

## Four Key Takeaways from ICANN 54

The 54th meeting of the Internet Corporation for Assigned Names and Numbers (ICANN) concluded on October 22, 2015, in Dublin, Ireland. As always, the ICANN community discussed several high-profile topics during the meeting, all of which are relevant to registry operators, brand owners and future new gTLD applicants alike. Topics included ICANN accountability issues, the scope of ICANN's ability to regulate online content and new gTLD program reviews and preparations for subsequent rounds of new gTLDs. In addition, internal discord within the Generic Names Supporting Organization (GNSO) led to a failure to elect a new Chair.

### Community Work on Enhancing ICANN Accountability Continues in the Face of Growing Pains

As anticipated, ICANN accountability again dominated community discussions. Indeed, the final schedule for the meeting was adjusted last-minute to accommodate additional community sessions dedicated to this subject. There had been recent significant pushback on community proposals from the ICANN Board and its outside legal counsel, as well as the perceived need for the community to address that pushback.

Indeed, the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG) held a full-day session on Friday, October 16, dedicated to reviewing public comments<sup>1</sup> received on its Second Draft Report and updating its internal "scorecard"<sup>2</sup> tracking the

progression of its proposals toward community consensus. As of the Dublin meeting, eight proposals from the CCWG have been categorized as having community support in principle, namely:

- Fundamental Bylaws in concept;
- Mechanism for approving Fundamental Bylaw changes;
- Mechanisms for community rejection of Board-proposed Bylaws changes;
- Incorporation of the Affirmation of Commitments into the Bylaws;
- Enhancements to the Independent Review Panel (IRP);
- A *de novo* standard of review in IRP proceedings;
- The scope of topics to be considered in a subsequent work stream; and
- Need for accountability of Supporting Organizations and Advisory Committees.

In addition, ICANN accountability was a prevalent topic within the Governmental Advisory Committee (GAC), which appeared to take offense at key concerns regarding any accountability proposal, including the risk of capture, the risk of concentrating or reallocating power within a few interest groups, the risk of inadvertently excluding certain stakeholders from community powers, and the risk of decreasing ICANN efficiency. Members of the CCWG met with the GAC to discuss changes to the accountability proposal, geared toward addressing these concerns, including a

recommended “community forum” that would replace the previously recommended voting methodology, in the hopes of enhancing community consensus-building and participation. ICANN CEO Fadi Chehadé sympathized with GAC concerns, but offered that the steps made thus far between the CCWG and the Board were promising. Unsurprisingly, many government representatives sought to apply pressure on the CCWG to shy away from reliance on US courts or other mechanisms tied to jurisdiction in the United States; however, keeping ICANN under US jurisdiction is of critical importance for many US-based brand owners and contracted parties, as well as the US National Telecommunications and Information Administration (NTIA).

In addition, significant discussion took place within the GAC, and through GAC members of the CCWG, regarding the semantics to any mandate that ICANN’s multi-stakeholder model be “private-sector led.” Of course, there are many governments that wish to see greater governmental influence within ICANN; however, the NTIA has made clear that any IANA transition proposal—and therefore, any accountability proposal—must not include a government-led solution.

The GAC also internally disagreed upon a number of CCWG proposals. Most importantly, several GAC members remain opposed to Stress Test Eighteen, which recognizes that the GAC may, in the future, decide to supplant its current definition of consensus (the absence of any opposition) with majority voting to achieve GAC Advice. In response, to avoid the possibility of capture by a minority of government representatives within the GAC, the CCWG has recommended that the ICANN Bylaws require due deference only to Advice achieved through non-opposition (the United Nations definition of consensus) as opposed to any majority voting methodology. Representatives from Argentina

and Brazil, among others, remain strongly opposed to this amendment as “simply unnecessary,” whereas other representatives, for example from the United States, the United Kingdom, Canada, Japan and Denmark, expressed support for Stress Test Eighteen inasmuch as it merely encapsulates the *status quo* and is already supported widely among the community. Indeed, while both support and opposition was voiced, a shocking number of GAC representatives seemingly failed to comprehend the specific nature of Stress Test Eighteen or the correlating CCWG proposal.

Ultimately, public GAC discussion on the issue ended in apparent stalemate. However, after an explanation and apology from ICANN CEO Fadi Chehadé, the GAC Dublin Communiqué<sup>3</sup> stressed maintenance of the *status quo*, while retaining sovereignty, at an extremely high level, to establish and amend the definition of consensus Advice within the GAC.

Members of the Commercial Stakeholders Group, led primarily by those in the IPC representing copyright interests, continued to push the CCWG to include Bylaws language to the effect that ICANN’s mandate must include an explicit ability to enter into, interpret, and enforce its contracts in fulfillment of its public interest mission. In sum, the CCWG merely clarified that language it has included as a proposed revision to the ICANN Mission statement that would prohibit ICANN from regulating services that use the Internet’s unique identifiers or the content they carry or provide, is not intended to circumscribe ICANN’s contractual enforcement powers.

Finally, after several days of internal discussion and input from the community, the CCWG determined to pursue a “Single Designator Model” (SDM) for exercising community powers in lieu of the previously proposed “Single Member Model” (SMM).

Single Designator Model	Single Member Model
<p>Supporting Organizations and Advisory Committees (SOs/ACs )given specific rights in the Bylaws as third parties (“designators”), but not endowed with statutory legal powers; SOs/ACs could choose to acquire legal personhood, which would enhance enforceability of powers outside of ICANN, but this is not necessary to use internally binding processes.</p>	<p>Bylaws would provide that ICANN is a membership organization where one or more SOs/ACs (at their option) jointly become the “single member”; members are endowed with certain statutory legal powers.</p>
<p>Each designator can invoke IRP; each designator that is a legal person agrees to be bound by internal IRP process. No standing to bring derivative suits against fiduciaries.</p>	<p>Single member can invoke IRP, agrees to be bound by internal IRP process. Each SO/AC can invoke IRP. No single SO/AC has standing to bring derivative suits against fiduciaries.</p>
<p>Bylaws may require Board to reconsider budget/strategy/operating plan if community mechanism rejects it, within limits respecting board fiduciary duties. Board failure to revise may trigger community vote on Board recall. Designators cannot be given the right to reject the budget/strategic plan themselves, but can recall Board if it fails to make appropriate revisions in response to community vote.</p>	<p>Single member given reserved power under Bylaws to override Board decision directly, regardless of board fiduciary duties. Single member has standing to enforce this right.</p>
<p>Named SOs/ACs may be given right to veto amendments approved by Board. Only to be exercised when directed by community mechanism. Possible to trigger springing resignations or community vote on Board recall if Board ignores community rejection of Board-approved amendment. Designators contractually agree to veto Articles/Bylaws amendments only if directed by community mechanism. As new legal persons, designators can enforce this right.</p>	<p>Single member can veto proposed Bylaws amendments after required community mechanism process. Single member has standing to enforce this right.</p>
<p>Proposed fundamental Bylaws changes must be presented to community mechanism for approval or veto. Board failure to get approval may trigger community vote on Board recall. Designators contractually agree to veto or approve Articles/Bylaws amendments as directed by community mechanism. As new legal persons, designators can enforce this right.</p>	<p>Single member can be given right to approve any Bylaws amendment; fundamental Bylaws amendments require extraordinary approval threshold in community mechanism as basis for Single member approval. Single member has standing to enforce this right.</p>

Single Designator Model	Single Member Model
<p>Designator (legal persons or not) removes director on its own. If sitting director refuses to vacate, new director has standing to enforce. As new legal persons, designators could enforce this right (bylaws-as-contract theory). If sitting directors refuse to vacate, new directors also have standing to enforce.</p>	<p>Single member appoints and removes individual directors based on direction from applicable SO/AC/NC. Single member has standing to enforce this right.</p>
<p>Community mechanism vote to approve recall triggers springing resignations and/or Designators (legal persons or not) remove directors at request of community mechanism. If sitting directors refuse to vacate, new directors have standing to enforce. Designators contractually agree to remove their respective directors in event of community mechanism vote to recall. As legal persons, designators could enforce this right (bylaws-as-contract theory). If sitting directors refuse to vacate, new directors also have standing to enforce.</p>	<p>Single member can recall Board after required community mechanism process. Single member has standing to enforce this right.</p>
<p>Bylaws may require Board to implement recommendations, within limits respecting board fiduciary duties. Board failure to implement may trigger community vote on Board recall. Designators cannot be given the right to implement recommendations themselves, but can recall Board if it fails to implement recommendations.</p>	<p>Single member given reserved power under Bylaws to override Board decision, regardless of board fiduciary duties. Single member has standing to enforce this right.</p>

As can be seen from this comparison, ultimately, the SDM appears to provide an appropriate level of enforceability to the proposed community powers, and should serve as a balanced compromise framework to protect both the community and the ICANN Board.

Despite the significant progress made during ICANN 54, the CCWG has considerable work left to accomplish. A Third Draft Proposal is expected to be published by mid-November 2015, followed by a 35-day public comment period and submission of final recommendations to the Board by late January 2016.

### Policing Online Content May Be Beyond ICANN’s Remit, but Voluntary Content Regulation Measures May Be on the Horizon for Contracted Parties

Another hot topic was ICANN’s role in content regulation, and a proposed voluntary framework to enforce contracted parties’ obligations with respect to claims of intellectual property infringement. The controversy primarily stems from Section 3.18 of the 2013 Registrar Accreditation Agreement (2013 RAA), which obligates registrars to “investigate” and “respond

appropriately” to complaints of domain name abuse, as well as Specification 11 to the Registry Agreement (RA), which is a pass-through prohibition to domain name registrars and registrants against, *inter alia*, “piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law,” and requires “consequences for such activities including suspension of the domain name.”

While ICANN leadership insisted that any analysis necessary for policing intellectual property is beyond ICANN’s remit, they encouraged a community discussion on establishing a voluntary framework to handle contractual obligations regarding content. Meanwhile, registries and registrars resisted the proposal.

Setting the tone in his opening remarks, Mr. Chehadé stated that ICANN’s remit does not extend to “making judgment calls” regarding the content of Internet domains and websites, such as copyright infringement, which would involve a factual or legal analysis.

ICANN’s Intellectual Property Constituency (IPC) clarified to the ICANN Board that it does not expect ICANN to be the “content police,” but to vigorously enforce its contracts with registries and registrars. In response, Mr. Chehadé stated that while ICANN does not have solutions to these problems, it is committed to working toward solutions with the community.

In a later meeting with the IPC, Chief Contract Compliance Officer Allen Grogan stated that ICANN will enforce Specification 11 as much as any other component of any of its contracts, assuaging some IPC concerns that non-party complainants may be left to enforce PICs through the PIC Dispute Resolution Procedure (PICDRP).

Meanwhile, at a meeting of the gTLD Registries Stakeholder Group (RySG), RySG representatives expressed shock at

Mr. Chehadé’s apparent commitment to establishing “voluntary [best practices] with teeth [because intellectual property infringement may be] beyond our remit, but it is our responsibility.” The RySG and Registrars Stakeholder Group (RrSG) encouraged the Board to resist IPC calls and argued that “*voluntary requirements with teeth*” to police content are no longer voluntary at all,” and that many of the terms could remove legal protections provided to registries and registrars under national safe harbor laws. In response, Board member Mr. Bruce Tonkin warned that adding “teeth” and involving compliance would put an end to any voluntary standards or practices. Board member Ms. Erika Mann added that ICANN wants to encourage dialog and informed debate on the topic rather than change the *status quo*.

Mr. Grogan clarified that his plan was “only to discuss *voluntary* solutions” in Dublin, and that “voluntary means voluntary.” Following suit, Mr. Chehadé lamented that “we all share evidentiary frustrations, and [contracted parties] cannot act without determinations being made [on content and infringement].” He reiterated that such determinations are outside ICANN’s remit. “Although people do things voluntarily because they have reputational or financial incentives,” he continued, “we have elements in our contracts that could be used as financial incentives,” but “hope [that] we never get to that point.” RySG representatives responded that ICANN should be authorized to direct piracy and other complaints to the appropriate forum like “a traffic cop,” or flag and reject inappropriate censorship.

The debate languished in a subsequent public meeting to discuss the Role of Voluntary Practices in Combating Abuse and Illegal Activities, during which Mr. Grogan asserted, “I do not think it is appropriate for ICANN to be the trusted mediator to discuss market-driven self regulation.” It was a surprising statement given the original impetus for the session.

Arguments also spilled over to a meeting with law enforcement personnel, during which registrars explained that they are not necessarily the best place to submit law enforcement requests concerning illegal activity, particularly in cases where webhosts are hosting illegal content. Law enforcement representatives constructively suggested that some certifying body should recognize and highlight registrars employing industry best methods for handling abuse complaints and illegal conduct.

Meanwhile in a presentation on ICANN's Contractual Compliance Program, ICANN staff disclosed that the compliance group is enforcing the 2013 RAA requirement for registrars to "investigate and respond appropriately to reports of abuse." Notably, compliance staff somewhat ambiguously advised that ICANN evaluates the quality of each report, and informs reporters if complaints are outside ICANN's scope. In response to questions, ICANN compliance staff explained that the "appropriate response" is left to the registrar to decide.

On the last formal day of the meeting, during ICANN 54 Public Forum, Mr. Chehadé reiterated the limitations of ICANN's remit to regulate content online, in the context of accountability and Internet Assigned Numbers Authority (IANA) stewardship transition questions. In particular, Mr. Chehadé characterized the US NTIA transition proposal criterion to "maintain the openness of the Internet" as precluding ICANN's restrictions on Internet operations at a lower technical layer, rather than an upper content layer. In a perplexing remark, he added "to the extent that what we do does not start creating policies that infringe on these things and infringe on the openness of the Internet, then we're okay ... [b]ut they're not talking about the upper layers where we have no remit, where we have no responsibility."

## New gTLD Program Reviews Continue and the Community Begins to Lay Groundwork for a Subsequent Round

ICANN and the community continue to conduct, or are preparing to commence, a number of key reviews to examine various aspects of the New gTLD Program, including:

- Competition, Consumer Choice and Consumer Trust (CCT) Review;
- Rights Protection Mechanism (RPM) Review;
- Independent Trademark Clearinghouse Review;
- Review of All RPMs in All gTLDs; and
- New gTLD Program Implementation Review.

Since ICANN 53 in Buenos Aires, ICANN has published an updated RPM Review report,<sup>4</sup> a draft Program Implementation Review report,<sup>5</sup> a registrant survey<sup>6</sup> and an initial economic study<sup>7</sup> feeding into the CCT Review, as well as a call for volunteers<sup>8</sup> to join the CCT Review Team. ICANN is currently in the process of completing an RFP process to retain providers to conduct an independent Trademark Clearinghouse (TMCH) review.

These reviews will inform policy development work involving a subsequent round of new gTLDs and the RPMs implemented for new gTLDs, and will help measure the success of the 2012 round from industry, intellectual property, and end user perspectives. More specifically, ICANN is currently in the process of preparing for a Policy Development Process (PDP) on New gTLD Subsequent Rounds,<sup>9</sup> as well as a possible PDP on Reviewing All RPMs in All gTLDs.<sup>10</sup> The latter will also likely have implications on the former, and will require close coordination between the parallel PDPs to ensure alignment on new gTLD-related RPM issues. Both matters are making their way through the Issue Report phase, and are likely to come before the GNSO Council to approve the launch of the respective PDPs by the end of the year.

Community feedback on these efforts during ICANN 54 revealed several themes. First, unsurprisingly, the domain investor community has begun to push back strongly on any efforts perceived as moving toward implementation of new gTLD RPMs across all gTLDs, including legacy TLDs, primarily through the proposed PDP on Review of All RPMs in All gTLDs. Comments in Dublin highlighted their preference of separating the review of new gTLD RPMs from that of the UDRP, to minimize overlap and reduce the likelihood that the PDP working group will recommend that all legacy TLDs adopt some or all of the new gTLD RPMs. Apparently, in the view of the domain name investor community, legacy TLDs are somehow more profitable with fewer rights protection mechanisms applicable. This carries forward ongoing efforts by these stakeholders to prevent the voluntary adoption of the Uniform Rapid Suspension System (URS) by several legacy TLDs as part of their renewal registry agreements, including .CAT, .PRO, and .TRAVEL.

In addition, intellectual property owners continue to mobilize in preparation for both PDPs, participation in which will be critical for ensuring that the community implements positive changes with respect to a subsequent round of new gTLD applications, both in terms of protecting trademark rights in open generic TLDs and ensuring an efficient and cost-effective process for additional .BRAND TLD applicants, as well as improvements to RPMs and the adoption of new RPMs in legacy TLDs, as appropriate. The IPC provided substantial comments on the Preliminary Issue Report on New gTLD Subsequent Rounds, highlighting key areas either left unaddressed or inadequately discussed in the Report, including around premium names and pricing practices, reserved names practices, RPMs, and .BRAND application issues. Similarly, the IPC is finalizing comments on the proposed PDP to Review All RPMs in All gTLDs, with an eye

toward advocating a laundry list of enhancements to current RPMs, including:

- A strict “loser pays” system for the Uniform Domain Name Dispute Resolution Policy (UDRP) and Uniform Rapid Suspension system (URS);
- Amending the UDRP to require merely evidence of the disjunctive “bad faith registration **or** use” rather than the conjunctive, more demanding standard requiring evidence of “bad faith registration **and** use”;
- Application of all RPMs to all TLDs, including legacy TLDs;
- A serial cybersquatter screening mechanism whereby any registrant who loses in three UDRP or URS proceedings is prohibited from registering any additional domain names; and
- A prohibition against “weaponizing” the trademark clearinghouse against brand owners. In other words, the IPC continued to support restrictions on the use of clearinghouse data, outside implementation of sunrise and claims services.

That said, the IPC is cognizant of not losing ground with respect to the RPMs, and has acknowledged the staunch opposition it will face in attempting to garner these enhancements from contracted parties, domain investors, and free speech and privacy advocates, alike.

Finally, many contracted party representatives continue to push for a fast-track of these policy development efforts in order to open a new round of gTLD applications as quickly as possible. Indeed, even a number of prominent brand owners are anxious for a subsequent round to provide an opportunity to apply for their .BRAND TLDs, having missed out on the opportunity to do so during the 2012 round.

Many have suggested a possible “brands only” round solely for .BRAND applicants, and many hope that such a process—whether only open to .BRAND applicants, or open to any new gTLD

applicants—will provide a reduced application fee, and more efficient review and approval processes than applicants experienced in the 2012 round. However, given ICANN’s commitment to complete the review processes and undertake policy development work prior to launching a new round of gTLDs, we do not expect another round to open until mid-2018 at the earliest. Nonetheless, the community will continue to engage heavily in the reviews and policy development work over the months and years to come, keeping this issue at the forefront, as ICANN gears up for an inevitable subsequent round of new gTLDs.

### GNSO Council Controversy Resurfaces Culminating in Failed Election of New Council Chair

Although it was not a substantive theme of ICANN 54, the Dublin meeting drew to a close with some unprecedented, but not unexpected, controversy in the GNSO Council, which failed to elect a new Chair to replace outgoing, term-limited Chair, Jonathan Robinson from the RySG. The Contracted Parties House (CPH) had nominated James Bladel from GoDaddy Inc. and the Registrar Stakeholder Group to serve as Chair, while the Non-Contracted Parties House (NCPH) had nominated Heather Forrest, an academic from the IPC. Although some within the IPC were cautiously optimistic about Ms. Forrest’s chances in the election, 100 percent of the CPH voted for Mr. Bladel. On the other hand, however, there was some unexpected division within the NCPH, where 46 percent voted in favor of Mr. Bladel, and only a scarce majority of 54 percent in favor of Ms. Forrest.

In order to prevail, a candidate must garner at least 2/3 of the vote in each House, and in order to remain in contention a candidate must have received at least 2/3 of the vote in one House. It was easy to discern that the majority of the Non-Commercial Stakeholder Group (NCSG) voted in favor of Mr. Bladel, although the possibility remained that at least one of the Councilors

from the Commercial Stakeholder Group (CSG) had also not voted in favor of its own candidate.

As a result, having not reached the necessary threshold of 2/3 of the votes in at least one of the Houses, Ms. Forrest was not able to remain in contention. As per its procedures, the Council held a second ballot on which Councilors were asked to vote either in favor of Mr. Bladel or not in favor of Mr. Bladel. As expected, 100 percent of the CPH voted in favor of Mr. Bladel, while in the NCPH, the vote was 54 percent in favor and 46 percent not in favor. As a result, Mr. Bladel did not meet the threshold of 2/3 of the votes in both Houses, resulting in a failed election.

The Council Chair election returned to the nomination stage, in which the Houses were given an opportunity identify a new candidate within 15 days, and a new election has been scheduled for late November 2015. In addition, each House must elect a Vice Chair from within its House. The current Vice Chairs will serve as interim Chair until a new Chair is elected. Although this result was rather anti-climactic, it will provide the GNSO an opportunity to regroup and rethink election strategy for a second voting round. That said, the election demonstrated the longstanding, underlying tension within the NCPH as between the CSG and NCSG, who clearly could not agree to support Ms. Forrest’s candidacy, even after the House managed to unanimously nominate her for the Chair role.

Since the conclusion of ICANN 54, the CPH has re-nominated James Bladel, while the NCPH has determined not to elect a candidate. In effect, the NCPH has decided to tacitly support Mr. Bladel, who, now running unopposed, should prevail in the upcoming election process, continuing the general precedent of a Council Chair from the CPH. The winner of the election is to be announced on November 24, 2015.

ICANN 55 will be held March 5 - 10, 2015, in Marrakech, Morocco.



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## Endnotes

- <sup>1</sup> ICANN, Cross-Community Working Group on Enhancing ICANN Accountability (CCWG) Second Draft Report Public Comments, <https://www.icann.org/public-comments/ccwg-accountability-2015-08-03-en> (last visited Nov. 12, 2015).
- <sup>2</sup> ICANN, CCWG Scorecard, [https://docs.google.com/spreadsheets/d/1HcUUDn5DHSVo7lLo-FWU\\_QMa8PGgfZWTP\\_kGo1EXNQs/edit#gid=321359797](https://docs.google.com/spreadsheets/d/1HcUUDn5DHSVo7lLo-FWU_QMa8PGgfZWTP_kGo1EXNQs/edit#gid=321359797) (last visited Nov. 12, 2015).
- <sup>3</sup> ICANN, GAC Dublin Communiqué (Oct. 21, 2015), *available at* <https://www.icann.org/en/system/files/correspondence/gac-to-board-21oct15-en.pdf>.
- <sup>4</sup> ICANN, Rights Protection Mechanism (RPM) Review Final Report (Sept. 11, 2015), *available at* <https://www.icann.org/news/announcement-2015-09-11-en>.
- <sup>5</sup> ICANN, Draft New gTLD Program Implementation Review Report (Sept. 23, 2015), *available at* <https://www.icann.org/news/announcement-2-2015-09-23-en>.
- <sup>6</sup> ICANN, New gTLD Program Registrant Survey (Sept. 25, 2015), *available at* <https://www.icann.org/news/announcement-2015-09-25-en>.
- <sup>7</sup> ICANN, Competition, Consumer Choice and Consumer Trust Review Economic Study: Phase One (Sept. 28, 2015),

*available at* <https://www.icann.org/news/announcement-2-2015-09-28-en>.

- <sup>8</sup> ICANN, Competition, Consumer Choice and Consumer Trust Review Team Call for Volunteers (Oct. 1, 2015), *available at* <https://www.icann.org/news/announcement-2-2015-10-01-en>.
- <sup>9</sup> ICANN, Preliminary Issue Report on a PDP on New gTLD Subsequent Rounds: Public Comments (Aug. 31, 2015), *available at* <https://www.icann.org/public-comments/new-gtld-subsequent-prelim-2015-08-31-en>.
- <sup>10</sup> ICANN, Preliminary Issue Report on a PDP to Review All RPMs in All gTLDs (Oct. 9, 2015), *available at* <https://www.icann.org/public-comments/rpm-prelim-issue-2015-10-09-en>.

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