

## CWG-IANA: ISSUES FOR INDEPENDENT LEGAL ADVICE

### Overview:

This is a request for legal advice to the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (the “CWG” or “CWG-IANA”). The CWG was formed by ICANN in response to the National Telecommunication and Information Administration’s announcement that it would transition its oversight (embodied in the IANA Functions Contract between the NTIA and ICANN) of the IANA Functions<sup>1</sup> to the “global multistakeholder community.” According to the CWG’s charter, the primary goal of the CWG *“will be to produce a consolidated transition proposal for the elements of the IANA Functions relating to the Domain Name System. This proposal may include alternative options for specific features within it, provided that each option carries comparable support from the CWG. This proposal must meet the needs of the naming community in general, including the needs of all of the CWG’s chartering organizations, as well as the needs of direct consumers of IANA naming services including generic and country code top level domains.”*<sup>2</sup>

The CWG’s work requires it to identify effective and efficient mechanisms to replace the oversight role of the NTIA with respect to the IANA Functions, as used in the domain name environment.<sup>3</sup>

The CWG believes that the NTIA’s ability to issue a contract for the IANA functions to a party other than ICANN has provided the NTIA with sufficient power (or “leverage”) to ensure that ICANN performs the IANA tasks described in the contract adequately, and provides the possibility of changing providers in the event of non-performance. Finally, the contract provides documentation for the duties and obligations of the IANA Functions operator. As such the CWG is looking to identify mechanisms which would provide similarly effective tools in the absence of the NTIA.

---

<sup>1</sup> The IANA Functions are performed by the “IANA Functions Operator” (which has been ICANN since its formation). The IANA Functions (essentially managing a “land registry”-like function of the Internet for TLD names (e.g., .com, .ca, .photo, etc.)) are a fundamental part of the domain name system (“DNS”), which in turn is a critical subset of the Internet and has been since its inception (as long as there have been domain names). With the creation of ICANN, the group performing the IANA Functions was integrated into ICANN and continued to perform its functions. As part of the overall reorganization of the administration of the Internet, the United States Government issued a contract to ICANN to perform the IANA Functions, which has been renewed several times. The NTIA currently has a fixed-term contract with ICANN to perform the IANA Functions and is looking to transition the current role played by the NTIA in key Internet domain name functions to the “global multistakeholder community.” (See <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.)

<sup>2</sup> The Charter of the CWG can be found at <https://community.icann.org/display/gnsocwgdtstwrshp/Charter>.

<sup>3</sup> The IANA Functions are also used in the context of “numbers” (i.e., IP addresses) and protocol parameters. The numbers and protocol parameters communities are developing separate proposals for the transition as it relates to their activities, and all three communities will submit their proposals to the IANA Stewardship Transition Coordination Group (ICG).

Any solution proposed by the CWG is required by the NTIA to support and enhance the multistakeholder model as well as meet the needs and expectation of the global customers and partners of the IANA functions relating to the DNS. The CWG has interpreted the NTIA’s statement that it is transitioning its role to the “global multistakeholder community” as requiring a transition to multistakeholder entity or body of some sort.

Aside from acting as the IANA Functions Operator, ICANN’s primary function is to act as the policy development coordinating body for the DNS environment.<sup>4</sup> (This dual role as policy developer and IANA functions operator is more evident in the gTLD processes than in the ccTLD processes.) Some are uncomfortable with this dual role, and the current IANA Functions Contract requires “functional separation” between ICANN’s activities as the IANA Functions Operator and ICANN’s policy activities. This discomfort arises from the view of many stakeholders that there have been a number of instances of significant interference by the ICANN Board in the interpretation and implementation of multistakeholder-developed policies. Many also take the view that there is currently no effective recourse against such actions (other than litigation). While the broader issue of ICANN’s overall accountability is the subject of another, related working group, this concern informs the work of the CWG.

A final complication is that part of the name space within the DNS is reserved for country code top level domains (“ccTLDs,” e.g., .ca for Canada). Some country code operators are governments, while others have contractual or other relationships with the country’s government. Still others have no relationship to that country’s government. Most of these country code operators do not have any type of formal agreement with ICANN. The governments of the countries or territories associated with these ccTLDs consider issues relating to the administration and transfer of ccTLDs to be matters of local law and policy (not ICANN policy), as long as the security and stability of the overall internet is not at issue. Most, if not all, ccTLDs, as well as ICANN, adhere to the policies described in RFC 1591,<sup>5</sup> which predates ICANN, for the management of ccTLDs. The creation or the transfer of responsibility of a ccTLD can be a complex, delicate and long process (some taking several years) which is difficult if not impossible to properly document in detail here. There is ongoing work towards developing a “framework of interpretation” to guide the future delegation and redelegation of ccTLDs.<sup>6</sup>

To that end, the CWG is considering proposals to address the key elements identified by CWG as important:

1. How can the possibility of changing the IANA Functions Operator in case of non-performance be retained (an option that the NTIA currently maintains through its power to issue a new RFP/award the contract to a new Operator)?
2. How to maintain documentation of ICANN’s obligations as the IANA Functions Operator?

---

<sup>4</sup> Policy is developed by relevant parts of the multistakeholder community and then provided in the form of a “recommendation” to the ICANN Board for its approval. Through private contracts with registries and registrars, ICANN then implements key parts of the DNS policy.

<sup>5</sup> RFC 1591, Domain Name System Structure and Delegation, <https://www.ietf.org/rfc/rfc1591.txt>.

<sup>6</sup> ccNSO Framework of Interpretation Working Group, <http://ccnso.icann.org/workinggroups/foiwg.htm>.

3. How do we assure that there is a requirement of separation between ICANN’s performance of the IANA functions and ICANN’s policy coordination role?
4. How can we build in effective recourse mechanisms for situations where ICANN performs the IANA functions in a manner that is not consistent with documented policies?
5. In the event of a change of Operator, how to ensure that ICANN (which would still be the policy source for gTLDs) complies/relates properly with the new Operator to ensure stability and continuity of operation?

In this context, the CWG is currently considering two types of proposals:

- An “external” solution: NTIA’s oversight and contracting role would be transferred to a new company (“Contract Co.”), which would hold the rights to grant a contract to an “IANA Functions Operator” to perform the IANA Functions. Contract Co. and ICANN would enter into a new “IANA Functions contract” granting ICANN the right to act as the IANA Functions Operator for a term of set duration. Contract Co. is proposed to be a “lightweight” limited purpose corporation with little or no staff. A “multistakeholder review team” (the “MRT”), composed of representatives of different stakeholder groups (largely selected from the ICANN multistakeholder environment), would provide direction to Contract Co., which would act in accordance with those directions. A “customer standing committee” (the “CSC”), consisting primarily of registries (but which may include a few more non-registry stakeholders), would provide day-to-day oversight of the technical and operational performance of the IANA Functions based on defined SLAs and would escalate to the MRT any performance issues it could not resolve with ICANN rapidly. The MRT would attempt to resolve issues escalated to it, and if the failure of the IANA Functions Operator to perform was material and could not be resolved, the MRT could instruct Contract Co. to terminate the contract. The MRT would also coordinate the RFP to seek a new IANA Functions Operator and the choice of the new Operator to be engaged by Contract Co. In one variation of this proposal, the RFP is proposed to occur periodically irrespective of the performance level of the current operator. Although legally effective and relatively straightforward, there are many concerns regarding capture, costs, litigation, jurisdiction, and independence in addition to possibly recreating another ICANN-like structure with all the associated costs (which the CWG strongly opposes).
- An “internal” solution: One or two new “internal-to-ICANN” groups from the stakeholder community would be created to provide oversight of ICANN’s provision of the IANA functions as the IANA Functions Operator.<sup>7</sup> In addition to concerns as to if or how effective accountability could be instituted, there is an additional concern related to the ability to separate the IANA functions from ICANN and transfer them to an outside entity if it becomes necessary (e.g., in the event of an uncured and sustained material breach). The conundrum is that ICANN cannot effectively contract with these “internal-to-ICANN” groups for the performance of the IANA functions, and would therefore have

---

<sup>7</sup> The ICANN community includes many, if not most, of the major elements of the multistakeholder community concerned with the DNS and is unique in many respects and well suited for the job.

ultimate accountability only to itself for the performance of the functions. Furthermore, it is not clear how a group that is a part of ICANN and thus subordinate to its Board and staff could effectively force the Board to divest itself of an important part of its operations. Moreover, assigning such powers to an internal-to-ICANN group does not seem to eliminate any concerns about capture, since an internal group, if it were truly autonomous, would pose the same risks of ‘capture’ as an external group. Additionally, the CWG believes that the ICANN Bylaws do not currently provide adequate mechanisms that could replace the key elements of enforcement and security provided by the current contracting arrangements and wonders whether such can be achieved. Finally, the documentation regarding duties and obligations of the IANA Functions Operator, which currently resides in the IANA Functions Contract, would need to be set forth in some other documents and in a binding fashion.

In order to move forward effectively, the CWG needs advice from corporate governance and corporate structure legal experts, with experience in California law generally and California non-profit corporations law specifically. Questions arising from the two solutions above include, without limitation:

1. Board Decisions: What are the options available to allow a multistakeholder body to (a) mandate, (b) overrule, or (c) take a binding appeal from, a particular Board decision?
  - a. If these options are not legally available in California, what are the closest available alternative options in California?
  - b. If these options are not legally available in California, are there other jurisdictions (foreign or US) where they may be available (or where there are better alternative options)?
  - c. What are the types of situations where it is appropriate (or inappropriate) for the acts of a Board to be subject to binding oversight, be it through mandate, overrule or binding appeal, etc.? (*i.e.*, are there particular levels or types of decisions for which that would be appropriate?)
  - d. Could that binding oversight requirement be incorporated into the Bylaws or Articles of Incorporation? If so, how can it be protected from being changed by the Board?
  - e. What would the characteristics of that “oversight” accountability group look like (multistakeholder body? non-profit membership? arbitral panel? etc.))
  - f. NOTE: All options should be under consideration, including changing the form of the corporation (e.g., membership organization, moving away from Public Benefit Corporation), changing bylaws (e.g., “golden share/bylaw”; requiring “consensus against” by the Board to reject a change mandated by the “community”), change in jurisdiction, etc.
2. Replacing the Control and Binding Nature of a Contract: Currently, ICANN is under contract to the NTIA to perform the IANA Functions. If the NTIA (in the role of contracting party) is replaced by the “global multistakeholder community,” how can that community have an arrangement with ICANN (or the IANA Function Operator directly) that replicates the control and binding nature of the IANA Functions contract?
  - a. What documentation would be needed?

- b. What structures would be needed?
  - c. NOTE: Consider this in light of (i) having all structures and documents “internal to ICANN” or (ii) having some structures and documents be “external to ICANN.”
- 3. Jurisdictional Issues: While this is not an initial focus of our request for legal advice, if a “Contract Co.” is to be established, we will need to explore whether California, another US jurisdiction (e.g., Delaware or New York), or another country would be the most appropriate domicile for Contract Co. As such, we will need to understand the “pro’s and con’s” of several jurisdictions. Also, as noted in Section 1 above, we may need to determine whether other jurisdictions will allow greater multistakeholder control of the Board, if California does not offer sufficient avenues for such control.
- 4. Structure of Contract Co.:
  - a. How can Contract Co. be created and continue to exist as a “bare bones” entity with little or no staff, and with a Board that has no mandate to do anything but follow orders from the MRT?
    - i. If the above is not possible as stated, how can Contract Co. be structured to come as close as possible to this model?
  - b. Could Contract Co. be an unincorporated association?
  - c. If Contract Co.’s Articles and Bylaws are drafted to give it a very narrow remit, and to ensure that its Board cannot change that remit, how can Contract Co. change to adapt to unforeseen circumstances?
  - d. What steps should be taken to protect Contract Co. from capture or acquisition at any time?
  - e. How (and to what extent) can Contract Co. be protected from bankruptcy?
  - f. How can Contract Co. retain its rights with regard to the IANA Functions if it enters bankruptcy?
- 5. Structure of MRT: The MRT is not expected to be an incorporated entity, but rather a “committee” (or something similar) with no specific parent or legal status, if possible.
  - a. How can the MRT’s multistakeholder character be ensured (e.g., by Charter, Contract Co. bylaws, etc.)?
  - b. Could members of the MRT be held individually liable in the event of litigation (e.g., a losing bid in an RFP), and how can that liability be minimized?
  - c. Would the MRT need to have a particular legal structure in order to be the source of Contract Co.’s instructions?
- 6. Relationship of MRT to Contract Co.
  - a. How can Contract Co. be obligated to take the direction of the MRT? Through By-Laws, by contract or otherwise?
  - b. Should the MRT be a part of Contract Co. (e.g., a committee, or its members, or even its Board)?
- 7. Potential Trust Structure. Could, or should, Contract Co. be replaced in the proposal by a Trust established under U.S. law?
  - a. Could the Trust be registered with a U.S. court to ensure that the terms of the Trust will at all times in the future be met?

- b. Could the Trust have a Board of Trustees selected from the global internet community?
  - c. Could the Trust receive an assignment from the NTIA of the IANA Contract or all the US government's rights and duties thereunder the "IANA contract"?
  - d. Could the Trust be set up to have as its primary purpose and duty to ensure the continuous operation of a free, open, secure, and stable global internet DNS, including the Internet Root Zone, by the selection of an IANA Functions Operator (presently ICANN), for a term of years (subject to termination for cause), and such other terms, conditions, and covenants necessary or convenient, in order to carry out the purpose of the Trust and the duty of the Trustees thereof to act at all times in the wider public interest of the global internet community?
8. Potential Community Organization Structure. Could Contract Co. be replaced in the proposal by an "Internet Community Association" ("ICA")?
- a. Could the ICA be a lightweight, unincorporated organization, with a specific very limited purpose to award an MoU to an entity to act as the IANA Functions Operator?
  - b. How can the multistakeholder community determine which entity, if chosen as IANA Functions Operator, can best serve the technical requirements of the Registry operators (ccTLDs and gTLDs) and the multistakeholder community? Can this determination be made solely by Registry operators?
  - c. If the IANA Function Operator uses or abuses its position to the detriment of one or more Registry Operators (as determined by either the CSC, the MRT, or some external party) could such determination trigger a process to find a new IANA Functions Operator? What are the risks of such a process?
  - d. Could this concept be designed to provide less opportunity for empire building vs. Contract Co.?
  - e. Would this "ICA" be less of a legal target than an incorporated Contract Co.?
9. Contract: Can one party indemnify the other relating to the costs of litigation between the parties? Will this be enforceable if the litigation relates to the validity of the contract and the contract is found to be invalid? What is the difference between a contract and a Memorandum of Understanding?
10. Antitrust Risk: If the CSC is primarily made up of registries, does the CSC risk violating antitrust/competition law by acting or even by meeting? If the MRT is "captured" by registry interests, does the MRT risk violating antitrust/competition law by acting or even by meeting?