



Comment of the Intellectual Property Constituency on the Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1)

The GNSO Intellectual Property Constituency (IPC) appreciates the opportunity to comment on the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) 2nd Draft Report (Work Stream 1). The IPC has previously commented on the CCWG-Accountability First Draft Report.¹

1. Bylaws Amendment on the “Regulation” of “Content”

As IPC stressed in its comments on the preceding version of the CCWG-Accountability report, “the risk of ICANN’s failure to consistently and transparently enforce contracts must be effectively addressed in any accountability framework.” The revised report does not accomplish this. In fact, it moves in precisely the wrong direction compared to the previous draft. Comments on the previous draft from IPC highlighted the need to ensure that amended by-laws restricting ICANN from “regulating services or content” were made explicitly inapplicable to ICANN contract compliance efforts. Not only was this change not made (pp. 25-26), the draft has moved in the opposite direction, privileging challenges to ICANN contractual authority (such as by recognizing the specious stress tests #29 and 30, discussed in more detail below) while relegating the obligation to exercise that authority to much weaker review mechanisms such as reconsideration.

The substitution of contractual controls for governmental regulatory regimes is the cornerstone of the multi-stakeholder model. That cornerstone will support the superstructure of management of key Internet resources only if the contracts that constitute that management are vigorously enforced. The changes to ICANN’s bylaws proposed by CCWG-Accountability entirely ignore this fundamental principle. IPC has concluded that in order to achieve the meaningful accountability framework that must accompany the IANA functions transition, ICANN’s bylaws must be amended to include an explicit recognition of ICANN’s responsibility to enter into, interpret and enforce contracts in order to fulfill its mission. This recognition must be enshrined in ICANN’s organic document so that enhanced accountability mechanisms such as the IRP (see p. 39 for scope of enhanced IRP) are available when the corporation fails to discharge this responsibility and does not enforce its contracts.

Ironically, the CCWG report seems to take the position that those claiming to be injured when ICANN does enforce its contracts, or does so “strongly,” could invoke the enhanced IRP (see p.

¹ <http://www.ipconstituency.org/storage/position-statements/IPC%20comments%20on%20CCWG-Accountability.pdf>

112, stress test #29), but that those harmed by contact compliance omissions or shortfalls could not. This is entirely backwards. Contract enforcement should be identified as one of ICANN's core responsibilities, not targeted as a risk that must be guarded against.

2. Proposed Bylaws Amendment on ICANN and Human Rights

In this Second Draft Report, the CCWG has introduced a proposed Bylaw amendment on ICANN's responsibilities relating to Human Rights. While Human Rights are a laudable concern, this proposed Bylaw suffers from being introduced rather late in the process. There is no explanation or framework or interpretive guidance in the Report; just a couple of spare paragraphs. This is not sufficient to support a Bylaws amendment of potentially far-reaching consequences. One thing that needs to be made clear is that this Bylaw amendment is being introduced to replace the NTIA's role as a backstop and guardian of Human Rights; it is not intended to expand ICANN's Human Rights obligations. The CCWG must develop an appropriate framework so that it is clearly understood what the intent and effect of this Bylaw is, and what it isn't. The IPC would be hard pressed to support a Bylaws amendment without this type of supporting documentation.

With regard to the specific Bylaws proposed, the IPC would support the second option (assuming appropriate documentation is developed). The first option is highly inappropriate; the CCWG should not "cherry-pick" a couple of human rights and leave the rest behind. Human Rights conventions, treaties and declarations have been developed in a comprehensive and interrelated fashion, and ICANN should respect the full suite of Human Rights, e.g., the Universal Declaration of Human Rights.

3. Bylaws Amendments on Mission, Commitments and Core Values

The IPC generally agrees with recommended changes to ICANN's Mission, Commitments, and Core Values, which help create a culture of accountability within the organization. However, the IPC has some specific concerns.

First, in paragraph 193-195, the CCWG has eliminated language related to the balancing of one Commitment against another, or balancing a Commitment against a Core Value. This takes away some needed flexibility from the Board in order to deal with overlapping and potentially conflicting Commitments.

Second, the IPC is concerned about repeated references to ICANN's "limited technical mission" or similar phrases. The IPC does not support broadening ICANN's scope. However, these phrases are often invoked in attempts to limit or remove intellectual property protections. In combination with the repeated admonitions against "content regulation," the IPC is concerned

that there is a web of revisions in this Report intended to be used to weaken intellectual property protections and intellectual property rights.

Third, the IPC notes that the First Draft Report of the CCWG stated (in para. 337 of the First Draft Report) that the following “commitment” (in para. 336 of the First Draft Report) would be added to the Core Values: *“ICANN will ensure that as it expands the Top-Level Domain (TLD) space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.”* This was a fairly direct transposition of Section 9.3 of the Affirmation of Commitments, which reads *“ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation.*

However, it appears that this section has been “demoted” in the Second Draft Report, and will no longer become a “Core Value.” A few pieces survived the demotion – specifically, “security, stability and resiliency” are reflected in para. 199 and “competition” is reflected in para. 218. However, “malicious abuse issues, sovereignty concerns and rights protection” no longer make the grade. These concerns continue to be accounted for in the review process (para. 566), but this is not sufficient. The concern here is as the proposed IRP will judge the merits of cases it reviews against the standard of ICANN’s Mission, Commitments and Core Values; as such, it is important this missing language be explicitly listed in the Core Values section. The IPC requests that this change be made.

4. Bringing the Affirmation of Commitments into the Bylaws.

IPC strongly supports the concept of incorporating into the ICANN Bylaws key provisions of the 2009 Affirmation of Commitments (AOC) signed by ICANN and the U.S. Department of Commerce. However, we have significant concerns about some aspects of how this concept is implemented in the current Proposal, including:

a. Incorporation of Section 8(b) of the AOC. In Section 8(b) of the AOC, ICANN committed to “remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community.” This commitment is critical to ICANN’s accountability and to the continued applicability of U.S. law to its major agreements and contracts. Previous comments from the IPC (and others) called for the substance of section 8(b) of the AOC to be included as a Fundamental Bylaw of ICANN, which can only be changed with the support of a supermajority of the community. This has not been done. The explanation provided for failing to do so (see p. 36) is not persuasive. The fundamental problem is that if the commitment to maintain status as a U.S. non-profit corporation is relegated to the status of a

normal (as opposed to Fundamental) bylaw, then it can be changed by the ICANN Board, even if a majority of the community (as constituted in the Community Mechanism as Sole Member) disagrees. IPC urges that the substance of Section 8(b) be embodied in a Fundamental Bylaw so that only a supermajority of the Board and the community can change it.

b. Incorporation of Section 7 of the AOC. Section 7 commits ICANN to several critical transparency and accountability mechanisms, including “to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and ... to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.” Section 7 is omitted from the list of “relevant ICANN commitments” that would be enshrined in the ICANN Bylaws (p. 72, para. 504). This needs to be explained (e.g., if the commitments are already covered elsewhere) or corrected.

c. Changes to the AoC reviews.

As noted above, the IPC strongly supports the incorporation of the AoC into the ICANN Bylaws, including the incorporation of the various AoC-mandated reviews.² That said, the IPC remains concerned about the composition of these AoC review teams. According to the Second Draft Report, “community stakeholder groups should appoint their own representatives to the review teams.”³ The IPC is concerned that appointment of AoC review team representatives at the stakeholder group level (as opposed to the constituency level) may undermine the full diversity of community participation in these critical review processes, and marginalize these stakeholders, particularly from non-contracted parties. Therefore, the IPC strongly recommends that the CCWG report clarify that community stakeholder groups and constituencies appoint their own representatives to AoC review teams.

Further, the IPC notes that the proposed Bylaw text regarding these periodic reviews proposes that each SO and AC participating in the review may suggest up to 7 prospective members for the review team,⁴ but that the SO and AC chairs will select a group of up to 21 Review Team members to include up to 3 members from each participating SO and AC.⁵ This would suggest that the GNSO would be able to propose one representative for each of its 7 stakeholder groups

² Namely the Accountability & Transparency Review; Security, Stability, and Resiliency Review; Competition, Consumer Trust, and Consumer Choice Review; and the WHOIS/Directory Services Review. See Second Draft Report, at 77-81.

³ See Second Draft Report, at 72 n.508 (emphasis added).

⁴ See Second Draft Report, at 74 n. 514 (“Review teams are established to include both a fixed number of members and an open number of participants. Each SO and AC participating in the Review may suggest up to 7 prospective members for the Review Team.”).

⁵ See Second Draft Report, at 72 n. 514 (“The group of chairs of the participating SOs and ACs will select a group of up to 21 Review Team members, balanced for diversity and skills, to include up to 3 members from each participating SO and AC.”).

and constituencies, but that the ultimate composition of the review team would be limited to 3 members of the GNSO, and therefore would not contain a representative of each stakeholder group and constituency. Again, the IPC is concerned that this proposal for constituting the AoC review teams may marginalize community voices, particularly among non-contracted parties, in these vital accountability processes, and could result in capture by certain portions of the community, particularly contracted parties, over these processes.

In addition, the IPC reiterates concerns expressed in its public comments on the CCWG's First Draft Report that this mechanism may tend to dilute GNSO influence in the context of the AoC reviews, even though the GNSO would likely be disproportionately affected by the outcomes of many of the reviews.⁶

Therefore, the CCWG-Accountability should reconsider this proposal to ensure that AoC review teams are comprised of the full complement of community representatives at the stakeholder group and constituency level, and that participation in particular reviews is reflective of all stakeholders affected by the subject of the review.

In addition, the IPC supports the continued inclusion of WHOIS/Directory Services review criteria as currently reflected in the AoC.

The IPC also hopes to clarify that any recommendations put forth by the CCWG should not affect any AoC reviews currently in process, and that any such reviews slated to begin in the next calendar year not be halted or otherwise affected by the CCWG-Accountability process.

5. Single Member Model

The IPC generally supports the "Single Member Model." However, the IPC is concerned that it is not explained in sufficient clarity and detail, especially the interplay between the "Community Mechanism" and "Community Forum." This has left the Report open to undue criticism. We encourage the CCWG to further clarify and explicate the workings of the Single Member Model. We also reiterate the concerns expressed in our previous (June 3) comments (pp. 9-10) about the proposed weighting of votes in the Single Member Model, most of which remain unanswered in the current version of the proposal.

While the IPC strongly supports the Single Member recommendation, it is not yet clear whether the GAC and/or the ALAC will participate in that model. Therefore, the IPC reserves the right to provide further comment on the functioning of the model depending on whether or not one or both of these Advisory Committees will participate as a voting body in the Sole Member. In this

⁶ Cf. Comments of the IPC on the Initial Draft Proposal from the CCWG-Accountability, at 9.

regard, the IPC believes that the resulting impact on the voting structure must be addressed prior to the adoption of a CCWG Final Report.

6. Independent Review Process

The IPC generally supports the changes to the IRP as well. However, we continue to have concerns relating to a potential “tyranny of the majority.” First, it is important to maintain the ability for stakeholder groups, constituencies and other subsets of larger stakeholder organizations to challenge Board decisions even if the majority does not support such a challenge. Second, it is important to have checks and balances available to avoid or temper situations where the majority attempts to commence an action on behalf of the “community” where a minority does not support such actions.

7. Stress Test 18 and the GAC

Stress Test 18 has been the subject of much discussion and a good deal of criticism, much of it misplaced. In the view of some, Stress Test 18 inappropriately interferes with the GAC’s ability to set its voting thresholds. However, it does no such thing. It merely states that, if the GAC chooses to lower its voting thresholds from the current “consensus” requirement, its advice will no longer be entitled to the deference that consensus advice receives. The GAC is thus free to change its voting thresholds as it sees fit. It is eminently logical that a lower level of support in the GAC should translate to a lower level of deference for such advice. The IPC supports the approach of the CCWG with regard to the GAC voting thresholds and Stress Test 18.

8. Stress Test 29 and 30

Stress Tests 29 and 30 are new and troubling additions to the Second Draft Report. They are based on the disturbing premise that there are “contract provisions [in the current Registrar Agreement] that exceed the limited mission of ICANN.” Although the introduction alludes to multiple provisions, both Stress Tests focus on a single provision, the section that requires registrars to deal with reports of abuse.

Stress Test #29 sets out the following hypothetical scenario: “ICANN strongly enforces the new gTLD registrar contract provision to investigate and respond to reports of abuse, resulting in terminations of some name registrations.” The Report says that the “Consequence” of this action is that “ICANN effectively becomes a regulator of conduct and content on registrant websites.” The IPC vigorously disagrees with this purported “Consequence” and with the idea that this should be considered a “Stress Test.” Enforcement of agreed-upon registrar contracts, which were adopted after considerable community discussion and input, is simply not “regulation” under any circumstance. Furthermore, the link between ICANN’s enforcement of registrar agreements and termination of name registrations by registrars is tenuous at best. Registrars

should be investigating and responding to reports of abuse whether or not ICANN specifically “enforces” that provision. If “some name registrations” are terminated as a result of abuse investigations, that is because registrars have found legitimate instances of abuse, not because ICANN has “enforced” the registrar agreement, much less acted as a “regulator.”

Stress Test #30 is more of the same. Here the hypothetical scenario is that “ICANN terminates registrars for insufficient response to reports of copyright abuse on registered domains,” while the Consequence is the same as #29. This Stress Test is also deeply flawed. First, ICANN can only terminate a registrar for an “insufficient response” if that failure to respond rises to the level of a material breach of its registrar agreement. If a registrar’s behavior deviates so substantially from contractual compliance, then termination (after exhaustion of all of the extensive procedures provided by the contract) seems like an appropriate resolution of a real problem, not a troublesome “consequence” to a “stress test.”

The IPC rejects these two Stress Tests and the assumptions underlying them. As such, the IPC believes that these two Stress Tests should be removed from the Final Report. Furthermore, the use of the “limited mission” text -- to be added to the ICANN “Bylaws -- in an attempt to exclude or dilute valid contractual provisions casts a poor light on that proposed Bylaws provision. The CCWG needs to clarify that the “limited mission” text is not simply a pretext intended to provide ammunition to those who wish to eliminate or weaken intellectual property protections.

9. NTIA Stress Tests

Conversely, the IPC welcomes the addition of the NTIA-inspired stress tests. That said, they need some work. In Stress Test #32, paragraph 976 refers to a situation where “only 2 or 3 SO/ACs vote” but concludes this would be okay if the GNSO, ccNSO, ALAC and ASO were all among the voters. It is hard to see how all four SO/ACs could be among the voters if only 2-3 are voting. This casts doubt on the conclusion of this Stress Test.

Stress Test #33 regarding “internal capture” is far from hypothetical, in the view of the IPC. Rather, it reflects ongoing concerns in the ICANN of today. The Accountability Measures proposed by the CCWG are less than satisfactory. The prime difference between the measures available today and those available under the CCWG proposal is that the disenfranchised SO/AC members could institute a reconsideration or IRP after the Board adopts the “captured” policy recommendation. What measures would be available while the capture is afoot? Why do the disenfranchised have to sit powerless until the capture plays out to its conclusion? Furthermore, what if the vote of the “captured” SO/AC is not one that leads to a Board action, but is rather a vote on a “Community Power”? What is the solution then? These issues need to be resolved in a more satisfactory manner.

10. Conclusion

The IPC thanks the CCWG for the incredible hard work and dedication of its participants, and particular its Co-Chairs and Rapporteurs. The relatively brief comments from IPC reflect a generally high degree of satisfaction with the Second Draft Report.

However, the concerns we have expressed are substantial and significant to the IPC. In particular, there is a certain strain of animosity toward intellectual property rights and protections (stretching from the fixation with “content” “regulation” through Stress Tests 29 and 30 and into the cherry-picked version of the Human Rights bylaw), which we hope can be removed from the next version of the Report.

In particular, in its Final Report, the CCWG should incorporate the IPC recommendations embodied in the above comments in order to:

- (a) confirm that contractual enforcement is a core responsibility within the ICANN mission and clarify that such enforcement is consistent with ICANN’s “limited technical mission”⁷,
- (b) either delete the proposed Bylaws Amendment on Human Rights or embrace all Human Rights listed in the UN Convention,
- (c) reinstate the requirement to balance Commitments and Core Values,
- (d) make certain that AoC Reviews (and particularly the full commitment at para. 566) are part of the Fundamental Bylaws and make certain all constituencies, including the IPC, are directly represented on the Review Teams,
- (e) clarify that the recommended changes in structure do not affect AoC reviews currently in progress,
- (f) adjust voting weight in the Single Member Model to more accurately reflect community interests, including intellectual property interests,
- (g) provide a method for challenging Board decisions even where the majority does not support such a challenge,
- (h) retain Stress Test 18 regarding GAC consensus advice,
- (i) delete Stress Tests 29 and 30 as they are contrary to the concept that robust contractual enforcement is a key part of ICANN’s mission,

⁷ Alternatively, the CCWG could simply eliminate references to the “limited technical mission” of ICANN.

(j) provide for interim remedies available to the Community pending a reconsideration or IRP which suspends implementation by the Board of a “captured” policy, and

(k) deal with the possibility that the exercise of a Community Power may also be “captured” and provides a remedy for that situation.

With the above changes, and provided the Sole Member model is maintained, the IPC expects to be able to express support for the CCWG’s Final Report.

Respectfully submitted,

Intellectual Property Constituency