs.

ICANN should re-think its imposition of PICs as a layer of policy regulation that supersedes the community’s approved policy; ICANN can start respecting both consensus policy and freedom of expression by reversing its decision in .doctor.

1. http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm [↑](#footnote-ref-1)
2. Articles of Incorporation of ICANN, 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…” [↑](#footnote-ref-2)
3. Article 19 UNDHR: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Adopted by UN General Assembly in 1948. [↑](#footnote-ref-3)