
MEMORANDUM

To: Accountability and Transparency Review Team

From: R. Shawn Gunnarson

Date: December 3, 2010

Subject: ICANN's Accountability and California Law

Introduction

The Accountability and Transparency Review Team (“ATRT”) has run into a legal problem. ICANN insists that California law prohibits the board from “empower[ing] any entity to overturn decisions or actions of the board because that would result in that entity indirectly controlling the activities and affairs of the corporation and thus usurping the legal duties of the board.”¹ ICANN’s legal position clearly influenced the ATRT’s Proposed Recommendations² and the Final Report of the Berkman Center³ on which it relied. Given that influence, the range of available recommendations that ATRT can make in its final report now depends on whether ICANN has read California law correctly.

This memorandum seeks to assist the ATRT by analyzing ICANN’s legal position in light of California law. It demonstrates that ICANN’s reading of California law is mistaken. ICANN may resist independent and binding accountability on other grounds, but it cannot fairly claim that is compelled to avoid such accountability as a matter of law. The analysis consists of three parts. First, it recites how California law has come to influence the form of accountability that ATRT may recommend. Second, it explains how ICANN’s reading of California law is mistaken. Third, it shows that ICANN’s effort to avoid independent and binding accountability by relying on California law runs contrary to its past commitments and to the ICANN model of privatized DNS management.

¹ ICANN, *Limitations on Third Party Review of Corporate Board Actions under California Law*, Aug. 31, 2010 (“*Limitations*”).

² Accountability And Transparency Review Team, *Proposed Recommendations & Request For Public Comment*, Nov. 3, 2010 (“*Proposed Recommendations*”).

³ The Berkman Center for Internet & Society at Harvard University, Final Report, *Accountability and Transparency at ICANN: An Independent Report*, Oct. 20, 2010 (“*Berkman Center Report*”).

1. ATRT's Proposed Recommendations Are Constrained by ICANN's Interpretation of California Law.

The problem of California law arose while ATRT was carrying out its mandate under the Affirmation of Commitments (“AoC”) to “consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest.”⁴ To be precise, it cropped up during Working Group 4’s (“WG4”) “consideration of an appeal mechanism for Board decisions.”⁵ In attempting to identify an appeal mechanism that would be binding on the board, “WG4 queried ICANN about California law governing ICANN and any implications for a possible recommendation from the ATRT.”⁶ ICANN replied with a one-page document stating its position that under California law “the board *cannot* empower any entity to overturn decisions or actions of the board.”⁷

ICANN’s legal position created an impasse for WG4. Its investigation concluded that neither the Ombudsman nor the request for reconsideration were truly independent of the board and their decisions are not binding on it.⁸ It rejected a new proposal for a community re-vote as likely to require too high a level of consensus among the SOs and ACs.⁹ Only the Independent Review Panel (“IRP”) was found to be sufficiently independent, and its effectiveness was questioned because “its decisions and recommendations are not binding on the ICANN Board.”¹⁰ Resolving the impasse caused by ICANN’s legal position was regarded by WG4 as “*critical* to establishing an appeals mechanism that is both binding and independent, and *essential* to the viability of the ICANN model itself.”¹¹ Based on these concerns, WG4 tentatively recommended that “pending further research” it would “[c]hallenge ICANN’s interpretation of California corporate governance law as it applies to ICANN policy development.”¹²

ATRT, acting as a whole, has taken a different tack. Its Proposed Recommendations concede that ATRT “did not reach consensus on whether binding authority was the standard upon which to judge ICANN’s accountability.”¹³ Consensus broke down over whether an adequate appeals mechanism from board actions needed to be binding. “[W]hile some members of the ATRT believe that having a binding appeals process is critical to ensure accountability to the community and the long term viability of the multi-stakeholder ICANN model, other members of the ATRT raised concerns that such a standard would

⁴ *Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers*, Sep. 30, 2009, at ¶ 9.1 (“AoC”).

⁵ *Id.* at ¶ 9.1(a).

⁶ *Proposed Recommendations*, at 44.

⁷ *See Limitations* (emphasis added).

⁸ AoC / ATRT Working Group #4, Independent Review of Board Decisions, *Findings and Recommendations (Draft)* (“Draft Findings”).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

¹² *Id.*

¹³ *Proposed Recommendations*, at 46.

create a new set of accountability and transparency issues by assigning to some new, unnamed set of individuals the power to overturn Board decisions.”¹⁴ Resolving this dispute was evidently elusive, despite “concern from the Community and, in part, from the Berkman Case Studies, over the fact that none of the three accountability mechanisms can review and potentially reverse ICANN Board decisions with binding authority.”¹⁵

The Berkman Center report found, in turn, that “there are no binding appeal mechanisms”¹⁶ but concluded “that it is not advisable to implement such a broad-reaching third-party review of any Board decisions and actions.”¹⁷ One reason for that conclusion was that “it remains doubtful whether such a broad regime would hold under Californian corporate law.”¹⁸

These doubts about the validity of placing the board under a binding form of review led ATRT to make an interesting distinction. It acknowledged that ICANN may agree to binding arbitration in its commercial agreements “without running afoul of California law” but reasoned that “it is less clear and deserves further legal analysis as to what extent and through what mechanisms ICANN could agree to enter into binding arbitration more generally.”¹⁹

2. ICANN’s Legal Position Misstates California Law

ATRT’s final recommendations will contribute toward shaping and informing public discourse about ICANN’s accountability for the foreseeable future. Such consequential work should not be built on unresolved doubts about how far California law permits ICANN’s board of directors to be held accountable. To remove or reduce such doubts, ICANN’s legal position is analyzed below in light of the controlling statutory provisions found in the California Nonprofit Public Benefit Corporation Law.²⁰ Each statement in ICANN’s memorandum is quoted verbatim in italics, followed by analysis and discussion.

- a. *California law requires that the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board of directors. See Cal. Corp. Code § 5210.*

Actually, section 5210 says more than that:

Each corporation shall have a board of directors. Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Berkman Center Report*, at 2.

¹⁷ *Id.* at 45.

¹⁸ *Id.*

¹⁹ *Proposed Recommendations*, at 46.

²⁰ Calif. Corp. Code §§ 5110-6910.

direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.²¹

ICANN's misreading is evident. The principle that "the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board"²² is circumscribed by multiple exceptions that ICANN omits. Section 5210 hardly makes corporate board authority an absolute under California law.

These exceptions to corporate autonomy are substantial. They include "the provisions of this part,"²³ meaning part 2 of division 2 of the California Corporations Code. That part spans sections 5110 through 6910 and includes numerous qualifications on the board's power, some of which will be pointed out shortly. They also include "any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033)."²⁴ With these exceptions in view, the proviso that a delegation of corporate management or powers requires that "all corporate powers shall be exercised under the ultimate direction of the board"²⁵ is immaterial. At issue is the validity of an appeal mechanism from the board's decisions, not a delegation of its powers.

For the moment it is enough to say that section 5210's principle of board autonomy has significant exceptions that ICANN omits. To that extent alone, its reading of California law is flawed.

- b. *The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that all corporate powers shall be exercised under the ultimate direction of the board.*

This statement packs two substantial mistakes into a single sentence.

California law does not require "all corporate powers" to be exercised under the board's "ultimate control." To cite only one contrary example, the law specifically authorizes the board to designate statutory members²⁶ who may exercise substantial corporate powers, such as the power to remove directors or amend the bylaws, and who assuredly do not act under the board's direction. (More on them shortly.)

In addition, ICANN once again confuses limitations on power with delegations of power. An independent review body, whether the IRP or another, presumably would limit the board's power by reversing or nullifying its action. But that limitation acts as a brake, not a

²¹ *Id.* at § 5210.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.* at § 5310(a) ("A corporation may admit persons to membership, as provided in its articles or bylaws....").

steering wheel. Review of a disputed board decision by an independent review board does not exercise ICANN's corporate powers any more than does an arbitration panel adjudicating a dispute under a registry agreement. Because a review body exercises only the power to curb the board and not to manage ICANN or to act in its name, any issue of the board's "ultimate direction" is legally immaterial.

c. Although the board is broadly empowered to delegate certain management functions to officers, employees, committees and other third parties, the board cannot empower any entity to overturn decisions or actions of the board because that would result in that entity indirectly controlling the activities and affairs of the corporation and thus usurping the legal duties of the board.

Here we see the nub of ICANN's position. ICANN contends that "the board cannot empower any entity to overturn decisions or actions of the board." ICANN cites no legal authority for its absolutist understanding of corporate autonomy. In fact, California law specifically authorizes the board oversight that ICANN denies.

Board oversight of the kind ICANN denies is available through the creation of statutory members. Public benefit nonprofit corporations like ICANN "may admit persons to membership, as provided in its articles or bylaws."²⁷ "Membership" under the statute means "the rights a member has pursuant to a corporation's articles, bylaws, and this division."²⁸ Importantly, this means that members' rights and duties are not entirely spelled out by statute; the articles and bylaws may modify and enhance them. By statute alone, membership carries include "the right to elect and remove directors"; "the right to sue the directors in derivative actions, or third parties on behalf of the corporation, under certain circumstances and subject to specified limitations"; and "other rights spelled out in the statutes and in the corporation's bylaws."²⁹ In addition, members may amend the bylaws and approve (or disapprove) of amendments to most articles, on the terms prescribed by the bylaws and articles.³⁰ It is well established that "[t]hese rights can be enforced in civil court actions."³¹

Binding oversight also may be exercised by the California Attorney General, who is charged to oversee ICANN's corporate affairs and, if necessary, subject it to binding proceedings "to correct the noncompliance or departure" from its basic purpose or the trusts it has assumed.³² Although the Attorney General's supervisory powers are established by statute and not by the board, they tend to rebut ICANN's central argument that the board is legally required to retain untrammelled autonomy.

In addition to these specific grants of oversight authority to statutory members and the Attorney General, California law vests nonprofit corporations with broad powers to structure their internal affairs by amending the articles and bylaws. "California law

²⁷ *Id.* at § 5310(a).

²⁸ *Id.* at § 5057.

²⁹ Edmund G. Brown, Jr., California Attorney General's Guide for Charities 24 (2005) ("Guide for Charities").

³⁰ *See* Calif. Corp. Code at §§ 5150(b) (bylaws); 5812(a) (articles).

³¹ Guide for Charities, at 25.

³² Calif. Corp. Code at § 5250.

permits a non-profit corporation like ICANN to limit its powers in its Articles of Incorporation *without qualification*.”³³ This testimony during the *ICM Registry* case by Harvard Law School Professor Goldsmith is supported by sections 5131 and 5140. The former provides that “articles of incorporation may set forth a further statement *limiting the purposes or powers* of the corporation,”³⁴ while the latter provides that a corporation has the powers of a natural person “[s]ubject to *any limitations* contained in the articles or bylaws.”³⁵ Unless doing so would violate a super-majority voting requirement, “[t]he articles or bylaws may *restrict or eliminate* the power of the board to adopt, amend or repeal any or all bylaws”³⁶ And “[b]ylaws may also provide that repeal or amendment of those bylaws, or the repeal or amendment of specified portions of those bylaws, may occur only with the approval in writing of a specified person or persons *other than the board or members*.”³⁷

Taken together, these provisions mean that ICANN’s position rests on a misinterpretation of California law. A fair reading of the relevant statutory provisions shows that the law authorizes the board to institute members with the powers to elect and remove directors, bring a derivative action against the corporation, and amend the bylaws to deny the board itself power to alter the bylaws. Any of these devices might be used to reverse objectionable board actions. The law contains no provision qualifying the board’s power limit its own power, even if such limitations reduce the corporation’s powers. Contrary to ICANN’s legal position, none of these broadly-worded statutory provisions is qualified by the supposed requirement of preserving corporate autonomy. Instead, they permit ICANN to do what it says California law forbids: empower some entity to exercise binding review of the board.

On this critical point of law, ICANN simply got it wrong.

- d. *In order to exercise its fiduciary duties to the corporation under California law, the board may not abdicate its ultimate authority to exercise all corporate powers.*

Fiduciary duties do not excuse the board from its duty to be accountable to the community whose activities it regulates. To be sure, California law places ICANN’s directors under obligations of loyalty, care, inquiry³⁸ and adherence to prudent investment standards³⁹ to ICANN as an institution. So much is uncontested.

But ICANN’s legal position implies a false choice between fidelity to these duties and its subjection to independent and binding review. If the board would not unlawfully “abdicate” its authority by creating statutory memberships, with extensive powers over the board, it is

³³ Expert Report of Jack Goldsmith, *In re ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers*, ICDR Case No. 50 117 T 00224 08, at 11 & n.27, Jan. 22, 2009 (emphasis added).

³⁴ Cal. Corp. Code § 5131 (emphasis added).

³⁵ *Id.* at § 5140 (emphasis added).

³⁶ *Id.* at § 5150(c) (emphasis added).

³⁷ *Id.* at § 5150(d) (emphasis added).

³⁸ *Id.* at § 5231(a) (“A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”).

³⁹ *See id.* at § 5240.

hard to see how it could abdicate its authority by adopting a form of binding review with presumably lesser powers.

- e. *Entering into binding arbitration clauses for certain actions within contractual agreements would be acceptable, but cannot be used as a catch-all waiver of a California corporation board's legal rights and obligations to have final responsibility for actions of the organization.*

Waivers are not the issue, statutory authority is. ICANN's legal position is that California law precludes the board from accepting binding review of its decisions. Its prior course of conduct in its contractual dealings is irrelevant to whether the law permits an entity to overturn board decisions for purposes other than resolving contractual disputes. Its contractual arrangements do tend to show, however, that ICANN does not regard the board's autonomy as non-negotiable for all circumstances—only when it is convenient.

Three of the Internet's most popular TLDs—.com, .info, and .org—have registry agreements with ICANN whose current terms dictate binding arbitration as a form of dispute resolution.⁴⁰ Each agreement contains the identical clause at section 5.1(b):

Disputes arising under or in connection with this Agreement, including requests for specific performance, shall be resolved through binding arbitration conducted as provided in this Section 5.1(b) pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC").⁴¹

Binding arbitration produces decisions that may compel the board to act or refrain from acting. ICANN implicitly acknowledges this fact in agreeing that an arbitration award issued under the registry agreements, if confirmed, entitles the prevailing party "to enforce a judgment ... in any court of competent jurisdiction."⁴² To that extent, ICANN has implicitly acknowledged that it understands California law to allow the board to be reversed or overturned under certain circumstances.

A comparison of these registry agreements with the bylaws governing the IRP confirms that it is ICANN's own decision, not California law, which determines whether ICANN's board is subject to reversal by an external authority. When dealing with its contracting partners, ICANN agrees to be subject to binding arbitration and specifically provides for the enforcement of any confirmed arbitration award by a court of law. But when dealing with the question of whether a board action is "inconsistent with the Articles of Incorporation or Bylaws,"⁴³ ICANN reserves power for the board to accept or reject the

⁴⁰ See .com Registry Agreement between ICANN and VeriSign, Inc., Mar. 1, 2006, at § 5.1(b) ("Disputes arising under or in connection with this Agreement ... shall be resolved through binding arbitration ..."); .info Registry Agreement between ICANN and Afilias Limited, Dec. 18, 2006, at § 5.1(b) (same); .org Registry Agreement between ICANN and Public Interest Registry, Dec. 8, 2006, at § 5.1(b) (last visited on Oct. 28, 2010) ("org Agreement") (same).

⁴¹ .org Agreement, at § 5.1(b).

⁴² *Id.*

⁴³ ICANN, Bylaws, art. IV § 3(1).

IRP's findings.⁴⁴ ICANN's board thus accepts the authority of binding arbitration for the purpose of its contractual agreements but rejects it for the purpose of resolving disputes over the validity of its actions.

This distinction is unknown to the relevant California statutes. Neither section 5240 that ICANN cites, nor any other statutory section reviewed above, conditions the validity of binding arbitration or other binding review of the board's actions on the purpose for which it is used. ATRT's concern with the distinction between arbitration-for-contracts and arbitration-for-other-purposes is needless.⁴⁵ It can reasonably disregard a distinction the law does not make.

ICANN's acceptance of binding arbitration in its registry agreements does not prevent it from arguing against giving IRP (or some other entity) binding review over its decisions. But because the purpose of using binding arbitration is irrelevant to its legal validity, ICANN's use of arbitration to resolve contractual disputes does preclude it from arguing consistently that California law, and not its institutional preference, stands in the way of establishing an independent and binding review of board actions.

In several ways, then, ICANN's legal position is mistaken. It exaggerates the requirement of corporate autonomy and disregards the inconsistency between its acceptance of binding arbitration to resolve contractual disputes and its rejection of binding arbitration to compel the board's fidelity to the articles and bylaws. That ICANN's opinion of the board's autonomy during the ATRT review process is exaggerated should come as no surprise to anyone familiar with the IRP determination that ICANN's assertions of autonomy in its dispute with ICM Registry likewise found no support in California law.⁴⁶

ICANN's legal position deserves to be rejected, not only because it is wrong, but because it lends support to ICANN's apparent retreat from its institutional commitment to due process. The history of that commitment reveals how seriously ICANN's legal position threatens to compromise its future viability as the global manager for the Internet DNS.

3. ICANN Has an Historic and Fundamental Commitment to Binding Review of Its Decisions as an Essential Element of Its Institutional Character.

WG4 made it clear that in its judgment, independent and binding review is "*essential* to the viability of the ICANN model itself."⁴⁷ Its judgment is supported by the history of the DNS Project, the long effort to "transition the coordination of DNS responsibilities, previously

⁴⁴ See *id.* at art. IV §§ 3(8)(c) & (15) (granting the IRP authority to "recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP" and directing the board "[w]here feasible" to "consider the IRP declaration at the Board's next meeting"). The nonbinding nature of an IRP declaration was recently affirmed in the .xxx case. See *In re ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers*, Int'l Centre for Dispute Resolution, ICDR Case No. 50 117 T 00224 08, at 61 ("*ICM Registry*") ("[T]he intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.").

⁴⁵ See *Proposed Recommendations*, at 46.

⁴⁶ *ICM Registry*, at 32 ("ICANN's reliance on the 'business judgment rule' and the related doctrine of 'judicial deference' under California law is misplaced").

⁴⁷ *Draft Findings* (emphasis added).

performed by the U.S. government or on behalf of the U.S. Government, to the private sector so as to enable industry leadership and bottom-up policy making.”⁴⁸

In the *DNS White Paper* the U.S. government considered it essential to delegate DNS management functions to an organization with formal accountability,⁴⁹ including “due process requirements and other appropriate processes that ensure transparency, equity and fair play in the development of policies or practices.”⁵⁰ By these requirements and processes the government meant that “[e]ntities and individuals would need to be able to participate by expressing a position and its basis, having that position considered, and *appealing if adversely affected*.”⁵¹

In WG4’s view, establishing independent review of board decisions goes to the foundation of ICANN’s authority over the Internet DNS. Accepting the need for such review was a principal condition for ICANN to receive U.S. government approval of its proposal to take responsibility for DNS management.⁵² Nor did that condition abate after ICANN began carrying out its management responsibilities. ICANN agreed in its first Memorandum of Understanding “that the mechanisms, methods, and procedures developed under the DNS Project ... will ensure *sufficient appeal procedures* for adversely affected members of the Internet community.”⁵³ That agreement survived six amendments, as well as the Joint Project Agreement (“JPA”), none of which modified or repealed ICANN’s agreement to “ensure sufficient appeal procedures.”⁵⁴ Succeeding the JPA was AoC, which reiterated the understanding that “assessing and improving ICANN Board of Directors (Board) governance” included “the consideration of *an appeal mechanism for Board decisions*.”⁵⁵

Ensuring “sufficient appeal procedures” for the review of board decisions is one of ICANN’s most basic and consistent institutional commitments. Its apparent retreat from that commitment now puts in question whether ICANN has the capacity to carry out its technical mission with “transparency, equity and fair play in the development of policies or practices.”⁵⁶ If ICANN were to continue relying on a mistaken interpretation of California law to resist binding review, serious doubts would arise about its willingness to be

⁴⁸ NTIA, Notice of Inquiry, *Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System*, 74 Fed. Reg. 18688, 18689 (Apr. 24, 2009) (“NOI”).

⁴⁹ Nat’l Telecom. & Information Agency, Statement of Policy, *Management of Internet Names and Addresses*, 63 Fed. Reg. 31741, 31742 (June 10, 1998) (“As Internet names increasingly have commercial value, the decision to add new top-level domains cannot be made on an *ad hoc* basis by entities or individuals that are not *formally accountable* to the Internet community.”) (emphasis added).

⁵⁰ *Id.* at 31747 (emphasis added).

⁵¹ *Id.*

⁵² See Jonathan Weinberg, *The Problem of Legitimacy*, 50 Duke L.J. 187, 228-29 (2000) (explaining that ICANN’s original bylaws provided for independent review of board decisions in ICANN’s “sole discretion,” but the U.S. demanded an amendment to the bylaws that subjected the board to external review before it would agree to the ICANN proposal).

⁵³ Memorandum Of Understanding Between The U.S. Department Of Commerce And Internet Corporation For Assigned Names And Numbers, Nov. 25, 1998, at § V(A)(2).

⁵⁴ *Id.*

⁵⁵ AoC ¶ 9.1(a) (emphasis added).

⁵⁶ *DNS White Paper* at 31747.

sufficiently accountable and, with them, questions about the sustainability of ICANN's authority as global manager of the Internet DNS. Regardless of how the question of binding review is ultimately decided, it should be made with a full understanding of the legal landscape and DNS history.

Relying on a mistaken view of California law to discourage even the discussion of binding review is inconsistent with ICANN's self-description as "a multinational institution working for the common good."⁵⁷ California law's "rigorous framework of legal accountabilities"⁵⁸ should be used to ensure ICANN's accountability to its global constituency—not to defeat it.

Conclusion

California law does not prevent ICANN's board from accepting a binding review of its actions. To the contrary, the law authorizes the board to create statutory members with substantial powers over the board or permit another entity to exercise binding review of the board's actions. ICANN's use of binding arbitration in its registry agreements demonstrates that ICANN itself does not view the board's autonomy as an absolute principle. Absent a legal distinction between the use of arbitration for contractual disputes and other purposes, ICANN can fairly maintain only that it prefers to avoid independent and binding review of the board's actions, not that the law requires it to do so.

This review of California law strongly supports WG4's recommendation to challenge ICANN's legal position. Challenging ICANN on this point is imperative, as ATRT's recommendations are put into final form. It would be a shame for ATRT's hard work over several months to be permanently distorted by a legal mistake.

⁵⁷ Rod Beckstrom, Opening Address, ICANN Regional Meeting, Brussels, June 21, 2010.

⁵⁸ ICANN, *Accountability & Transparency: Frameworks and Principles*, at 16 (Jan. 2008).