



The GNSO Intellectual Property Constituency (IPC) offers the following brief comments on the Draft Amended and Restated Articles of Incorporation for ICANN. See <https://www.icann.org/public-comments/draft-restated-articles-incorporation-2016-05-27-en>.

We do not question the conclusion of outside counsel (and of ICANN General Counsel) that “the Draft Restated Articles are consistent with the community proposals relating to the IANA Stewardship Transition.” Our comments are offered solely to support the requests of two other commenters for ICANN to provide some public explanation of two proposed deletions from the existing Articles of Incorporation, and the request of one other commenter for a clarifying edit to the Restated Articles.

First, the current Articles list the five activities in which ICANN is authorized to engage in order to “lessen the burdens of government and promote the global public interest in the operational stability of the Internet.”¹ The Draft Restated Articles would delete this list and instead appear to simply authorize ICANN to engage in any activities to “promote the global public interest in the operational stability of the Internet, as such global public interest may be determined from time to time by the multistakeholder community through an inclusive bottom-up multistakeholder community process, by carrying out the mission set forth in the bylaws of the Corporation.” One commenter has expressed concerns that this change could lead to “mission creep.” <https://forum.icann.org/lists/comments-draft-restated-articles-incorporation-27may16/msg00000.html> (comment of Brian Carpenter). It is our understanding that this change was made simply to avoid inconsistency between ICANN’s “purpose” (as stated in the Articles) and ICANN’s “mission” (as stated in the Bylaws) by having only a single detailed list in the Bylaws. However, this is not stated anywhere in the materials provided, and the deletion here leaves the impression that ICANN’s purpose is less restricted than before. IPC urges ICANN to explain why this change is being proposed, how it interacts with changes in the Bylaws and why it would not, in ICANN’s view, blur the boundaries of ICANN’s authorized activities.

Similarly, another commenter has pointed out that no explanation has been provided for the deletion of section 5(e) of the current Articles, referencing a provision of the U.S. Internal Revenue Code. See <https://forum.icann.org/lists/comments-draft-restated-articles-incorporation-27may16/pdf4q0D2pzsVp.pdf> (comments of Brett Schaefer and Paul Rosenzweig), at 2-3.

While there may well be perfectly sound explanations for both these changes, the absence of any explanation in the materials presented for public comment is puzzling, and could leave ICANN’s proposals open to misinterpretation. IPC urges ICANN to foreclose such a scenario by providing such an explanation before the Draft Restated Articles are finalized.

¹ “(i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).”

Finally, another commenter notes “potential misunderstandings” arising from the change in Article 2, in particular the insertion of language regarding the “determination” of the Global Public Interest. See <https://forum.icann.org/lists/comments-draft-restated-articles-incorporation-27may16/msg00004.html> (comments of CCWG-Accountability). Members of IPC have also noted misunderstandings and confusion arising from these changes. The clarifying revisions proposed by CCWG-Accountability may alleviate these problems and offer a potential solution. We urge ICANN and the drafting team to consider these proposed revisions.

Respectfully submitted,

Intellectual Property Constituency