

CWG-IANA: LEGAL ISSUES FOR INDEPENDENT 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”). 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) of the IANA Functions¹ 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.”*²

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, which are performed by ICANN.

The CWG believes that NTIA’s ability to issue a contract for the IANA functions to a party other than ICANN provided the NTIA with sufficient power to ensure that ICANN performed the IANA tasks described in the contract adequately, and provided 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.

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

¹ The IANA functions (essentially managing a “land registry”-like function of the Internet for TLD names (e.g., .com, .ca, .photo)) 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 IANA group 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 asserted control over the Internet and 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 its responsibilities to an appropriate non-governmental organization.

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

partners of the IANA services which the CWG has interpreted as requiring a multistakeholder entity.

ICANN is primarily the policy development body for the DNS environment, in addition to being the IANA Functions operator which implements key parts of the DNS policy. Some are uncomfortable with this dual role, especially considering that certain elements of the ICANN multistakeholder community have documented what they consider to be significant interference of the ICANN Board in the interpretation and application of policies in an environment where many consider there is no effective recourse against such actions beyond the courts. It should be noted that while ICANN accountability (as IANA Functions operator) is a core issue for the CWG, ICANN accountability generally is the subject of another, related working group.³

A final complication is that part of the DNS is reserved for country code top level domains (ccTLDs, e.g., .ca for Canada). 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 them to be sovereign property to be administered according to local law, 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 RFC1591,⁴ 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.

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

- The rights to the NTIA functions would be transferred to a new company (“Contract Co.”), which would hold the rights to allocate the IANA Functions to ICANN as a contractor, thus essentially replacing the NTIA in an IANA Functions contract. Although legally effective and simple there are many concerns regarding capture, costs, litigation, jurisdiction in addition to possibly recreating another ICANN like structure with all the associated costs (which the CWG strongly opposes).
- The rights to the NTIA functions would be transferred to ICANN. One or two new “internal-to-ICANN” groups from the stakeholder community would be created to provide oversight of the IANA functions provided by ICANN.⁵ A simple and efficient solution, but there are many concerns as to if or how effective accountability could be instituted. An additional concern is the ability to transfer the IANA functions outside of ICANN if it becomes necessary. The conundrum is that if ICANN, a California public benefit non-member corporation, is selected as the entity for the transition it becomes accountable to itself in a situation where there can be no contract. Additionally the

³ The issue of how to hold ICANN (as the IANA Functions operator) accountable is at the core of the CWG’s task.

⁴ <https://www.ietf.org/rfc/rfc1591.txt>

⁵ 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.

ICANN Bylaws do not currently provide adequate mechanisms that could replace the key elements of enforcement and security provided by the current contracting arrangements.

In order to move forward effectively, the CWG need advice from a corporate governance and corporate structure legal expert, with experience in California law generally and California non-profit corporations law specifically. Questions arising from the 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?
 - b. If these options are not legally available in California, are there other jurisdictions (foreign or US) where they may be available (or where better alternative options)?
 - c. 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 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: If a “Contract Co.” is 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 home. We will need to determine the “pro’s and con’s” of several jurisdictions.