

Cross Community Working Party  
on ICANN's  
Corporate and Social Responsibility to  
Respect  
Human Rights

March 7 2016  
ICANN55  
Chair

13:45 – 15:00  
Marrakech  
Niels ten Oever

# Agenda

1. **Welcome**
2. Update on Human Rights in CCWG Accountability
3. Views from the board on human rights
4. HR & ICANN visualisations (SG1)
5. Cases in which ICANN is impacting human rights (SG2)
6. Human Rights Impact Assessment (SG3)
7. gTLD process and Human Rights impacts (SG4)
8. Human rights in new WHOIS PDP (SG5)
9. Intermediary Liability and Human Rights

# Follow or join the work

- Reports and mailinglist is available at <https://icannhumanrights.net>
- Joint session GAC WG HRIL & CCWP HR  
Tuesday 18:00 – 19:00 Room Cristal
- CCWP HR Working Session  
Wednesday 17:00 – 18:00 Room Opale

# Continuing the discussion

- ICANN 50 London - Report by Thomas Schneider & Monika Zalnieriute, facilitated by CoE
- ICANN 51 LA - Session
- ICANN 52 Singapore - CCWP-HR established
  - GAC WG
  - Report by Article19
- ICANN 53 BA
  - Sessions (GAC WG, CCWP-HR, meetings with constituencies)
  - Report by Article19
- ICANN 54 Dublin
  - Sessions
  - Report by CCWP-HR
- ICANN 55 Marrakech
  - Sessions
  - 5 subgroups with draft outputs

# Charter / Terms of Reference CCWP-HR

- Raise awareness
- Map policies, procedures and operations that impact human rights
- Provide information, suggestions and recommendations to chartering orgs and ICANN community
- Propose procedures and mechanisms for HR impact assessment
- Develop and explore CSR guidelines that are in place or should be created
- Produce position papers and statements where appropriate

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# CCWG-Accountability & Human rights

- Third Draft Proposal: Recommendation #6: Reaffirming ICANN's Commitment to respect internationally recognized Human Rights as it carries out its mission. Bylaw language+ transitional bylaw
- Public comments: no framework for interpretation, risk of litigation, risk of IPR, deadline for WS2 is too tight
- Final report: consensus language.

## Final report: Annex 06.

“Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN.

This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations’ approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.”



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RIGHT INVOLVED	THEME	ICANN POLICY OR PROCESS
<b>Freedom of expression</b>	New gTLD programme	Applicant Guidebook <ul style="list-style-type: none"> <li>- community-based TLDs</li> <li>- Sensitive strings</li> </ul> New gTLD subsequent round
	Rights protection mechanism <ul style="list-style-type: none"> <li>- Trademark Clearinghouse (TMCH)</li> <li>- Uniform Rapid Suspension Procedure (URS)</li> <li>- Post-delegation dispute resolution procedure (PDDRPs)</li> <li>- Public Interest Commitments (specification 11 of the Registry Agreement)</li> <li>- Registry contract (specification 7 - “abuse” not clearly defined)</li> </ul>	Rights protection mechanisms is all gTLDs  New gTLDs subsequent round  Curative Rights protection for IGOs/INGOs  Protection of International Organization Names is all gTLDs
	IDNs	Implementation of IDNs
<b>Freedom of association</b>	New gTLD program	Applicant Guidebook <ul style="list-style-type: none"> <li>- community-based TLDs</li> </ul>

<b>Economic and social rights</b>	New gTLD programme	<ul style="list-style-type: none"> <li>- Application fees</li> <li>- Registrar accreditation process &amp; insurance requirements</li> <li>- GNSO new gTLD auctions proceeds drafting team</li> </ul>
	IP addresses	Coordination and distribution of IP addresses
<b>Privacy</b>	WHOIS	<p>Next generation gTLD registration directory service</p> <p>Registration Data Access Protocol (RDAP) changes and privacy</p> <p>Thick WHOIS Implementation Review Team</p>
	2013 Registrar Accreditation Agreement	<p>WHOIS accuracy specification requirement</p> <p>Data escrow provider financial support</p>
	Documentary Information Disclosure Policy (DIDP)	Defined Conditions of Nondisclosure (DCND)
<b>Right to security</b>	DNSSEC	Implementation of DNSSEC
<b>Due process</b>	PDP procedure	GNSO PDP improvements discussion group
	Rights protection mechanism	PDP to review all RPMs in all gTLDs
	Documentary Information Disclosure Policy (DIDP)	DIDP Requests
	GAC early warning	
	Reconsideration Request	Effect of failure and the use of the Ombudsman

	IRP Process	Effect of failure and the use of the Ombudsman
	All Dispute Resolution processes within ICANN	Need to ensure that parties know about Ombudsman for unfair process
<b>Gender/Race/diversity issues</b>	Protection of rights to fair and equal treatment	Awareness of Ombudsman office for complaints

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# CCWP Human Rights

Sub Group 2 – Documenting cases  
and examples in which ICANN is  
impacting human rights

# I. ICANN Geographical Regions Final Report

- *“The Community wants to minimize any changes to the current structure”*
  - The right to be represented
  - The right of freedom of association
  - Democratization of the Internet Governance processes



# 1. The right to be represented

In some exceptional cases, substantive representation is sidelined by formal representation, leading to a general lack of community interest and involvement, along with government and private sector involvement.

The recommendation “to maintain a strict geographic regions criterion in populating the Board, while keeping flexibility in other ICANN structures” can have a positive impact.

## 2. The right of freedom of association

- Preserving the current regional structure could restrict the ability of internet users and organizations to associate within their actual communities.

### 3. Democratization of Internet Governance processes

- ICANN's geographic regions' impact on human rights can be viewed and assessed in light of democratization of Internet Governance processes of popular countries or territories.
- In respect of “The Sovereignty and Right of Self Determination of States to Let Them Choose Their Region of Allocation” principle can have a positive impact.

# Case study: Armenia

- Media Education Center has had a number of meetings at different levels involving experts from civil society, academia, government, during which Armenia's geographical issues within ICANN's regional model were discussed. This brought to light various issues:

## 1. Socio political:

1. Within Eastern Europe, Armenia has an average performance as far as press freedom, democracy and rule of law is concerned.
2. Internet penetration rate in Armenia has improved over the past few years, reaching roughly 50 percent for fixed broadband, minimal restrictions on online content and absence of obstacles to access social media and political content.

- The change of Geographic region from Asia Pacific to Europe has had significant influence over the direction in which Armenia's internet policies have been developed.
- As a full member of the Council of Europe, Armenia has signed and ratified 58 conventions of the council of Europe, including the most significant human rights and minority rights agreements

## 2. Economy :

- The EU has been Armenia's main trading partner with half of Armenia's exports going to EU countries.
- Overall trade with EU accounts for roughly one third of Armenia's total commercial exchange.
- Trade agreements with EU entail commitments to respect democratic standards and carry out institutional reforms

## 3. Culture

## **II. Final Issue Report on a PDP to Review All RPMs in all gTLDs**

Potential issues concerning

1. UDRP
2. URS
3. TMCH
4. Sunrise Period



# Potential issues can come under the heads of:

- Free Speech
- Competition Concerns
- Procedural Fairness
- Protecting interests of non commercial registrants

# A human rights impact assessment of the new UDRP rules

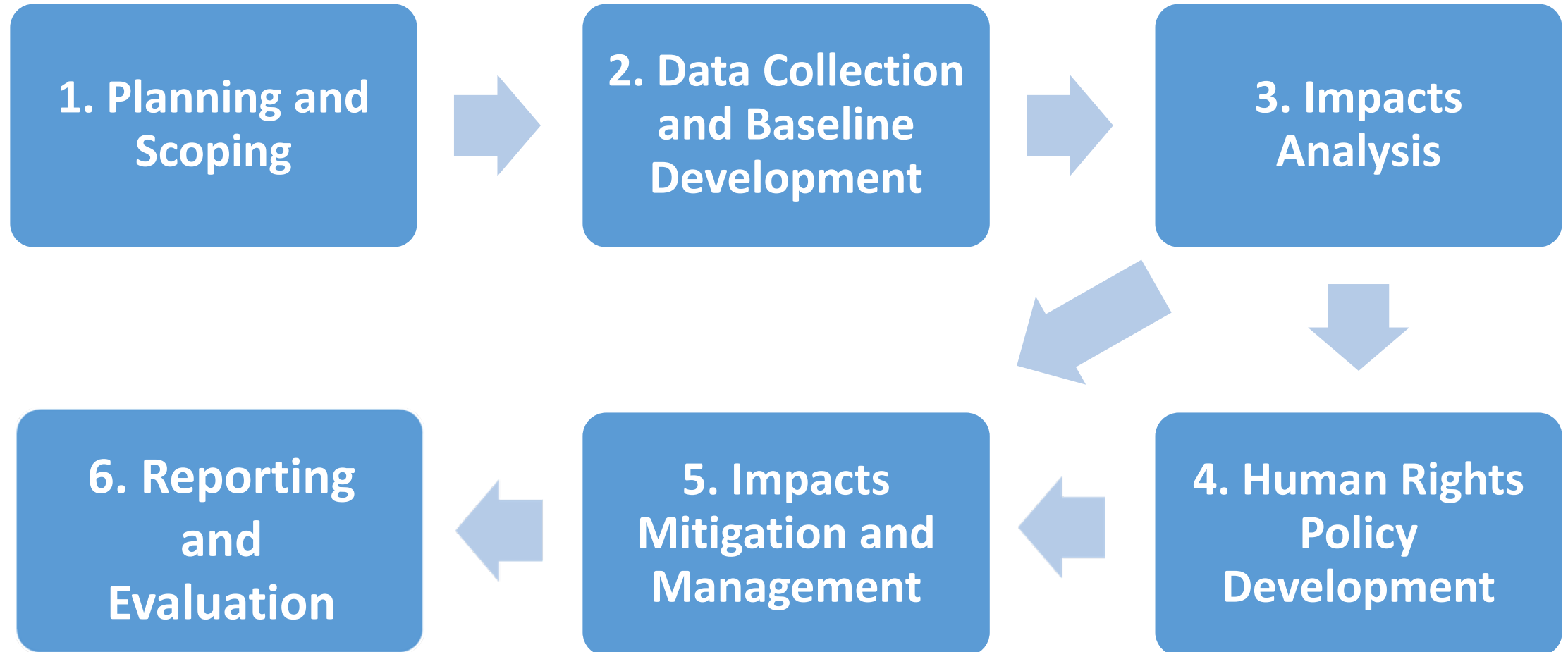
1. Problematic aspects : substantive
  - a. Freedom of Expression and UDRP Conditions for Domain Name Transfer
  - b. Problematic issue of very broad interpretation
2. Problematic aspects: procedural
  - a. Lack of choice of law rules
  - b. 'Lock' within revised rules
  - c. No appeal mechanism

Thank you!

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# A Human Rights Impact Assessment - process overview



# Phases I and 2 – Planning, Data Collection, and Baseline Development

## Phase 1

Summary of business activities and human rights context, using a questionnaire + Stakeholder identification

## Phase 2

Baseline report describing a status quo of human rights performance

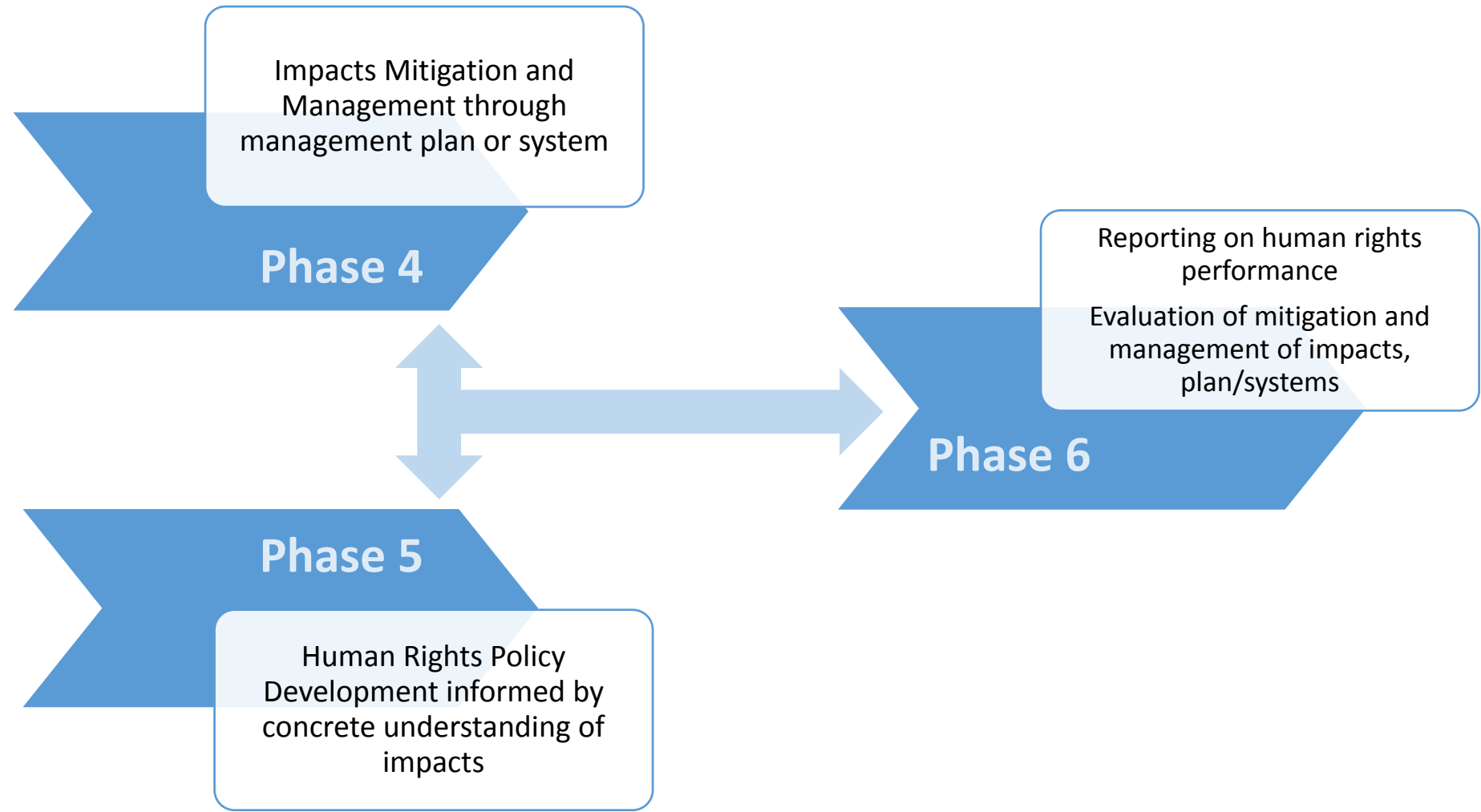
# Phase 3 – Impacts Assessment

## Phase 3

Focus on adverse human rights impacts by key functions through three scenarios:

- “Causation”
- “Contribution”
- “Direct Business Linkages”

# Phases 4 through 6





# For discussion

- Timeline and resources
- The role of the ICANN board, management, and the community
- The role of CCWP-HR
- The role of external human rights stakeholders and experts

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# New gTLDs

- **GNSO WG PDP new gTLDs subsequent procedures**
- **GNSO WG PDP on Rights Protection Mechanisms in all gTLDs**
- New gTLD auction proceeds (drafting team)
- New gTLD program reviews (Rights Protection Reviews, Trademark Clearinghouse Review, **Program Implementation Reviews**, Security & Stability Reviews, **Competition, Consumer Trust, and Consumer Choice Data & Review**, DNS Abuse Review)

# New gTLDs

- GNSO WG new gTLDs subsequent procedures
  - PDP
    - Clarifying, amending or overriding existing policy principles, recommendations, and implementation guidance;
    - Developing new policy recommendations;
    - Supplementing or developing new implementation guidance

## Current status

- WG has selected leadership: Avri Doria, Jeff Neuman, and Stephen Coates
- Held two WG calls and determined a schedule for ongoing meetings

**nxt**

## Next Steps

- Agree on organization of work and develop work plan: Begin substantive work
- Reach out to SO/ACs and SG/Cs for input
- Consider work from new gTLD related efforts in the community

# Group 1: Overall Process / Support / Outreach

- Community engagement
- Simplification of the application program
- Application fees
- Support for Applicants From Developing Countries
- *Economic and social rights, due process*

**Group 2: Legal / Regulatory: Implementation Guidance,  
“Second-level Rights Protection Mechanisms”,  
“Registry/Registrar Standardization”, “Global Public Interest”  
and “IGO/INGO Protections”**

- Reserved Names
- Base agreement (PICs included)
- Second-Level Rights Protection Mechanisms
- IGO/INGO Protections
- Closed Generics
- *FoE, due process*

# Group 3: String Contention / Objections & Disputes; Implementation Guidance

- Applicant's Freedom of Expression: Examine whether GAC Advice, community processes, and reserved names impacted this goal
- Community Applications
- Objections: Review rules around standing, fees, objection consolidation, consistency of proceedings and outcomes. Functions and role of the independent objector. Oversight of process and appeal mechanisms.
- Accountability Mechanisms: whether dispute resolution and challenge processes provide adequate redress options
- *FoE, freedom of association, due process*



# Group 4: Internationalized Domain Names

- Internationalized Domain Names and Universal Acceptance
- *Freedom of expression, freedom of association*

## Group 5: Technical and Operations

- Security and Stability
- *Right to security*

- F2F Session on Thursday, 10 March at 09:00 – 10:30 in Diamant

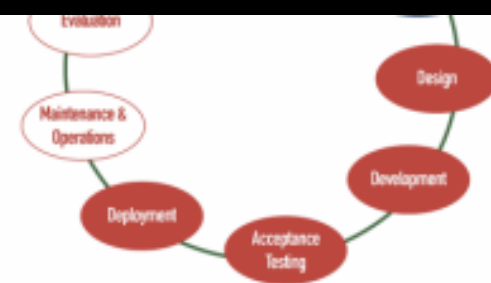
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# Subgroup 5: Input to PDP new WHOIS

- mandate: explore human rights implications of the proposals coming out of the WG on Next-Gen RDS
- WG work started end Jan;  $\approx$ 134 members; 110 obs
- weekly calls on Tue; draft work plan under review
- 1/3 phases: define requirements for RDS, regardless of delivery system (i.e. is new RDS needed or how to modify WHOIS?)
- next stepsubgr 5: identify HR implications starting from mindmap for WG produced by staff

The charter organizes work into eleven (11) questions that apply to each of the three phases:



- **What are the fundamental requirements for gTLD registration data?** When addressing this, the PDP WG should consider, at a minimum, five questions: *users/purposes, associated access, accuracy, data element, & privacy requirements*
- **Is a new policy framework and next-generation RDS needed to address these requirements?**
  - **If yes, what cross-cutting requirements must any next-generation RDS address,** including questions 6-11: *coexistence, compliance, system model, and cost, benefit, and risk analysis requirements*
  - **If no, does the current WHOIS policy framework sufficiently address these requirements?** If not, what revisions are recommended to the current WHOIS policy framework to do so?
- WG now reviewing available inputs to start identifying *possible requirements*

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# Intermediary Liability and its impact on human rights

Jeremy Malcolm

ICANN 55

March 7, 2016





## Outline

### **Introduction**

Overview

### **Why Principles on Intermediary Liability?**

The scope

The problem

### **Overview of the Manila Principles**

Components

Outline

### **Intermediary Liability and ICANN**

Registries and registrars being targetted

Domain name industry initiatives



## Introduction

Why Principles on Intermediary Liability?

Overview of the Manila Principles

Intermediary Liability and ICANN



## What are the Manila Principles?

- Best practice guidelines for limiting intermediary liability for content to promote freedom of expression and innovation



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- A broad-based civil society reference for our demands to governments and intermediaries

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Introduction

## **Why Principles on Intermediary Liability?**

Overview of the Manila Principles

Intermediary Liability and ICANN



## Who are intermediaries?

'Internet intermediaries' bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties

— OECD, 2010



## Intermediary immunity from liability promotes freedom of expression and association

- Most intermediaries are risk-averse, profit-maximizing private actors





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**Immunizing intermediaries from liability ensures users can maximally engage in lawful expression online**



## International legal opinions

[I]ntermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).

— Joint Declaration of Special Rapporteurs for Freedom of Opinion and Expression, 2011



## How intermediary immunity is undermined

- No safe harbor protection
- Safe harbor conditions that are not judicially assessed
  - For content hosts, notice and take-down
  - For ISPs, graduated response (“three strikes”)
- Increasing soft pressure
  - Under the TPP, “legal incentives to deter unauthorized storage and transmission of copyrighted materials”
  - Under the NETmundial Principles, “cooperation among all stakeholders should be encouraged to address and deter illegal activity, consistent with fair process”
- Extraterritorial jurisdiction of content restriction laws and decisions



## Escalation of threats to limit ISP immunity

The big operators, and we know who they are, can no longer close their eyes if they are considered accomplices of what they host. We must act at the European and international level to define a legal framework so that Internet platforms which manage social media be considered responsible, and that sanctions can be taken.

— French President Francois Hollande, February 2015



## Legal background

- There are three approaches to intermediary liability
  - Expansive Protections Against Liability for Intermediaries

**Example**

U.S. CDA 230





## Legal background

- There are three approaches to intermediary liability
  - Expansive Protections Against Liability for Intermediaries
  - Conditional Safe Harbour from Liability

### Example

U.S. DMCA, EU  
E-Commerce  
Directive



## Legal background

- There are three approaches to intermediary liability
  - Expansive Protections Against Liability for Intermediaries
  - Conditional Safe Harbour from Liability
  - Blanket or Strict Liability for Intermediaries

### Example

Thai Computer  
Crime Act



## Legal background

- There are three approaches to intermediary liability
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  - Conditional Safe Harbour from Liability
  - Blanket or Strict Liability for Intermediaries
- Different regimes may apply to different types of content

### Example

Korean  
Copyright Act,  
Networks Act

## Legal background

- There are three approaches to intermediary liability
  - Expansive Protections Against Liability for Intermediaries
  - Conditional Safe Harbour from Liability
  - Blanket or Strict Liability for Intermediaries
- Different regimes may apply to different types of content
- Obligations can be hard or soft

### Example

CDA 230 good samaritan provision



Introduction

Why Principles on Intermediary Liability?

**Overview of the Manila Principles**

Intermediary Liability and ICANN



## Documentation

- Principles
  - Six high-level principles with numbered sub-points.
- Background paper
  - More detailed, with references. Non-normative.
- Jurisdictional analysis
  - Analysis of intermediary liability laws and policies from many jurisdictions.
- FAQ
  - Overview, “How does this apply to me”.
- Template notice to users
  - To launch next month—a notice from intermediaries when their users’ content is restricted.

## The Manila Principles version 1.00

- 1 Intermediaries should be shielded from liability for third-party content
- 2 Content must not be required to be restricted without an order by a judicial authority
- 3 Requests for restrictions of content must be clear, be unambiguous, and follow due process
- 4 Laws and content restriction orders and practices must comply with the tests of necessity and proportionality
- 5 Laws and content restriction policies and practices must respect due process
- 6 Transparency and accountability must be built into laws and content restriction policies and practices



Introduction

Why Principles on Intermediary Liability?

Overview of the Manila Principles

**Intermediary Liability and ICANN**





## Attacks on websites through intermediaries

- Private lawsuits against registrars
  - Last year's Movietube case (unsuccessfully) sought preliminary injunction enjoining all registrars
  - Wikileaks site originally taken down by private lawsuit



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  - Wikileaks site originally taken down by private lawsuit
- Law enforcement domain seizures
  - Online gambling sites attacked through U.S. registrars
  - U.S. Homeland Security's "Operation In Our Sites"



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- Law enforcement domain seizures
  - Online gambling sites attacked through U.S. registrars
  - U.S. Homeland Security's "Operation In Our Sites"
- International pressure
  - U.S. Special 301 Report targeted registrars like Tucows



## Shift to voluntary initiatives

- Donuts announced a private “Trusted Notifier” arrangement with the MPAA last month
- Domain Name Association “Healthy Domains Initiative” also launched, prompted by rightsholder and law enforcement concerns



## Shift to voluntary initiatives

- Donuts announced a private “Trusted Notifier” arrangement with the MPAA last month
- Domain Name Association “Healthy Domains Initiative” also launched, prompted by rightsholder and law enforcement concerns
- Problems with such initiatives:
  - Inclusivity of affected stakeholders is usually very poor
  - No or limited public oversight and transparency is typical
  - No necessity to comply with the rule of law



## Conclusion

- Domain registries and registrars have been an “easy target” for rightsholders, LEAs and trade ministries seeking to eliminate undesired content
- As with other intermediaries, we are seeing a shift from compulsory legal takedowns to “voluntary” initiatives

## Conclusion

- Domain registries and registrars have been an “easy target” for rightsholders, LEAs and trade ministries seeking to eliminate undesired content
- As with other intermediaries, we are seeing a shift from compulsory legal takedowns to “voluntary” initiatives
- The Manila Principles provide:
  - A principled way to push back against pressure for “voluntary” measures
  - A guide for how to enact terms of service that respect users and free speech



## Resources

- <https://www.manilaprinciples.org/>
- [jmalcolm@eff.org](mailto:jmalcolm@eff.org)
- Attend our workshop at RightsCon 2016!



# Follow or join the work

- Reports and mailinglist is available at <https://icannhumanrights.net>
- Joint session GAC WG HRIL & CCWP HR  
Tuesday 18:00 – 19:00 Room Cristal
- CCWP HR Working Session  
Wednesday 17:00 – 18:00 Room Opale