**ENHANCING ICANN ACCOUNTABILITY**

I would like to thank the ICANN Board for this opportunity to address the issue of accountability within ICANN. My experience questions, however, the seriousness of this Board and this staff to create and abide by a truly accountable and transparent policy development process and institutional structure.

My name is Edward Morris. I am a citizen of the Republic of Ireland and of the United States of and currently spread my residence between Los Angeles, U.S.A., Dublin, Ireland and Leeds, United Kingdom. Although a member of the Noncommercial Users Constituency (NCUC) and the Noncommercial Stakeholders Group (NCSG) this Reply is solely my own and represents my personal views only.

My perspective was principally developed over the past fifteen months when, as a member of the 2013 N.C.U.C. Executive Committee representing North America, I spent a few hundred volunteer hours working with others researching, drafting and writing the two N.C.S.G. Reconsideration Requests (RR 13-3 and 13-11) and our sole DIDP (20130724-1) request. Although none of these efforts met with success I am very proud of the work we did.

Prior to our well-publicized efforts to get the Board to comply with clearly stated GNSO preferences concerning standards to be used in the Trademark Clearinghouse, ICANN’s accountability structures were largely moribund. I recall a private conversation I had with a best-left unnamed Board member in Beijing who told me the lack of use of ICANN accountability mechanisms represented the widespread satisfaction of the community, despite occasional grumbling, with the work of the ICANN staff and board. I’d suggest evidence from the past year indicates the perspective of my dear friend was dead wrong.

In calendar years 2011 and 2012 a grand total of 3 Requests for Reconsideration were filed with ICANN. Since the NCSG filed it’s initial Request for Reconsideration on 19 April 2013, 52 additional Reconsideration Requests have been made. I’d suggest that the widespread publicity surrounding the NCSG Request on the Trademark 50 issue led others to discover, and use, this accountability procedure. It was lack of knowledge of the existence of this procedure, rather than satisfaction with the Board, that had led to its previous nonuse.

Sadly, despite the increased use of this accountability procedure by community members, accountability itself cannot be said to have increased. To date, only one Request for Reconsideration has been successful. Without judging the merits of the individual cases I will suggest that a rejection rate of over 98% suggests either the Board is rather averse to actually examining its previous decisions or the procedure itself is flawed or, perhaps, a bit of both.

This inflexibility can also be ascribed to staff and Board in its implementation of the Documentary Information Disclosure Policy (DIDP). The DIDP was created to act as a type of Freedom of Information Act (FOIA) for ICANN. Sadly, rather than operate the DIDP scheme with an attitude of openness and accessibility, ICANN staff has turned a statutory exception to the policy of openness into it’s norm, resulting in a disclosure policy that is more opaque than it is open. Since 2012 there have been 21 DIDP Requests. None of these requests have successfully resulted in the release of previously non-disclosed information. Seventy-six percent of the time ICANN staff has cited the Defined Conditions of Nondisclosure (DCND) in refusing to provide requested information. The DCND is supposed to be a limited exception to the ICANN policy of openness and transparency. Instead it has become the de facto standard used by staff to refuse to release information requested by community members.

Indeed, in 80% of DIDP requests ICANN staff directs the requestor to public links where related, though generally not the requested, information is available. Staff does this even in cases, such as the NCSG request, where they have been asked in the Request not to do so. This reaction appears to be no more than a public relations effort by Staff to make it seem as if ICANN is transparent, while refusing to release information that would demonstrate it actually is.

The circular nature of ICANN’s “accountability” mechanisms should be obvious. Disagreement with a Board decision is appealed to the Board which invariably reaffirms it’s previous decision. Disagreement with a staff decision not to release information is appealed to staff which also invariably reaffirms it’s previous decision. Unfortunately the two external accountability mechanisms available are equally flawed.

As someone who has spent much of his adult life in the Nordic region, I understand, like and cherish the possibilities implicit in having a truly independent Ombudsman at ICANN. Without reflecting on any particular individual, I’m sad to say structurally ICANN does not have one.

The ICANN Ombudsman is selected, paid by and serves at the discretion of the Board. Although given reasonable investigative powers, his or her remit is limited (“fairness” is the key word), actual power is limited to publicity and recommendation and his or her independence is effectively compromised by his or her paymaster. In effect, the ICANN Ombudsman is designed to be no more than a glorified complaints department which attempts to mitigate and mediate problems rather than cause to ICANN act in a manner different than the one previously determined, particularly if the previous action was one taken by the Board.

The Independent Review Process (IRP) was the one external accountability mechanism that provided third party oversight of Board actions. Although nonbinding upon the Board, the IRP did offer hope to those confronted with an inflexible ICANN front. The desire and attempt by the NCSG to proceed to an IRP in the Trademark 50 case would perhaps be instructive to others as to the IRP’s failings, cost and scope amongst them.

The IRP is a winner pays model. As we considered our options following the rejection of our Reconsideration and DIDP Requests we had to confront the fact that, as the relatively impoverished representative of civil society and the individual user in the GNSO, we likely would not be able to provide the deposits required to initiate an IRP. Further, if we were to lose the IRP, a possibility that always needs to be considered regardless of the strength of case, it would surely wipe us out financially. Paying for ICANN’s legal bill was beyond our means. Although there are provisions in the IRP for reducing liability through participation in a Constructive Engagement Process (CEP) prior to proceedings, there is no guarantee prior to the conclusion of the IRP that us or any other litigant would be granted such relief.

An accountability mechanism that can only be accessed by the wealthy and powerful should not be acceptable to the community.

Of greater concern, even to those with means, are changes recently made to the IRP by the Board. It is obvious that this new emphasis on and appreciation for accountability is a direct result of the United States government’s attempt to withdraw from the IANA process. Prior to this development, the Board was decreasing the remit of accountability mechanisms and did not seem to be concerned to any great degree as to the fall out of it’s actions. As Byron Holland of the CCNSO (17 June 2014) points out the Board recently changed the Bylaws so that to win an IRP the injured party has to prove the Board acted in “bad faith” to obtain redress. As a result of this recent Board decision, absent malfeasance, the IRP has ceased to act as any sort of control that can effectively deter the Board from violating it’s Bylaws or Articles of Incorporation if it so wanted.

This is the principle reason that I have communicated both to my representatives in the U.S. Congress, and to those I’ve previously worked with and for on The Hill, my belief that accountability and transparency mechanisms must be in place prior to any transfer of the IANA function by the American government. I agree with the positions of Google (28 May 2014) and The Heritage Foundation (20 June 2014) on this matter. Once the transition imperative disappears I have no great faith that this newfound belief in accountability and transparency will continue in ICANN’s upper echelons.

It becomes apparent from reading the many public comments already posted on this matter that many community members share the CCNSO concern (17 June 2014) that ICANN’s apparent belief that ICANN is already accountable is not shared by all in the community. The question then is what to do about it.

It is my view that the twin problems of accountability and transparency can be solved within the current ICANN structure. Tweaks need to be made to the IRP, Reconsideration, DIDP and Ombudsman systems to enable them to function in a way that the spirit and reality of openness, accountability, transparency and trust they were intended to engender occur. The bigger challenge is a revision to ICANN’s governance structure. One is needed.

The one I recommend is evolutionary rather than revolutionary and, I hope, is keeping with the recommendations of CENTR (28 May 2014) and LACTLD (30 May 2014) to not create additional layers of governance. The California Corporations Code provides acceptable alternatives to ICANN’s current top down governance structure that as a community we need to explore.

**I. Governance reform**

I had the good fortune while a student at the University of Southern California to have a work-study job at the Information Sciences Institute. It was there I met Jon Postel and Joyce Reynolds. At the time I had no idea what they were doing but I did get a feel for the type of people they were. I can see why people trusted Jon and Joyce to handle the number and name functions in the early days of the Internet. They were the type of people you could trust.

I don’t feel the same way about the current Board, although individually I greatly admire the time and effort they put in to our joint project. Our problem today is that our governance structure in ICANN is pretty much the same on a macro level as it was in the days when Jon and Joyce together did all of the work. There is a philosopher-king, if you will; in times past it was Jon and today it is the Board. That needs to change.

I took Paul Twomey’s (5 June 2014) advice and spent some time looking at the history of accountability, transparency and, indeed, governance at ICANN. There was a moment when the community decided upon a version of corporate organization that empowered the Board, as opposed to empowering the community. It was a different time, ICANN was a fragile organization without many assets and the decision seems to me to have made sense at the time. It no longer does.

ICANN is incorporated as a California public benefits corporation. There are consequences to this model of corporate governance, some of which invalidate some of the fine proposals made on accountability by our community members.

The Heritage Foundation (5 June 2014), the Motion Picture Association of America (5 June 2014), Verizon (4 June 2014) and the Noncommercial Stakeholders Group (6 June 2014) all propose some sort of new board or other third party to oversee the activities of our current board. In some proposals this new entity would have the power to reject or override Board decisions, in others it’s power is not as broad (or is not enumerated). I would suggest that the later would be ineffectual while the former would likely not be permitted under California law.

Under the California Corporations Code (see, for example, §5210) the Board is supreme. It may delegate powers, it may agree to abide by third party decisions, but in the end “all corporate powers shall be exercised under the ultimate direction of the Board”. I don’t believe under California corporate law you can have an entity empowered to overrule the Board. However, as Robin Gross (6 June 2014) astutely opines “the Board is still required to follow it’s own corporate Bylaws and Articles”. That is largely the only limit placed upon the Board by the Corporations Code. That realization is the key to creating a structural system of true transparency and accountability.

There is acknowledgement in the community that there needs to be an increased line of accountability directly from the Board to the community.

Brian Carpenter (9 May 2014) calls for amending the Articles of Incorporation so that “accountability to the various stakeholder groups is required”. Thomas Lenard (27 May 2014) feels the need for a modified Board structure. Konrad von Finckenstein (16 May 2014) has issued a plea for “direct democracy”. Multistakeholder Ethos Award winner Avri Doria (4 June 2014) suggests various mechanisms through which the community can remove ICANN’s Chair and/or Board members from office. I agree with all of these comments and/or positions.

There are two basic types of California public benefits corporations: one with Members and one without Members. It is my strong belief that switching ICANN’s form of incorporation from that of a public benefits corporation without Members to that of a public benefits corporation with Members is the best way to ensure that ICANN enters the new era with a structure in place that ensures accountability, transparency and responsiveness to the needs of the community and, indeed, to all internet users throughout the world.

The membership structure can and should be based on the current community structures. Memberships should accrue to current community SO’s and AC’s in a manner to be determined. Provisions would be made for inclusion of groups not yet involved in the ICANN community.

As things currently stand, under ICANN’s current corporate organization the ICANN Board is answerable only to itself and to the Attorney General of the State of California. Under a members based California public benefits corporation arrangement, the Board will be first and foremost answerable to those who are in the community. Members would have the right to file derivative actions (§5710), along with the directors to approve changes to corporate Bylaws (§5812) and to elect and recall members of the Board of Directors (£5512). Ultimate power lies with the Members rather than with the Board. It is bottom up, not top down. Isn’t that what ICANN is supposed to be all about and from where it theoretically derives it’s legitimacy?

**II. Supporting Organisations / Advisory Committees**

In a Member based governance structure the SO’s and AC’s become the validators of the legitimacy of the ICANN governance structure. They would need to become legal persons to participate in the process. I would like to say there would be a greater need for the SO’s and AC’s to become more transparent and accountable themselves at that time, but I agree with Fiona Asonga (3 June 2014) when she writes that all ICANN “supporting organizations and affiliate organizations” need to develop their own “accountability and transparency mechanisms”. Not in the future, but now.

I note, for example, that the Intellectual Property Constituency (IPC) does not have a public membership list. The I.P.C. has three categories of members but only divulges publically the members of one category. That is not acceptable in a truly transparent and accountable organization. The fact the I.P.C. now has a small operational role in ICANN makes this omission particularly troublesome.

No group is perfect. Those of us who are members of the Noncommercial Users Constituency (NCUC) like to think that we are the most open and transparent organization in ICANN. I think we are. Yet during the last election cycle an outgoing NCUC board member wrote of a “cabal” influencing elections. The same term was used a few years earlier in reference to the NCUC’s predecessor organization. I know the people involved, like and respect them, but it really doesn’t matter what I think. In politics, and much of this is political in nature, perception is reality and often is not itself based upon reality. These issues need to be dealt with.

The Government of Spain (6 June 2014) has recommended an external review of accountability and transparency procedures throughout ICANN. I agree with that proposal. For the SO’s and AC’s, though, I like a proposal made by Fadi Chehade even more.

During a January 2013 intersession meeting in Los Angeles with members of the NCSG, Mr. Chehade suggested the possibility of having Transparency International (TI) conduct an audit of all SO’s and AC’s. It was a good idea then, it is a good idea now and I hope is something that comes to fruition. TI has the experience and the expertise to be a genuine asset for ICANN at all levels.

ICANN needs to be transparent and accountable from the bottom up, not just from the top down.

**III. Affirmation of Commitments (AoC) / Human Rights Acknowledgement**

I agree with Milton Mueller (7 June 2014) that the AoC is an internal review process and not an accountability measure. In the initial NCSG Reconsideration Review Request violations of the AoC were noted. In it’s response the Board ignored the AOC issues that were raised.

I believe, however, that suggestions by the USCIB (27 May 2014) and the Business Constituency (25 June 2014) that the AoC, or portions thereof, be placed in ICANN’s Bylaws is something I can support. As Robin Gross (6 June 2014) noted, the Board needs to legally comply with those items that are in it’s Bylaws or Articles of Incorporation. By placing the AoC in the Bylaws, recourse to the Attorney General of the State of California would be possible if basic principles contained in the AoC are violated. This would actually give the individual better recourse than he or she has now under ICANN’s current AoC with the American government.

A basic statement that ICANN endeavors to respect the Universal Declaration of Human Rights, and the principles contained in it, also should find a place in the AoC before it achieves Bylaw status. These are principles that as an international corporation ICANN needs to adhere to.

**IV. Disclosure Reform**

On December 9, 2011 I attended a conference on trademarks and the Internet held in Dublin and sponsored by the International Trademark Association (INTA). The keynote speaker was a member of ICANN’s Board who had come to Dublin from the United States of America.

Unusual for keynote addresses this speech was scheduled for the end of the day, a Friday during the Christmas shopping season, and consisted of four slides presented by the Board member to a largely empty room.

Since that day when issues concerning intellectual property came before the Board I’ve questioned that conference and it’s effect on the impartiality of the Board member in question. I have no knowledge of any impropriety and am unaware if the Board member in question even received any compensation for his or her appearance. The optics, however, are bad.

I fully support proposals calling for mandatory public disclosure by all members of the ICANN Board, and those in other leadership positions at ICANN, of all monies earned from speaking appearances or any other benefit procured as a result of said leaders affiliation with ICANN.

**V. Documentary Information Disclosure Policy Reform**

I fully support and applaud the submission by the Centre For Internet & Society, India, (7 June 2014) concerning ICANN’s Documentary Information Disclosure Policy (DIDP). Third party oversight and a sunset period for information classified as non-discloseable are both excellent ideas worthy of support.

As stated earlier, the reliance of ICANN staff of the Defined Conditions for Nondisclosure (DCND) (used to deny information in 76% of all DIDP requests since 2012) is troubling. Transparency is the foundation of any accountability effort. If ICANN is serious about becoming an open and accountable organization it needs to modify it’s DCND policy. There are models, including many used by cooperative societies, proper for corporate entities that would greatly increase ICANN’s transparency and restore community confidence in ICANN’s corporate practices. They should be explored.

**VI. Ombudsman Reform**

I concur with the NCSG in it’s proposal to strengthen the position and authority of the ICANN Ombudsman (6 June 2014).

In addition, steps need to be taken to ensure the independence of the Ombudsman. Currently he is the creation on and responsive to the Board. Period.

Under the current ICANN administrative set up I would suggest delegating the duty of selecting and retaining the ICANN Ombudsman to the NomCom. There needs to be community participation in these matters if the Ombudsman is to retain credibility, particularly when investigating matters related to the Board.

**VII. Reconsideration Reform**

There is nothing structurally wrong with the Reconsideration process. What is wrong are the outcomes and the refusal by the Board to actually and seriously re-examine it’s actions. A 98% rejection rate is not something that can be easily explained.

Once again, I would suggest that making the Board responsive to the community through a corporate reorganization that creates a membership category may be the only way to truly fashion a Board that is responsive to the community.

**VIII. Independent Review Process (IRP) Reform**

Three recommendations to reform a seriously broken process:

1. I agree with the government of Spain (6 June 2014) that the cost to the applicant for using the IRP needs to be seriously reduced. Rather than half the cost, as Spain proposes, I’d suggest simply doing away with the loser pays all philosophy. Each side should have to bear its own costs for processing its claim. A sliding scale based upon resources of the applicant should apply for costs relating to the actual proceeding. Accountability benefits the entire community and should not be available only to those with the resources to pursue their grievance.

2. Changes to the Bylaws limiting redress under the IRP to instances where the Board acted in bad faith need to be reversed. It is unconscionable that an entity claiming to believe in transparency and accountability has narrowed it’s principle third party accountability vehicle to those narrow instances where provable malfeasance has occurred. The IRP needs to be available to all applicants who feel the Board has violated it’s Bylaws or Articles, not just a select few.

3. Robin Gross (6 June 2014) is correct in her assertion that the Cooperative Engagement Process (CEP) needs to be open and transparent. Having participated in C.E.P. proceedings I can state the closed nature seriously inhibits a more widespread discussion of issues raised both with community members and with those directly involved in the action.

I’d like to thank all the members of the community who have participated by posting during this public comment period. I’ve learned a lot from what I’ve read. I only hope our concerns are taken seriously and together we really can build a truly open and accountable ICANN.

Kind Regards,

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