



COMMENT OF THE INTELLECTUAL PROPERTY CONSTITUENCY ON THE DRAFT FRAMEWORK OF
INTERPRETATION FOR HUMAN RIGHTS

June 15, 2017

The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on the Cross Community Working Group Accountability Draft Framework of Interpretation for Human Rights. (<https://www.icann.org/public-comments/foi-hr-2017-05-05-en>)

The IPC praises the members of the Human Rights subgroup on drafting a Framework of Interpretation for Human Rights (FOI-HR) that will play a key role in guiding ICANN's approach to the topic of Human Rights in fulfilling the Mission, Commitments and Core Values of its new Bylaws. The tenets of Human Rights are of profound importance to Intellectual Property owners as they in effect form the foundation on which rights holders can express themselves and indeed prosper from their works if they so choose. Rights such as freedom of expression, and the right to claim ownership and authorship of creative works have a symbiotic relationship, supporting a virtuous circle of creativity and expression that supports public discourse, cultural diversity and access to information and ideas.

While the Draft FOI-HR is a great start, there are still several areas that require additional thought and discussion by the Community.

On the need to ensure all Human Rights are considered

In the IPC's March 9, 2016 comment on the Cross-Community Working Group on Enhancing ICANN Accountability ("CCWG") we expressed a concern there is a tendency to focus on certain human rights (e.g., freedom of expression, freedom of speech and privacy) to the exclusion or minimization of others including, for example, Article 17 of the Universal Declaration of Human Rights that states "(1) *Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.*" and Article 27 concerning the "*right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*"

Analyzing the impact of technology and policy on human rights (and vice versa) is a balancing act given the intertwined and interdependent nature of all Human Rights outlined in the UNDHR, for example. As such, we very much agree with draft framework text asserting that "A particular Human Right should not be considered in isolation since Human Rights are universal, indivisible, interdependent, and interrelated."

It is critical that ICANN bear in mind the practical issues involved in enforcement of these important rights that touch upon matters within ICANN's remit. Particularly in light of the coming implementation of the new EU General Data Protection Regulation, the IPC would like to emphasize its position that in order to protect the Article 17 and Article 27 Human Rights mentioned above, the ICANN community will need to focus on balancing privacy interests with the interests of creators and intellectual property owners (such as via a Consent provision to be added to domain name registrant agreements which takes into account the EU Directive on Enforcement of intellectual property rights found at this link: http://ec.europa.eu/growth/industry/intellectual-property/enforcement_en, and similar laws in other jurisdictions). The IPC understands that it is just such a law that creates a basis for requiring consent to access contact information regarding the registrant which is so critical to the protection of intellectual property rights.

On the need for an impact assessment

The IPC notes that the Board has asked ICANN staff to produce an impact assessment on the Draft FOI-HR. To the extent that this assessment is designed to gauge workload and costs associated with implementation of the FOI-HR, this makes sense. We believe, however, that a traditional Human Rights Impact Assessment is pre-mature at this point and would be misguided. Indeed, we believe that the Human Rights Bylaw should not be read to require a Human Rights impact assessment and note that the new Bylaws in fact create an impact in numerous areas, including for example financial impacts, intellectual property impacts, etc. The proper timing and scope of a Human Rights Impact Assessment (if any) should rather be determined in the context of a Policy Development Process (e.g., a GNSO PDP) to be undertaken after the adoption of the FOI-HR. It is our understanding that the FIO-HR was developed for purposes of guiding PDPs and other policy activities in a consistent interpretation of the Bylaw, and is not intended to operate as policy itself.

On "applicable law"

During the course of WS2 work on the Draft FOI-HR, various IPC members commented on the nature of the term "applicable law" as contained in the new Core Value. The IPC believes it is very important to recognize that ICANN is a California non-profit entity and is not itself bound by the various treaties and declarations which are listed in the Draft FOI-HR as reference points. These treaties and declarations legally bind state actors, not private non-profit (or for-profit) corporations. The new Core Value makes it clear that ICANN cannot be required to meet any commitment which extends beyond "applicable law." Accordingly, the IPC believes that when staff conducts an impact assessment of the FOI-HR as requested by the Board, that assessment should be limited to the impact of those actions which ICANN is required to conduct or implement in accordance with "applicable law." In particular, the IPC notes that there was no consensus within WS2 to adopt the so-called Ruggie Principles and that these principles are not appropriate in the context of ICANN's limited Mission.

On the Implementation of the FOI-HR

The IPC believes implementation of the FOI-HR will require considerable additional work and input from the ICANN community. As the FOI-HR impacts ICANN policy development for gTLDs directly, the IPC strongly suggests that discussions on how the Human Rights Bylaws should be implemented in the context of gTLD policy development, GNSO Working Group procedures and GNSO procedures generally, are all best and most appropriately left to the GNSO. Policy experts within the GNSO community are well situated to determine how best to structure and sequence such implementation. This is also consistent with ICANN's long-standing practices regarding the relative roles of different structures in the larger ICANN system.

On Grievance Procedures

The Revised ICANN By-Laws specify that no Request for Reconsideration or Independent Review Panel solely based on the Human Rights Bylaw may be invoked unless and until the FOI-HR is adopted. However, if one assumes that these grievance procedures apply as soon as the FOI-HR is adopted by the Board, then ICANN should be careful to understand and document any and all applicable grievance procedures which may appropriately apply before these more formal remedies come into play. For example, could the Human Rights Bylaw serve as the basis for an Empowered Community enforcement sanction? What is the role of the Ombudsman and/or the Complaints Officer in connection with implementation of the FOI-HR or the application of the Human Rights Bylaw? If a limited Public Interest Objection has been filed against an application for a new gTLD on Human Rights grounds and fails, does that preclude other avenues to pursue grievances based on claims of Human Rights violations? Again, we believe that these questions need to be answered in an orderly manner with bottom-up Multistakeholder participation. The Board should consider whether formal adoption by the Board of the FOI-HR prior to such questions being answered would be premature.

Respectfully Submitted,

Intellectual Property Constituency