

Name: Greg Shatan

Organization: GNSO Intellectual Property Constituency (IPC)

Submission ID: 125

The Intellectual Property Constituency of the ICANN GNSO appreciates the opportunity to submit the attached comments in response to the ICG's combined Proposal to Transition Stewardship of the IANA Functions from the NTIA to the Global Multistakeholder Community.

Respectfully submitted,

Gregory S. Shatan
President, Intellectual Property Constituency more information read the [Privacy Note](#).



Comment of the Intellectual Property Constituency on the IANA Stewardship Transition Coordination Group Proposal to Transition the Stewardship of the IANA Functions from the NTIA to the Global Multistakeholder Community

The GNSO Intellectual Property Constituency (“IPC”) appreciates the opportunity to comment on the IANA Stewardship Transition Coordination Group (“ICG”) Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (“IANA”) Functions from the U.S. Commerce Department’s National Telecommunications and Information Administration (“NTIA”) to the Global Multistakeholder Community. The IPC has previously commented on the Cross Community Working Group on Naming Related Functions (“CWG”) Draft Proposal¹ and Second Draft Proposal,² and contributed to the GNSO’s approval of the CWG’s Final Proposal submitted to the ICG, which now forms a significant part of the ICG Proposal.

Questions Concerning the Proposal as a Whole

1. Completeness and clarity: Is the combined proposal complete? Each of the operational community proposals contains aspects to be completed in the future when the proposal is implemented. Is the combined proposal specified in sufficient detail such that it can be evaluated against the NTIA criteria?

The IPC believes that the Proposal is specified in sufficient detail to be evaluated against the NTIA criteria. The IPC would not characterize the Proposal as “complete,” due to certain accountability concerns under the proposal, which are raised more specifically in our answer to question 3. Furthermore, any IANA Transition proposal would be incomplete if the CCWG-Accountability proposal is incomplete, which it is -- not least because it lacks sufficient accountability mechanisms regarding ICANN’s responsibility to interpret and enforce contracts it enters into for management of the Domain Name system. The IPC’s overarching concern with the IANA transition is that it should only become effective once the proper accountability mechanisms have been agreed upon and adopted by ICANN and the Internet community. On the other hand, the IPC would not characterize the Proposal as “incomplete,” in the sense that there are glaring omissions that make it impossible to understand or evaluate the Proposal. The IPC understands that this Proposal was never intended to be a “turnkey” proposal, and that significant work needs to be done to implement the Proposal. There are, however, several ambiguities and implementation concerns that the IPC will highlight in this comment.

¹ <http://www.ipconstituency.org/storage/position-statements/IPC%20Comments%20on%20CWG%20Draft%20IANA%20Transition%20Proposal.pdf>

² <http://www.ipconstituency.org/storage/position-statements/CWG-Stewardship%20nd%20Draft%20Proposal%20Input%20Template.pdf>

2. Compatibility and interoperability: Do the operational community proposals work together in a single proposal? Do they suggest any incompatible arrangements where compatibility appears to be required? Is the handling of any conflicting overlaps between the functions resolved in a workable manner?

The IPC recognizes that each operational community's proposal had a limited remit, and could not go beyond that community's relationship with the IANA functions. The underlying proposals therefore tend to be fairly separate. The ICG's approach has been rather "minimalist" in harmonizing the proposals. It would be hard to truly consider them a single proposal. That said, there are relatively few outright incompatibilities.

One area where there is at least a potential incompatibility related to the IANA trademarks and domain names. The IPC understands that the CWG has now conveyed to the ICG that it does not object to the CRISP proposal that the trademarks and domain names be owned by an entity other than ICANN. While the IPC also does not object to this aspect of the proposal, the IPC has significant concerns about it, from a trademark law perspective. It is not possible for a trademark owner to be a "neutral" "container" for the trademarks. A trademark owner has active obligations and responsibilities. These include exercising quality control over the goods and services (e.g., approvals, periodic checks, samples, metrics, etc.) produced by licensees, monitoring authorized uses of the marks, protecting and enforcing the marks (including actively "policing" for unauthorized uses), and applying for and maintaining trademark registrations. As the company behind the name, the trademark owner must have broad discretion to exercise these responsibilities. As such, it is important that the owner of the IANA trademarks is overseen by and accountable to all three operational communities.

3. Accountability: Do the operational community proposals together include appropriate and properly supported independent accountability mechanisms for running the IANA functions? Are there any gaps in overall accountability under the single proposal?

A significant gap exists regarding oversight or appeal of actions by PTI affecting the root zone relating to ccTLD root zone actions, in particular delegations/redelegations. The CWG decided to drop any oversight process for IANA decisions and actions regarding ccTLD root zone entries, and there is no timetable for developing such a process prior to the transition (see page 51 and Annex O). This violates Section 5(vi)³ and 7(v)⁴ of the "principles and criteria" adopted by CWG (page 77) and raises questions about compliance with the NTIA criteria. We are skeptical that such a process will ever be developed if it is not developed now. At the least, we believe there should be a firm and explicit commitment to develop such a process on a known timeline.

³ "Appeals and redress: Any appeals process should be independent, robust, affordable, timely, provide binding redress open to affected parties and be open to public scrutiny. Appeals should be limited to challenging the implementation of policy or process followed, not the policy itself."

⁴ "The decisions and actions of the IANA Functions Operator should be made objectively based on policy agreed to through the recognized bottom-up multistakeholder processes. As such, decisions and actions of the IANA Functions Operator should ... Be appealable by significantly interested parties."

Furthermore, in light of the strong interdependencies of this proposal with the ICANN accountability enhancements proposed by the CCWG-Accountability, the transition cannot be implemented until those accountability enhancements have been agreed upon and implemented.

4. Workability: Do the results of any tests or evaluations of workability that were included in the operational community proposals conflict with each other or raise possible concerns when considered in combination?

The IPC has no comment to offer in response to this question.

Questions Concerning NTIA Criteria

5. Do you believe the proposal supports and enhances the multistakeholder model? If yes, please explain why. If not, please explain why and what proposal modifications you believe are necessary.

Overall, the IPC believes that the proposal supports the multistakeholder model. However, in one very important aspect, the IPC believes that the proposal does not support and certainly does not enhance the multistakeholder model. In the bodies created by the CWG -- and the CCWG-Accountability as well -- representation from the GNSO stakeholder communities is set at the stakeholder group level. This means that the IPC, Business Constituency (BC) and Internet Service and Connectivity Providers Constituency (ISPCP) will be crammed into a single Commercial Stakeholder Group (CSG) seat. This is far removed from (and an inappropriate use of) the narrow purpose of the CSG, which was to organize voting for the GNSO Council. The result is that the IPC will, more likely than not, fail to be directly represented on those bodies. When an IPC member is seated, they will need to represent a homogenized view of the ISPCP and BC communities rather than speak for the IPC. This tends to diminish and exclude the IPC, and compromise representation of the entire commercial sector. For specific examples, see, e.g., the composition of the IANA Function Review Teams on pages 85 and 87.

6. Do you believe the proposal maintains the security, stability, and resiliency of the DNS? If yes, please explain why. If not, please explain why and what proposal modifications you believe are necessary.

Modifying the proposal to provide for implementation (before transition) of an oversight/appeal mechanism regarding ccTLD root zone decisions would enhance the extent to which the proposal maintains the security, stability and resiliency of the DNS. Satisfaction of this criterion also depends on the extent to which the accompanying accountability enhancements affirm and support ICANN's responsibility to negotiate, interpret and enforce contracts for management of DNS functions such as gTLD domain name registration.

7. Do you believe the proposal meets the needs and expectations of the global customers and partners of the IANA services? If yes, please explain why. If not, please explain why and what proposal modifications you believe are necessary. Please indicate if you are a customer or partner of the IANA services.

The IPC is not a direct customer or partner of the IANA services (although our members are directly or indirectly affected by the IANA services). As such, we do not believe it is appropriate to offer a comment in response to this question.

8. Do you believe the proposal maintains the openness of the Internet? If yes, please explain why. If not, please explain why and what proposal modifications you believe are necessary.

While the proposal may “maintain” the openness of the Internet, it presents an opportunity for improving transparency, access and openness of operations which should not be missed. For one example, the provisions of the “draft term sheet” in Annex S (page 140) would add greater transparency to decisions regarding the IANA naming functions. Consideration should be given to making these transparency provisions a binding aspect of the transition plan.

9. Do you have any concerns that the proposal is replacing NTIA’s role with a government-led or inter-governmental organization solution? If yes, please explain why and what proposal modifications you believe are necessary. If not, please explain why.

The IPC is concerned with one aspect of the proposal in this regard. In the event of a potential separation by the naming community, the recommendations of the IANA Functions Review and of the SCWG are to be approved by the “community mechanism” to be created by the CCWG-Accountability. As proposed by the CCWG, the community mechanism may have the GAC as a voting body within the mechanism, with votes equal to the GNSO or the ccNSO. This contrasts with the GAC’s current role on the ICANN Board, where it has no votes and acts in an advisory capacity (albeit with special weight given to formal advice to the Board). This voting role for the GAC significantly expands the GAC’s mandate within ICANN, including (but not limited to) IANA-related matters.

10. Do you believe that the implementation of the proposal will continue to uphold the NTIA criteria in the future? If yes, please explain why. If not, please explain why and what proposal modifications you believe are necessary.

There are still unresolved or unfinished issues relating to each of the NTIA criteria. Until these issues are resolved, we cannot say with confidence that the proposal will continue to uphold the NTIA criteria in the future. In particular:

1. Broad Community Support: Although the ICG has concluded that each of the individual proposals has broad community support, the ICG will make a determination about whether the combined proposal has achieved broad community support only after review of the public comments on the combined proposal.
2. Support and enhance the multistakeholder model: While the IANA side of the multistakeholder model (retaining the functional separation between policy development processes and IANA) seems straightforward and clear, the ICANN policy development process is supported by the statement that it “remains bottom-up, transparent, and

inclusive of all stakeholders.” While the IPC does not see anything in this Proposal that lessens the transparency and inclusiveness of the ICANN policy development process, the IPC also does not believe that it particularly enhances it. The IPC continues to emphasize that the policy development process needs enhancement in order to be fully “inclusive of all stakeholders.”

3. Maintain the security, stability, and resiliency of the Internet DNS: The ICG notes that there is ongoing work on developing Service Level Expectations for names and that the ongoing work must be completed. The IPC notes that this ongoing work has now led to recommendations from the CWG’s SLE Working Group, and it appears to be a well-drafted and considered set of recommendations. However, it is too early to comment on this aspect of the work and confirm that it maintains the security, stability and resilience of the operation of the DNS. Additionally, there is currently no clear replacement or amendment for the Cooperative Agreement between the Root Zone Maintainer (RZM) (currently Verisign) and the IANA functions operator for the Root Zone Management process, which the ICG states needs to happen to clearly define roles and responsibilities of both parties and is essential for the secure, stable and resilient operation of the Root Zone of the DNS. While there have been some recent statements about progress in this “interrelated and parallel” process, these statements have not been sufficient to provide clarity on the RZM process and oversight after the transition.
4. Meet the needs and expectations of the global customers and partners of the IANA services: As noted above, the IPC is not particularly well placed to comment on this aspect of the NTIA’s criteria.
5. Maintain the openness of the Internet: This has been answered earlier in this comment.
6. Does not replace NTIA role with a government or intergovernmental organization: This seems to relate largely to “preventing capture.” The primary vulnerability seems to be that “a government that operates a ccTLD may become a member of the CSC; governments are expected to comprise at most a minority of the CSC.” However, there is no limitation on how many governments (as ccTLD operators) may become members of the CSC. The GAC will also have a voting seat on the IANA Functions Review Team, which could also be viewed as an expansion of its current non-voting role in ICANN governance.

Questions Concerning ICG Report and Executive Summary

11. Do you believe the ICG report and executive summary accurately reflect all necessary aspects of the overall proposal? If not, please explain what modifications you believe are necessary.

Please see our comments above regarding aspects of the proposal where we have identified gaps and concerns.

General Questions

12. Do you have any general comments for the ICG about the proposal?

The IPC would like to take this opportunity to thank the ICG, the operational communities and their teams (the CWG, IANAPLAN Team and the CRISP team), and each of the members and participants in those groups, for their hard work in developing these proposals.

Respectfully Submitted,

Intellectual Property Constituency