



Statement of the Intellectual Property Constituency

The Intellectual Property Constituency (IPC) is pleased to participate in this historic vote regarding the future of ICANN. We appreciate all of the hard work and thousands of hours that have been put into the robust Final Proposal prepared by the Cross-Community Working Group on Enhancing ICANN Accountability (“CCWG”). We do have concerns about the process to date and future implementation. We note those concerns below. Our members have participated in the CCWG and we recognize that the time has come to vote to support the work of the CCWG-ACCT or to reject it. The IPC casts its votes in favor of the CCWG Proposal.

The Proposal offers accountability improvements which we believe should be made regardless of whether or not there is an IANA stewardship transition. Our votes are not for or against the concept or timing of the “transition” itself – those threshold questions have never been asked of the community, and we express no opinion on those topics.¹ Instead, we cast our votes in favor of the Proposal on Enhancing ICANN’s Accountability in spite of reservations we might have with specific aspects of certain recommendations.

With regard to the overall process:

While the effort of the CCWG has spanned 14 months, many of the details ultimately provided in the Proposal were not completely articulated until the Third Draft Proposal circulated in late Fall 2015. Further, a last minute, Board-initiated change was made less than two weeks before the commencement of ICANN 55 and the deadline for CCWG Chartering Organization decisions whether to approve or reject the Final Proposal. The Board-initiated change did not involve a fringe issue; rather it went to the heart of the proposal, and in particular the balance of government interests and private sector interests. Review of the final proposal between publication and the Marrakech meeting, as well as the earlier truncated comment period for the Third Draft Proposal, which fell during the Winter holidays, required herculean efforts to review, digest and (when called for) draft responsive comments.² Given their importance, it is unfortunate that the proposed changes to ICANN governance and accountability mechanisms were fast tracked. We note that there may be external political considerations regarding the timing of the proposal; however, external politics should not override thorough diligence.

¹ The IPC recognizes that the IANA transition has its genesis in former United States President Clinton’s Framework for Global Economic Commerce, as well as the NTIA green paper Proposal to Improve Technical Management of Internet Names and Addresses, and their subsequent Statement of Policy on the Management of Internet Names and Addresses. For example, the “green paper” provides, “The U.S. government would gradually transfer existing IANA functions, the root system and the appropriate databases to this new not-for-profit corporation [i.e., ICANN].”

² There was no public comment period for the final CCWG-ACCT report as presented for vote in Marrakech.

These recommendations will affect overarching ICANN governance concerns. However, it is not entirely clear how they will affect ICANN's day-to-day operations or whether unintended consequences may arise, particularly given the timeframes for review that were provided to the community. Given these timing concerns, we strongly urge ICANN to provide more reasonable comment periods when the actual bylaws are drafted and published for community input. As the revised bylaws themselves have yet to be produced, and the new paradigm for ICANN accountability remains practically untested, the IPC is deeply concerned that the voices of the businesses and individuals who own intellectual property may be unfairly marginalized. Therefore, the IPC will be vigilant regarding any deleterious, unintended consequences that may emerge during implementation, which could have been identified and avoided earlier had more reasonable opportunities for public review and comment been prioritized throughout this process.

With regard to Recommendation 5:

The IPC appreciates the improvements that have been proposed with respect to the ICANN Mission Statement. We remain concerned, however, that the Mission Statement fails to spell out explicitly ICANN's responsibility to enforce the contracts into which it enters as part of its coordination of the Domain Name System (including agreements with registries and registrars), rather than merely ICANN's ability to enforce such contracts. This responsibility is fundamental to the effective execution of the multi-stakeholder model, which is built upon a framework of private contracts as a preferable alternative to government regulation. The IPC looks forward to reviewing and commenting on proposed bylaws text with respect to this aspect of the Mission Statement, particularly with regard to providing a clear mandate for ICANN to effectively enforce its contracts, both as they currently stand and in the future.

With regard to Recommendation 6:

The Human Rights Bylaw proposed in Recommendation 6 will not become effective until ICANN adopts a Framework of Interpretation, which the CCWG will prepare in Work Stream 2. There are two specific issues that need to be addressed in the Framework of Interpretation:

- IPC encourages those preparing the Framework to strongly consider the Universal Declaration of Human Rights as the foundational document for application of the Bylaw.
- It is critical that all internationally recognized human rights are considered in any analysis, rather than concentrating on certain human rights (e.g., freedom of expression and privacy) to the exclusion or minimization of others (e.g., rights of authors and creators in their intellectual property as enshrined in the Universal Declaration of Human Rights).

With regard to Recommendation 9:

The process for selecting members of Review Teams (formerly part of the Affirmation of Commitments) was not modified to ensure that constituencies or stakeholder groups would be directly represented on Review Teams for topics of greatest interest to those stakeholders, or to ensure adequate GNSO representation on issues of gTLD policy). As these reviews are vital to gTLD policy-making, it is critical to ensure that the appropriate participants are chosen for the relevant Review Teams.

With regard to Recommendation 11:

Two aspects of this recommendation continue to cause concern for Intellectual Property Stakeholders.

The IPC continues to believe that in order for GAC Advice to be given the deference by the Board that Recommendation 11 calls for, that GAC advice must be discussed and drafted, and consensus reached, in transparent sessions open to all ICANN stakeholders.

In addition, in GAC consensus advice, the IPC continues to believe that the GAC must state that it is not aware of any national or international law or treaty which the consensus advice would contravene.