

**QUESTIONS TO THE COMMUNITY  
ON ACCOUNTABILITY AND TRANSPARENCY WITHIN ICANN**

The IPC welcomes the opportunity to respond to the questions raised by the AoC Accountability and Transparency Review Team (ATRT) in their process of analyzing stakeholder and community input regarding Accountability and Transparency within ICANN.

***1. Do you think ICANN is accountable to all stakeholders? Can you identify a specific example(s) when ICANN did not act in an accountable manner? If so, please provide specific information as to the circumstances and indicate why you believe ICANN's actions were not taken in an accountable manner.***

The IPC does not believe the public has sufficient political and procedural accountability over ICANN's management of the domain name system.

The IPC continues to believe that the public, including private-sector businesses, organizations, and consumers, is not adequately represented within ICANN's governance model, including on the ICANN Board of Directors. The IPC recommends a substantive role for the interests of the business and intellectual property community on the ICANN Board and a reform of ICANN's governance structure.

As a result of these organizational imbalances, over the past 10 years ICANN has not functioned as a "private-sector led" organization, but rather as an organization of different stakeholder interests vying for commercial or other advantages on governance issues.

The lack of adequate balanced representation of the intellectual property community within ICANN's governance model has been long identified by the IPC, and many of its member organizations, as an issue that has called into question ICANN's accountability and service to the public's interest.

Unfortunately, ICANN has taken steps in the wrong direction in terms of resolving this issue. In 2007, the ICANN Board of Directors initiated a review of its Generic Names Supporting Organization (GNSO), a main policy development organ of ICANN. The Board Working Group proposed recommendations to reform the GNSO, including a reorganization of its Policy Council in a manner that would further reduce the representation of the independent private sector.

This effort was a missed opportunity to correct a previous ICANN reform initiative that doubled the representation of its contractually-related constituencies. As

IPC has long stated, this imbalance in representation and philosophy remain an obstacle to ICANN acting in a manner accountable to the public's interest.

One example where ICANN's conduct has not been accountable to the public's interest is in relation to the handling of the process for evaluating issuance of new gTLDs. ICANN had previously committed to properly evaluating and considering the impact of the 2000 and 2003 rounds of new gTLDs on the public's interest before proposing to broadly expand the namespace<sup>1</sup>. However, a proper consideration and resolution of these issues did not take place prior to ICANN announcing implementation plans for unlimited new gTLDs in 2008.

This became clear when comments on the Draft Applicant Guidebook reflected significant and broad based concerns regarding the impact of the new gTLD proposal on the public's interest. However, the overarching issues of Trademark Protection, Economic Demand and Impact, Malicious Conduct, and Root Zone Scaling were all issues previously identified by ICANN as needing resolution before it would proceed with implementation for adding additional gTLDs to the DNS. This lack of follow-through on a critically important issue impacting the public's interest reflects ICANN's lack of true accountability to its stakeholders.

In terms of Whois, ICANN's inability to maintain the accuracy and integrity of the Whois database system is another example of ICANN's failure to act in a manner accountable to the public's interest. Law enforcement, intellectual property owners, and members of the public rely on information in the Whois database to prevent consumer fraud and other crimes on the Internet. Yet, in over 10 years of management of the system, ICANN has not produced adequate contractual compliance conditions that enable the domain name registration process to yield reliable and accurate Whois data.

**2. Do ICANN's accountability mechanisms, including the Ombudsman, the Board reconsideration procedure and the Independent Review Panel provide meaningful accountability and, if not, how could they be improved?**

Each of these three mechanisms is employed after a decision has been taken, and each relates to a specific form of public accountability. As a practical matter, once a decision has been taken, it is far more difficult to reverse that decision.. ICANN should give serious consideration to adopting review mechanisms that occur prior to final decisions being taken, and should improve its organizational structure to adequately represent the interest of the public within its governance model.

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<sup>1</sup> See October 2003 ICANN Board Resolution. <http://www.icann.org/en/announcements/advisory-31oct03.htm>

**3. Do you think ICANN's processes and decision making is transparent? Can you identify a specific example(s) when ICANN did not act in a transparent manner. If so, please provide specific information as to the circumstances and indicate why you believe ICANN's actions were not taken in a transparent manner. Are ICANN's transparency mechanisms robust and how could they be improved?**

Unfortunately, ICANN's actions are not consistently transparent and should be improved to provide transparency on overall decision-making and governance processes. ICANN has addressed key overarching issues with new gTLDs in a non-transparent top-down manner. For example, ICANN did not hold public consultations to address the overarching issue of Economic Demand and Impact of new gTLDs. Both economic reports issued by ICANN were commissioned in a non-transparent manner, without community input or knowledge of the questions and issues posed to the authors and the status of their relationship with ICANN. Similar decisions were made to resolve other overarching issues, such as Malicious Conduct. At a minimum, ICANN should regularly consult with and report to each of its GNSO constituencies, on an individual basis, on the main issues staff and the organization are pursuing. Such regular consultations and reports should be a specifically listed responsibility of a member of the ICANN staff.

**4. What is your general assessment of ICANN's commitment to the interests of global Internet users? Can you provide a specific example(s) when ICANN did not act in the interests of global Internet users? If so, please provide specific information as to the circumstances and indicate why you believe ICANN's actions were not taken in a manner consistent with the interests of global Internet users.**

Please see answer to Question 1 regarding new gTLDs and Whois.

While we believe the expectations placed on ICANN in this regard are high and the task complex, we do believe that there are missed opportunities to look toward the interests of **global** Internet users. By way of example, ambiguities in the DAG have lead to much discussion over what types of intellectual property rights will be granted protections in the new TLDs. Because of this failure to include all forms of intellectual property, regardless of the laws under which such rights accrue, the current discussions regarding rights protection mechanisms necessarily leave out entire categories of rights, and perhaps even entire countries, finding certain local protection systems to be "not good enough" to merit protection of trademark holders operating in those schemes as "rights holders". Further consideration must be given to recognizing all forms of intellectual property protection throughout the globe, not just to forms which easily conform to American or other norms.

**5. What is your assessment of the ICANN Board of Directors' governance with respect to the following factors:**

- ongoing evaluation of Board performance,**
- the Board selection process,**
- the extent to which Board composition meets ICANN's present and future needs , and**
- whether an appeal mechanism for Board decisions is needed?**

As previously stated to Question 1, the IPC believes one of the most important issues for ICANN is to develop a Board of Directors selection process that results in a Board that is reflective of the community it serves.

**6. What is your assessment of the role of the GAC and its interaction with the Board? How do you view the role of the GAC within the overall ICANN process?**

- What is your assessment of the interaction between the GAC and the Board?**
- Should the GAC be viewed as the body best placed to advise the Board on what constitutes the "public interest" regarding the coordination of the DNS?**

IPC does not have a comment for public submission on this question.

**7. Are additional steps needed to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS? If so, what specific steps would you recommend?**

IPC does not have a comment for public submission on this question.

**8. What is your assessment of the processes by which ICANN receives public input? What is your assessment on how ICANN receives input of English-speaking and non-English speaking communities? Can you identify a specific example(s) when ICANN did not adequately receive public input from English or non-English speakers? If so, please provide specific information as to the circumstances and indicate why you believe ICANN's actions were taken without adequate public input.**

ICANN must provide the community more time for public comment, and greatly improve and clarify the public comment process itself to allow for adequate public consideration of its decisions and policy making. For example, in 2010 alone, there have been two public comment periods when nearly 20 or more topics have been open for comments simultaneously.

Other recent examples of ICANN not adequately receiving public input was when the ICANN Board and Staff proposed a draft EOI mechanism before initial public comment on the concept closed. The Board also approved the FY2011 Budget and Operating Plan while the public comment period on the issue remained open.

**9. Does ICANN provide adequate explanation of decisions taken and the rationale thereof? Can you identify a specific example(s) when ICANN did not provide adequate explanation of decisions taken and the rationale thereof? If so, please provide specific information as to the circumstances and indicate why you believe ICANN's actions were taken without adequate explanation of decisions taken and the accompanying rationale.**

ICANN does provide some explanation of some decisions through a Summary of Analysis document posted following the close of a public comment period. While this is an improvement over the previous status quo of providing no formal response, the IPC believes the current breadth of these documents is insufficient. In too many cases, the Summary misses key points and issues, or the analysis provided is superficial or otherwise dismissive of stakeholder concerns. The IPC suggests ICANN expend the resources necessary to ensure its public comment process provides adequate consideration and response to the comments provided by the public and its constituents.

**10. What is your assessment of the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community? Can you identify a specific example(s) when ICANN decisions were not embraced, supported and accepted by the public and the Internet community? If so, please provide specific information as to the circumstances and indicate why you believe ICANN's actions were taken without adequate support and acceptance by the public and the Internet community.**

**See IPC answer to Question 1 on ICANN's lack of a balanced governance model, implementation of new gT Ds, and Whois.**

While not every operational issue may require "public buy-in", decisions of major importance, such as the introduction of new TLDs, certainly should have the benefit of the public's consent. Such consent is not possible unless there is adequate public representation in ICANN's governance model and in the case of gTLDs, public awareness and consent has been negligible.

**11. What is your assessment of the policy development process in ICANN with regard to:**

- facilitating enhanced cross-community deliberations, and**
- effective and timely policy development**

**Can you identify a specific example(s) when the policy making process in ICANN did not facilitate cross-community deliberations or result in effective and**

***timely policy development? If so, please provide specific information as to the circumstances and indicate why you believe the policy making process in ICANN did not facilitate cross-community deliberations or result in effective and timely policy development.***

The WHOIS controversy is the most well-known example of ICANN's inability to timely and effectively address needed policy. ICANN's own studies reflect that a significant portion of WHOIS information is false or misleading, yet ICANN appears unwilling to take contractual steps to enforce the obligation for WHOIS records to be accurate.