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Via Electronic Mail  
comments-draft-new-bylaws-21apr16@icann.org

**Re: Draft New ICANN Bylaws Recommendations for ICANN Board Consideration**

Karsten Manufacturing Corporation (“KMC”) and Ping Registry Provider, Inc. (“Ping”) appreciate the incredible effort undertaken by the ICANN legal team, the external counsels to the CCWG-Accountability and Cross Community Working Group Names, review teams and ICANN Board to develop the Draft New ICANN Bylaws (the “Draft Bylaws”), and welcome the opportunity to comment on the Draft Bylaws to highlight areas of concern from a manufacturing perspective. KMC is the parent company of PING, Inc., one of the top three golf equipment brands in the U.S., and is a privately held family business started by my grandfather that has been manufacturing custom-fit premium golf equipment in the U.S. for over 57 years. Ping is the registry operator of the .ping top level domain name, a closed branded domain name, and is also a subsidiary of KMC.

As an initial matter, KMC and Ping join their voices with others in stating that their support for many of the Accountability improvements are for those improvements alone and not for the concept of the termination of the oversight of ICANN and the IANA function by the NTIA and U.S. generally (the “Transition”).<sup>1</sup> The threshold question of “if” and “when” the Transition should occur has never been asked of the ICANN community nor of the American voters. The plan to Transition is based on former president Bill Clinton’s 1997 “Framework for Global Electronic Commerce” and by a 1998<sup>2</sup> “green paper” titled “Improvement of Technical Management of Internet Names and Addresses”,<sup>3</sup> not by any act of Congress. When these documents were written, the Internet was in its infancy and the U.S.’s position on the global political and economic stage was more predominant. Today, the global political framework looks much different than it did in 1997. Further, there is nearly universal use of domain names as a critical piece of infrastructure for business. Domain names are used to deliver content, place orders, and route email.

Under the U.S.’s stewardship, the Internet has served as a global resource for the manufacturing community. It allows us to reach our consumers while protecting intellectual property and ensuring that our customers receive timely, trusted and secure information about manufacturers’ products and services. This trusted network is of utmost importance to American manufacturing competitiveness. Disruption of .com email addresses alone would grind business to a halt in the U.S. Manufacturers of products depend upon their customers being able to contact them via the Internet using their trademark-protected brand names, and depend upon their domain names utilizing the assigned numbers function to accurately locate them as opposed to counterfeiters or thieves. Consumers, likewise, depend on manufacturers’ trademark-protected brand names, to identify quality and trustworthiness; without them, consumers harmed by low-quality, dangerous or fraudulent products would be unable to trace the product’s source.



*Play Your Best.™*

Our American innovators need to protect trade secrets from cyber theft and protect the privacy of electronic communications to compete on the global playing field. Without trusted communications between the military and its U.S. manufacturing suppliers, our nation's security, which undergirds all our economic activities, would be at risk.

KMC and Ping believe the Internet is too important to the American people and to our economy to allow transition of oversight from the U.S. Government to proceed without the approval of the American people through their Congressional representatives. Nonetheless, KMC and Ping are aware that the National Telecommunications and Information Administration has set the Transition to occur in September, 2016 without Congressional approval. Even assuming *arguendo* that the NTIA has sufficient authority to take this step, the ICANN Draft Bylaws as currently written undercut the assurances to businesses contained in the foundational Green Paper which promised "to provide trademark holders with the same rights they have in the physical world, to ensure transparency, [and] to guarantee a dispute resolution mechanism with resort to a court system".<sup>4</sup>

These Draft Bylaws, as detailed below, contravene the wishes of the multi-stakeholder community as found in the CCWG-Accountability recommendations. Instead, the Draft Bylaws allow the denial of trademark holders' rights which they acquired, enhanced, and protected under U.S. and international laws, enshrine ICANN's right to obscure transparency at its discretion, and wrongfully limit businesses' access to U.S. courts. If a transition to global interests is to have any chance of success, it must, at a minimum, provide a cost-effective and trustworthy means of holding ICANN to its bylaws, contracts and other promises with resort to U.S. courts that can retain general jurisdiction over ICANN.

Without this, the whole structure falls apart. For example, if a future ICANN Board, possibly with pressure from foreign governments, moved its headquarters to some other country in contravention of its Bylaws, how would ICANN be held accountable? Its headquarters no longer being in the U.S., the issue of U.S. courts having jurisdiction over ICANN might be called into question. Under the current Draft Bylaws, the entire global multistakeholder community would have to work together to hold ICANN to its commitments in its Bylaws to remain a California non-profit. But much of the global community would prefer to have ICANN housed in a more easily influenced jurisdiction, so the chances of the global community all working together to keep ICANN accountable to stay in the U.S. would be slim to none. We are not saying this is ICANN's current intent or future plan, although we understand that there are those in the community who are already attempting to reopen this issue in the so-called "Work Stream 2", only that the structure is deficient in being able to stop this should such an action be contemplated in the future.

While KMC and Ping applaud the CCWG-Accountability Plan's many needed improvements, the current Draft Bylaws depart from following the CCWG-Accountability's Plan in many significant ways, and leave in place many structural deficiencies that will serve to allow denial of trademark holders' rights. Moreover, such Draft Bylaws remain to be implemented and tested and should be subject to real world application before Transition to ensure the accountability mechanisms actually work as intended to protect the global Internet.



To begin with, the CCWG Report called for limiting ICANN’s mission and enumerating its powers, but instead the new ICANN Draft Bylaws in section 1.1:

- Does not contain the limitation language CCWG called for;
- Leaves out the policy making requirement which is the means by which ICANN ensures “the stable and secure operation of the Internet’s unique identifier systems” rather than ICANN ensuring this outcome by itself; this is an important distinction as following the CCWG Report would result in an ICANN with Mission boundaries committed to using a consensus-driven, community policy development process; whereas, as written, ICANN has no practical limits on its powers and has empowered itself, rather than the community process;
- Purports to make it impossible for anyone to ever challenge ICANN for exceeding its mission and scope of authority, whether through a Request for Reconsideration, an Independent Review Process or the U.S. court system (See Section 1.1(d)(ii)).<sup>5</sup> The CCWG posted public comments disputing this language, pointing out that this section was not called for by them, and that it wrongfully references documents not even in existence.

Instead, ICANN’s bylaws state in Article I, Section 1.1(b) that “ICANN shall not act outside its mission” but also says that ICANN cannot be challenged by anyone in any proceeding against ICANN for acting outside its mission. See Article I, Section 1.1(d)(ii):

“(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through( F) below, and ICANN’s performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN’s Mission or otherwise exceed the scope of ICANN’s authority or powers pursuant to these Bylaws (“Bylaws”) or ICANN’s Articles of Incorporation (“Articles of Incorporation”):

(A) (1) all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on, or undergoing negotiation as of, [1 October 2016]<sup>1</sup>, including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above that is based on substantially the same underlying form of registry agreement or registrar accreditation agreement that existed on [1 October 2016].”

This language seems to make the Draft Bylaws (and the Accountability measures developed by the community) of no value to anyone who already has an agreement or enters into one similar to a current one in the future, and feels that ICANN is exceeding their authority. It purports to insulate ICANN from the jurisdiction of U.S. courts to the detriment of the businesses and the multistakeholder community.

A related concern here is that final Bylaws are being rushed by arbitrary political deadlines. Given the significance of this document, attention must be given to the quality of the work, in a way that empowers the multistakeholder community and provides businesses access to U.S. courts to ensure ICANN fulfills its commitments. KMC and Ping urge ICANN to bring this language back to the CCWG to finish the work and allow it to limit ICANN's mission, enumerate its powers, provide for multistakeholder community driven policy development and provide a place and process for challenging ICANN if it exceeds its scope of authority.

ICANN inserted other new provisions not requested by the CCWG-Accountability plan. It is not appropriate to alter the Bylaws by including language which has not been subjected to prior community processes (no Supporting Organizations/Advisory Committees review or vote), thus there is no adequate transition plan sent to NTIA yet. Many provisions have not been vetted through the above process and are wholly made up. For example:

- A. Section 1.1(a)(i) Mission "...coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top level domains ("gTLDs")."
  - a. The inclusion of this new concept in the bylaws evidences that the handing off of the bylaws drafting function to ICANN's legal team and other lawyers rather than the CCWG finishing its work, resulted from a rush imposed by arbitrary political deadlines rather than attention to the quality of the work.
  - b. Also, this new language could be read to allow ICANN to interfere with a registry's right to set its own registration rules. This could have profound effects on .brand TLDs which need to keep third parties out in order to maintain safety for consumers.
- B. Section 1.1(d)(ii) As referenced earlier, this exculpatory language is against public policy (See U.S. District Court Central District of California 16-CV-008862 RGK April 12, 2016) and excludes registries and registrars from the benefits of Accountability, without notice in advance that the CCWG would exclude them (vote on CCWG Plan could be considered based on false inducement).
- C. Section 1.2(a)(ii) "Maintain the capacity and ability to coordinate the DNS at the overall level and work for the maintenance of a single, interoperable Internet"—new and very vague, what is "the overall level"?
- D. Section 4.2(r) allows ICANN board to redact "such briefing materials and the recording and transcript" for a host of potential reasons as ICANN prefers and would enshrine ICANN's right to obscure transparency at will.
- E. Section 4.3(a)(ix) adds new language creating an ambiguity that could allow ICANN to argue claim preclusion should an aggrieved party take advantage of the Independent Review Process and prevent them from seeking relief in a U.S. court.
- F. Section 4.3(i)—CCWG Report states, "The panel MAY undertake a de novo review of the case..." but ICANN bylaws state, "Each IRP Panel SHALL conduct an objective, de novo examination of the Dispute" which is a material change and could result in unintended consequences such as more expensive IRP proceedings, could have a chilling effect on filing due to ICANN's right to shift costs if it prevails, could result in delays in decisions resulting in ongoing

- commercial harm to aggrieved parties, etc.
- G. Section 4.3(n) This section contains limitations on the rules of procedures for IRPs which were supposed to be within the purview of the CCWG, but also lurch squarely into substance; see e.g., 4.3(n)(iv)(c) which indicates the rules of procedure will set forth the elements of claims (“Rules governing written submissions, including the required elements of a Claim)
  - H. Other new sections: 4.3(j), 12.2(a)(x), etc.

If it is believed that the proposed new language provisions referenced above are needed, the Transition Plan should be withdrawn and the community should have the opportunity to fully vet the proposed language.

The Draft Bylaws also enhance the power of governments to the detriment of the multistakeholder community, and causes the Transition Plan to violate NTIA’s stated criteria that the Transition Plan “must support and enhance the multistakeholder model of Internet governance.” The CCWG Report specifically notes that GAC advice does not trigger a mandatory ICANN board vote, stating, “This recommendation is intended only to limit the conditions under which the ICANN Board and GAC must ‘try to find a mutually acceptable solution,’ as required in ICANN’s current Bylaws. This recommendation shall not create any new obligations for the ICANN Board to consider, vote upon, or to implement GAC advice, relative to the Bylaws in effect prior to the IANA Stewardship Transition. This recommendation does not create any presumption or modify the standard applied by the Board in reviewing GAC advice.” But ICANN’s Draft Bylaws contrarily state that GAC advice “may only be rejected by a vote of 60% of the board.” Moreover, the final report contained several last minute ICANN board-driven changes, including a major change enhancing the role of governments within ICANN, namely a change that insulates the Board from being collectively replaced when it acts on unpopular GAC Advice, even if that advice does not technically violate another bylaw or if the advice results in changes which are so egregious that the community does not have the months or years necessary to wait for an IRP process to finalize.

NTIA’s requirement that the Transition Plan “must maintain the security, stability and resilience of the domain name system” depends upon a domain name system that necessarily relies on the rights of intellectual property holders to maintain their trademarked rights. However, it is challenging for businesses to obtain the independent review of ICANN promised because its basic structure remains flawed. The Accountability proposal put forward by the CCWG-Accountability does not fix the systemic conflict of interest problem which exhibits itself in the Request for Reconsideration process. So long as the same people who made the decision originally also pass judgment on the validity of that decision, the Request for Reconsideration process does not provide a meaningful accountability mechanism. The CCWG solution to have the whole ICANN board provide reconsideration, still makes the ICANN Board remain the determiner of whether ICANN is following its rules and bylaws. Likewise, while the Draft Bylaws contemplate Independent Review Panels now providing binding decisions, it remains an open question as to how these can be enforced, and whether they can be used against businesses for claim preclusion. If the IRP Panel fails to issue a decision within six months, the Draft Bylaws indicate that this cannot give rise to a claim, even if irreparable harm will occur. In the recent U.S. District Court Central District of California case, *DotConnectAfrica Trust v. ICANN*

& ZA Central Registry, 16-CV-00862 RGK (JCx), April 12, 2016, the IRP Panel and the other party involved believed the IRP Panel decision was binding, but ICANN determined it was advisory and ignored the Panel's decision, attempting to give a gTLD to another party until the court intervened and issued a preliminary injunction preventing ICANN from doing so. IRP decisions must be equally binding on ICANN as well as parties, and the entity (whether a party or ICANN) with the IRP decision against it, must implement that decision or bear the burden of seeking U.S. court relief from that IRP decision. Regardless of the eventual outcome of this case, whatever that may be, this case underscores the need for U.S. courts to maintain jurisdiction of ICANN so that harm can be evaluated in time to repair it.

NTIA Transition criteria also requires that the Transition Plan "meet the needs and expectations of the global customers and partners of the IANA services." ICANN's language in its Applicant Guidebook purporting to release it "from any and all claims", found unenforceable as against public policy by the U.S. District Court in the case mentioned above, likely had a chilling effect on aggrieved parties being willing to come forward regarding problems with ICANN. The whole CCWG-Accountability process was driven due to a perceived unaccountability of ICANN. The Draft Bylaws continuation of similar language in its mission paragraph referenced above further extends this problem. The Transition Plan and Draft Bylaws should allow for the opening of a claims period for those harmed prior to the Transition and to find out whether the needs and expectations of global customers and partners are being met.

Further, the CCWG called for a provision prohibiting capture of ICANN by governmental powers, and neither this nor the recent security breaches experienced by ICANN have been addressed in the Draft Bylaws. Meanwhile, other countries are already openly calling for and attempting to introduce restrictions on Internet free speech. One of the NTIA's core missions is to protect and preserve the free-flowing Internet, ensuring that it remains a robust platform for economic growth, innovation and free speech. The absence of these necessary provisions in the Draft Bylaws causes the Transition Plan to fall short of NTIA's stated criteria that the Transition Plan "must maintain the openness of the Internet."

We appreciate the ICANN legal team, CWG-Stewardship, and ICANN Board's efforts to develop the best Bylaws possible and thank each of them for carefully considering these comments and making suitable adjustments to the Draft Bylaws. We urge ICANN to implement the changes detailed above to bring it into compliance with the NTIA's four criteria for approval of the Transition Plan. We also hope that someday the threshold question of "if" and "when" the Transition should occur will be put in front of the ICANN community and the American public in order to ensure the legitimacy and success of the Transition. We further hope that the assurances made to U.S. trademark holders in the foundational Green Paper to assure the same trademark rights as we hold in the physical world via a transparent process with access to the U.S. court system will be honored and lead to a truly accountable and successful ICANN. This will ensure an open and free global Internet system that remains an engine for continued innovation and economic growth.

Sincerely,  
Dawn Grove  
Corporate Counsel  
Karsten Manufacturing Corporation

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<sup>1</sup> When the Intellectual Property Constituency voted to approve the ICANN accountability changes in Morocco in March 2016, they noted in their written statement that they were only voting on the accountability improvements, not voting on the Transition now:

"The Proposal offers accountability improvements which we believe should be made regardless of whether or not there is an IANA stewardship transition. Our votes are not for or against the concept or timing of the "transition" itself — those threshold questions have never been asked of the community, and we express no opinion on those topics. Instead, we cast our votes in favor of the Proposal on Enhancing ICANN's Accountability in spite of reservations we might have with specific aspects of certain recommendations."

And footnotes:

#1: "The IPC recognizes that the IANA transition has its genesis in former United States President Clinton's Framework for Global Economic [sic] Commerce as well as the NTIA green paper Proposal to Improve Technical Management of Internet Names and Addresses. For example, the "green paper" provides, "The U.S. Government would gradually transfer existing IANA functions, the root system and the appropriate data-bases to this new not-for-profit corporation [i.e., "ICANN"]."

#2: "There was no public comment period for the final CCWG-ACCT report as presented for vote in Marrakech."

See ICANN/GNSO Annex C Statement of Intellectual Property Constituency,  
<http://gns0.icann.org/en/correspondence/bladel-to-ccwg-accountability-chairs-09mar16-en.pdf>

<sup>2</sup> Much has changed in business, manufacturing and the Internet since 1998, and a public comment period on *whether* ICANN is ready for transition now, rather than *how* to transition now, would yield a better forum for the business community to comment on whether ICANN's current structure is the optimal structure to ensure the survival of the open and stable Internet, the potential effects on manufacturers' trademarked brand names, businesses' experiences dealing with ICANN, and any other potential unintended consequences of the proposed transition.

<sup>3</sup> See id.; President Clinton's Framework for Global Electronic Commerce:

<http://clinton4.nara.gov/WH/New/Commerce/read.html>

Green Paper: <https://www.ntia.doc.gov/legacy/ntiahome/domainname/022098fedreg.htm>

<sup>4</sup> "For cyberspace to function as an effective commercial market, businesses must have confidence that their trademarks can be protected. On the other hand, management of the Internet must respond to the needs of the Internet community as a whole, and not trademark owners exclusively. The balance we strike is to provide trademark holders with the same rights they have in the physical world, to ensure transparency, to guarantee a dispute resolution mechanism with resort to a court system, and to add new top-level domains carefully during the transition to private sector coordination of the domain name system."

Green Paper, Improvement of Technical Management of Internet Names and Addresses, Section VI (The Proposal) D. (The Trademark Dilemma) <https://www.ntia.doc.gov/legacy/ntiahome/domainname/022098fedreg.htm>