

CWG-IANA: ISSUES FOR INDEPENDENT LEGAL ADVICE

Overview:

This “scoping document” has been prepared to support a request to engage counsel to provide 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 of the IANA Functions¹ to the “global multistakeholder community.”²

According to the CWG’s charter, the primary goal of the CWG *“will be to produce a consolidated transition proposal for [the NTIA’s oversight of] 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.”*³

The NTIA’s oversight is embodied in the “IANA Functions Contract” between the NTIA and ICANN. At the end of each contract term, the NTIA has had the option to issue a new RFP and potentially issue the contract to a party other than ICANN. The CWG believes that this has provided the NTIA with power (or “leverage”) to ensure that ICANN performs the IANA tasks described in the contract adequately. The Contract also serves as documentation for the duties and obligations of the IANA Functions operator.

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.⁴ (This dual role as policy

¹ The IANA Functions are performed by the “IANA Functions Operator” (which has been ICANN since its formation in 1998). 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, 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>.)

² The IANA Functions are also used in the context of “numbers” (i.e., IP addresses) and protocol parameters. The numbers and protocol parameters communities have developed draft proposals for the transition as it relates to their activities, and all three communities must submit their proposals to the IANA Stewardship Transition Coordination Group (“ICG”), which will in turn submit a coordinated proposal to the NTIA.

³ The Charter of the CWG can be found at <https://community.icann.org/display/gnsocwgdtdstwrdsbp/Charter>.

⁴ 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.

developer and IANA Functions Operator is more evident in the gTLD⁵ processes than in the ccTLD⁶ 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 instances of significant interference by the ICANN Board in the interpretation and implementation of policies developed through the multistakeholder policy development process. 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 a Cross-Community Working Group on Enhancing ICANN’s Accountability, this concern also underlies the response of the CWG to its tasks.

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 themselves, while others are quasi-governmental or private operators who may or may not have contractual or other relationships with the 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 1591,⁷ 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 beyond the scope of this document. There is ongoing work towards developing a “framework of interpretation” to guide the future delegation and redelegation of ccTLDs.⁸

The CWG’s Responsibilities

The CWG must identify processes and structures to replace the NTIA in its oversight role, while ensuring that ICANN’s performance of the IANA functions continues smoothly and without interruption. At the same time, any solution proposed by the CWG is required by the NTIA to support and enhance the multistakeholder model and to meet the needs and expectation of the global customers and partners of the IANA functions relating to the Domain Name System (“DNS”).

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

1. Maintaining “separability” (i.e., the ability to replace ICANN as the IANA Functions Operator in the event of significant performance failures, and through the potential of RFPs at the end of a contract term (or a similar fixed term of years)).

⁵ gTLDs are generic Top Level Domains such as .com, .biz, .web, etc.

⁶ ccTLDs are country code Top Level Domain names such as .uk (for the United Kingdom or .de (for Germany).

⁷ RFC 1591, Domain Name System Structure and Delegation, <https://www.ietf.org/rfc/rfc1591.txt>.

⁸ ccNSO Framework of Interpretation Working Group, <http://ccnso.icann.org/workinggroups/foiwig.htm>.

2. Continuing to have binding documentation of ICANN's duties and obligations as the IANA Functions Operator and the rights and obligations of the NTIA's successor (currently set forth in the IANA Functions Contract).
3. Maintaining separation between ICANN's performance of the IANA functions and ICANN's policy coordination and implementation role.
4. Creating effective independent review and redress mechanisms for instances where ICANN's performance of the IANA functions fails to adhere to documented policies.
5. In the event of a change of IANA Functions Operator, ensuring that interactions between ICANN (as the policy source for gTLDs) and the new Operator maintain the stability and continuity of the IANA Functions.

Types of Proposals Under Consideration by the CWG

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 non-profit corporation ("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" 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" ("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" ("CSC"), consisting primarily of registries (and possibly some 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 in the event of an uncured and sustained material breach that could not be resolved through processes set forth in the Contract, the MRT could instruct Contract Co. to terminate the contract (the so-called "nuclear option"). 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 at the end of each term irrespective of the performance level of the current operator; in another variation, this would be left to the discretion of the MRT. There would also be an Independent Review Panel where certain actions of the IANA Functions Operator could be appealed. Although the CWG believes that this proposal is legally effective and relatively straightforward, concerns have been raised regarding "capture," costs, litigation, jurisdiction, and independence and the possibility that this could create another ICANN-like power structure (which the CWG strongly opposes).
- An "Internal" Solution: The CWG is also considering proposals where there is no external entity granting ICANN the right to act as the IANA Functions Operator. In one variation, ICANN would be the IANA Functions Operator, and MRT and CSC-like

substructures internal to ICANN would provide oversight of ICANN's performance of the IANA functions as the IANA Functions Operator. In another variation, ICANN would act as a "Trustee" and hold the IANA Functions (or the right to act as the IANA Functions Operator) in trust. The beneficiaries of the trust could be the multistakeholder community generally or only the registries. There would be a "Guardian" with powers analogous to the MRT, including the power (under the Declaration of Trust) to dictate outcomes to the trustee (i.e., ICANN). An "internal-to-ICANN" CSC-like body would perform day-to-day oversight, as in the "external" models. Under these "internal" solutions, there are concerns regarding (1) the institution and effectiveness of accountability processes internal to ICANN, (2) possible difficulties in separating the IANA functions from ICANN so that a third party could act as the IANA Functions Operator if it becomes necessary (e.g., in the event of an uncured and sustained material breach), (3) enforcing accountability in the absence of a contract (assuming that ICANN cannot effectively contract with these "internal-to-ICANN" groups for the performance of the IANA functions), (4) 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, (5) capture, (6) the lack of adequate mechanisms in the ICANN Bylaws that could replace the key elements of enforcement and security provided by the current contracting arrangements, and (7) how to document the duties and obligations of the IANA Functions Operator, which currently reside in the IANA Functions Contract.

In order to move forward effectively, the CWG needs advice from corporate governance, corporate structure and trust law legal experts, with expertise in California law generally and California non-profit corporations law specifically. Questions arising from the proposals 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 (and to what extent) can Contract Co.’s financial liability be limited?
 - g. How can Contract Co. retain its right to act as the IANA Functions Operator 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?
 - d. What types of structures could the MRT adopt? Could these be applied to the CSC?
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.
- a. Could ICANN hold its right to act as the IANA Functions Operator (or the IANA Functions themselves) "in trust"?
 - b. Under what circumstances would a trust be considered an entity?
 - c. Could Contract Co. be replaced in the proposal by a trust?
 - d. Could such a 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?
 - e. Can ICANN be the Trustee?
 - f. Could the Trust have a Board of Trustees selected from the global internet community?
 - g. Is the concept of a trust "Guardian" recognized under California law (or the law of other U.S. jurisdictions), perhaps under another name (e.g., "trust protector")?
 - h. What kind of group or organization can serve as a "Guardian"?
 - i. Could the Trust (or the Trustee) receive an assignment from the NTIA of the IANA Contract or all the US government's rights and duties thereunder the "IANA contract"?
 - j. Could a trust be set up to hold the right to the IANA Functions Operator role, and have the ability to select an IANA Functions Operator (presently ICANN), for a term of years (subject to termination for cause), subject to other terms, conditions, and covenants necessary or convenient to carry out the purpose of the Trust?
8. Potential Community Organization Structure. Could Contract Co. be replaced in the "external" 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. Can an unincorporated organization enter into an MoU?
 - c. What is the difference between an MoU and a contract?
 - d. Could the members of the ICA be limited to registry operators?
 - e. Would it be appropriate for registry operators, acting alone to 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? How can the multistakeholder community have input into this decision?

- f. Would this “ICA” be less of a legal target than an incorporated Contract Co.?

9. Antitrust Risk: If the CSC is primarily made up of registries, does the CSC risk being considered a “cartel” that violates 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?
10. Accountability without the “Nuclear Option”: How can ICANN be held accountable for its performance as IANA Functions Operator if there is no possibility of removing ICANN from the role of IANA Functions Operator, with the same strength as a system where the “nuclear option” is available? Are there models where ICANN would be subject to punitive and corrective directives, “terms of commitments, whereby ICANN would be subjected to corrective and punitive directives but never removed from the assigned role of IANA functions operator.
11. Protection or Immunity from Litigation: Can Contract Co. (or other entities, such as the MRT, CSC, Trust or ICA) be insulated from some or all litigation? If so, what is the effect on accountability of these entities?
12. 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?