

MEMORANDUM

TO: Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Litigation Risk and Bylaws Provisions on Human Rights

DATE: January 13, 2016

This memorandum¹ responds to the question certified to us on January 11, 2016,² as to whether the inclusion of bylaw provisions regarding human rights would increase ICANN's exposure to litigation risk in comparison to ICANN's current governing documents (including article 4 of ICANN's existing articles of incorporation).³ We provide our response in question and answer format and include comments on what might be done to further mitigate risks related to the inclusion of human rights bylaws provisions.

Background

The CCWG-Accountability Third Draft Proposal on Work Stream 1 Recommendations (30 Nov. 2015) recommended the adoption of a bylaw affirming ICANN's commitment to human rights. The proposed bylaw language is as follows:

“Within its Mission and in its operations, ICANN will respect internationally recognized human rights. This commitment does not in any way create an obligation for ICANN, or any entity having a relationship with ICANN, to protect or enforce human rights beyond what may be required by applicable

¹ Note as a general matter that our legal analysis is provided on a level in keeping with the question posed. Our legal analysis is tailored to the context in which the particular question arises. It is provided to inform and help facilitate your consideration of the governance accountability models under discussion and should not be relied upon by any other persons or groups for any other purpose. In our effort to respond in a limited time frame, we may not have completely identified, researched and addressed all potential implications and nuances involved.

² On January 11, 2016, the issue was certified to us as follows: “In their comment to the 3rd CCWG draft report the ICANN Board has raised concerns that the proposed inclusion of language in the bylaws with respect to human rights might lead to an increased risk of ICANN being exposed to legal claims or even law suits. We would appreciate if you could provide us with a brief assessment whether the inclusion of these bylaws as proposed in the 3rd draft report would increase the risk of ICANN being exposed to legal claims or even law suits vis a vis the current situation (taking into account the existing obligations under article 4 of ICANN's articles of incorporation), and if so, how such risk could be mitigated.

³ Article 4 of ICANN's current articles of incorporation provides as follows: “The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.”

law. In particular, this 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.”

Even though the language specifies that this bylaws provision does not expand ICANN’s obligation beyond what is required by law, concerns have been expressed by the ICANN Board that including human rights provisions in the Bylaws could increase the likelihood that ICANN would be subjected to litigation regarding human rights. Given that the proposed bylaws provision does not create any legal cause of action that does not already exist, we believe that this concern lacks any significant legal basis.

Question 1: What are ICANN’s existing obligations to uphold human rights?

As noted in our July 29, 2015 memorandum,⁴ many human rights (such as those regarding working conditions and hours for employees, nondiscrimination, and otherwise) are protected by statutory provisions in the United States and other countries in which ICANN operates. ICANN is required to comply with such laws already, but it is otherwise not legally required to do more than the such laws mandate regarding human rights.

As further noted in our memorandum, it is common for corporations to adopt internal rules for ethical conduct, corporate responsibility goals or other aspirational standards for operations. From a general U.S. and California law perspective, these tools to promote higher standards of ethics and corporate responsibility generally do not create rights for third parties to prosecute claims against the corporation. Of course, under certain circumstances an injured party having standing may bring a claim for liability for fraud or deception based on intentionally false or deceptive statements, but there is no reason to think that the bylaws provision about ICANN’s human rights commitment would be intentionally false or deceptive when made.

The language proposed for the human rights bylaws provision is intended to clarify that while ICANN may seek to abide by a higher standard than the law requires, no additional legal obligation arises that would provide persons or entities a right to bring suit against ICANN seeking liability related to this bylaw provision.

Question 2: Will adoption of a bylaw regarding respect for human rights increase the likelihood of legal claims against ICANN for violation of human rights?

As noted above, codes of corporate conduct and corporate responsibility, and similar internal corporate documents do not generally create rights for third parties to bring litigation against a corporation (in the absence of fraud or deception). Moreover, ICANN’s existing articles of incorporation, which include directions to ICANN to benefit the Internet community as a whole and comply with applicable laws, already arguably contain commitments as broad as the proposed commitment to respect human rights. Indeed, at least some human rights arguably are already implicated by ICANN’s existing commitment to benefit the Internet community. Given the limiting language in the proposed bylaw provision that specifically disclaims the creation of

⁴ Response to Questions Regarding ICANN’s Human Rights Obligations ([Link](#))

any new legal obligation beyond what ICANN is already subject to, the proposed provision should not increase ICANN's exposure to litigation risk in any significant way. It should not increase third-party claims, except to the extent that ICANN itself provides an internal enforceable procedure for bringing claims that is not limited to claims based on applicable law. To the extent that the concern is how ICANN's own internal dispute resolution systems may be misused, consideration should be given to whether, and if so how to limit the use of such systems in relation to the human rights bylaw provisions, as suggested below.

Question 3: What steps might ICANN take to further mitigate the risk of claims?

As drafted, the proposed human rights bylaw provision would limit legal claims by expressly noting that it is not intended to create any obligation for ICANN or parties dealing with ICANN to take any steps beyond the requirements of the laws to which ICANN or such parties are already subject and disclaiming any obligation to respond to claims regarding human rights. We recommend that this protective language be maintained.

In addition, consideration could be given to expressly limiting the jurisdiction of any internal dispute resolution systems within ICANN (such as the IRP) to preclude claims of human rights violations that are not grounded in a specific violation of an applicable law.

Conclusion

While the addition of the proposed human rights bylaw provision should not increase the exposure of ICANN to legal liability, we recognize that special interest groups and individuals might seek to bring non-meritorious claims, but the risk of meritless claims is already a risk that ICANN faces.