

MEMORANDUM

TO: John Curran

CC: Steve Ryan

FROM: Douglas N. Varley
William M. Klimon

CLIENT: American Registry for Internet Numbers (#11411)

DATE: May 25, 2015

RE: NRO's Status as an Unincorporated Association and Role as an ICANN Designator

You have asked us to confirm that the Number Resource Organization (NRO), of which ARIN is a founding member, should be considered an unincorporated association for the purposes of its role as a “designator” of directors of the Internet Corporation for Assigned Names and Numbers (ICANN). The NRO meets all of the criteria under California law to be considered an unincorporated association. It should be permitted to serve as a designator of nonprofit corporate directors under the California Nonprofit Public Benefit Corporation Law by virtue of the provisions of ICANN’s bylaws and, to the extent required, by its legal personality as an unincorporated association. In view of some proposals from the Cross Community Working Group (CCWG) to add a membership structure to ICANN’s governance, we also conclude that the NRO could also serve as a member of ICANN were it to adopt a membership structure.

We conclude this memo by observing that no public filings are required with the State of California to secure the NRO’s unincorporated-association status while also noting that the state does permit an optional filing that the NRO could make to give public notice of its organizational status.

Number Resource Organization

The NRO is an organization formed under a memorandum of understanding—originally signed on October 24, 2003—of the five Regional Internet Registries (RIRs).¹ Each of the

¹ “The five RIRs are: AFRINIC (established 2005, serving Africa and based in Mauritius), APNIC (established 1993, serving Asia Pacific region and based in Australia), ARIN (established 1997, serving the United States, Canada, many Caribbean and North Atlantic islands and based in the United States), LACNIC (established 2002, serving Latin America and the Caribbean and based in Uruguay) and the RIPE NCC (established 1992, serving Europe, Central Asia and the Middle East and based in

RIRs appoints an individual representative to an Executive Council, and the chairmanship of the Council rotates among the representatives.² In addition to the chairman, the Council also names a secretary and a treasurer. In April 2013, the NRO appointed a permanent NRO Executive Secretary to support the NRO's activities on a consistent basis.³

The NRO was formed for the threefold purpose of coordinating activities among the RIRs, undertaking delegations from the RIRs, and entering into agreements with other Internet coordinating bodies on behalf of the RIRs.⁴ The NRO carries out a number of activities in furtherance of those purposes: It undertakes technical coordination and administration of policy with the Internet Assigned Numbers Authority (IANA), which is the body responsible for the global coordination of the DNS Root, IP addressing, and other Internet protocol resources.⁵ It is a major contributor to the Internet Governance Forum (IGF), which is a forum for dialogue among and education of stakeholders on issues of Internet governance.⁶ And, in 2004, it negotiated and entered into an agreement to serve as the Address Supporting Organization (ASO) for ICANN.⁷

The NRO was formed explicitly as an "unincorporated" organization but with the option to incorporate in a mutually acceptable jurisdiction in the future.⁸

Applicable Law

The NRO's memorandum of understanding does not specify a governing law or home jurisdiction for the organization.⁹ However, one of the NRO's primary purposes is to enter into agreements with other Internet coordination or administrative bodies. The principal agreement of that kind is the ICANN Address Supporting Organization (ASO) MoU, under which the NRO serves as ICANN's ASO¹⁰ and under which ICANN's bylaws were amended

The Netherlands)." <https://www.nro.net/wp-content/uploads/Regional-Internet-Registries-Overview.pdf>

² NRO, Memorandum of Understanding sect. 6 (Oct. 24, 2003).

³ "About the NRO," <https://www.nro.net/about-the-nro>.

⁴ NRO, Memorandum of Understanding sect. 2.

⁵ NRO Memorandum of Understanding FAQ (Oct. 24, 2003), <https://www.nro.net/documents/nro-memorandum-of-understanding-faq>.

⁶ "Continuing Cooperation: The NRO and Internet Governance," <https://www.nro.net/wp-content/uploads/NRO-Continuing-Cooperation-Brochure-v2013-.pdf>

⁷ ICANN Address Supporting Organization (ASO) MoU (Oct. 21, 2004).

⁸ NRO, Memorandum of Understanding sect. 1.

⁹ It does specify a dispute resolution procedure for policy disagreements, using the arbitration rules of the International Chamber of Commerce with the arbitration to be held in Bermuda or another mutually agreeable location. NRO, Memorandum of Understanding sect. 10.a. Nothing in the Memorandum suggests that the location of the arbitration should determine the law to be applied in interpreting and construing the Memorandum.

¹⁰ ICANN ASO MoU sect. 1.

to name the NRO as ICANN's ASO.¹¹ Consequently, we have examined the question of the NRO's legal status under the law of the jurisdiction most relevant to the NRO's agreement with ICANN, namely California, where ICANN is incorporated and under whose laws ICANN is governed.

California has one of the more comprehensive statutes on unincorporated associations. The statute includes a clear definition: an unincorporated association is "an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not."¹² The California statute identifies a subspecies of unincorporated association, the nonprofit association, which is "an unincorporated association with a primary common purpose other than to operate a business for profit."¹³ The NRO qualifies as a "nonprofit association," since its stated purposes are other than to operate a business for profit, but that fact is not necessary to establish that it is an unincorporated association under California law.

Applying California's Association Law to the NRO

There are four elements to the definition of an association under California law—(1) an unincorporated group; (2) of two or more persons; (3) joined by mutual consent; (4) for a common lawful purpose—and each element is present in the case of the NRO.

1. Unincorporated Group

An unincorporated association may not have a corporate charter from any state. The California statute also explicitly excludes from the definition other kinds of common property ownership, e.g., joint tenancy, tenancy in common, or community property.¹⁴ California distinguishes unincorporated associations from other noncorporate organizational types—for example, partnerships, limited liability companies, and trusts—which are governed by distinct regimes. So, in California, a partnership is an "association of two or more persons to carry on as coowners a business for profit."¹⁵ A limited liability company is an association formed under a particular statute that denominates the organization as a limited liability company.¹⁶ A trust is created by a transfer of property to a trustee with the intention that a

¹¹ ICANN, Bylaws art. VIII, sect. 1.2 (as amended Jul. 30, 2014).

¹² Cal. Corp. Code § 18035(a). In general, status as an unincorporated association has been viewed as a legal "default." See, Rev. Unif. Nonprofit Ass'n Act, pref. note. It is what an organization is if it doesn't fit into any other category of legal entity.

¹³ Cal. Corp. Code § 18020(a).

¹⁴ Cal. Corp. Code § 18035(b)-(c).

¹⁵ Cal. Corp. Code § 16101(9).

¹⁶ Cal. Corp. Code § 17701.02(j)-(k).

trust be established for some beneficiary.¹⁷ Thus, while each of these entity types lacks a corporate charter, they are not unincorporated associations.

The NRO was explicitly formed as an unincorporated organization.¹⁸ It has received no corporate charter; nor has it filed to register under any other business-entity statute in any jurisdiction. Therefore, it is not a corporation, limited liability company, or other corporation-like entity. Similarly, the NRO is not a business carried on by co-owners and is therefore not a partnership. And finally, it holds no property in trust for the benefit of any other persons and so is not a trust. From the evidence we have examined, we conclude that the NRO is an unincorporated group and so meets the first element in the statutory definition.

2. Two or More Persons

The term “association” implies more than one person, and the statutory definition is explicit that an association must include two or more persons. California’s association statute includes a broad definition of “person”: “a natural person, corporation, partnership, or other unincorporated organization, government, or governmental subdivision or agency, or any other entity.”¹⁹

The NRO comprises the five RIRs,²⁰ each of which is a type of corporate entity,²¹ except for LACNIC, which appears to be an unincorporated, international nongovernmental organization established in Uruguay.²² In any case, given the expansive definition of person under the California association statute, there is no doubt the NRO is made up of more than one person. The NRO is thus a multi-person organization and so also meets the second element of the definition of an unincorporated association.

3. Joined by Mutual Consent

For a group to be recognized as an association there must be some evidence of association, demonstrating an agreement among the participants to act together. It is of the nature of unincorporated associations that there can be no formal charter granted by a state to establish the organization. In fact, there need not even be internal governing documents like bylaws or a constitution at all. As the California Court of Appeals held even before the adoption of California’s current associations law, “Formalities of quasi-corporate

¹⁷ Cal. Probate Code §§ 15200-15205; *see also* *Morrissey v. Commiss’r*, 296 U.S. 344, 356-57 (1935) (enumerating the differences between an association and a trust).

¹⁸ NRO, Memorandum of Understanding sect. 1.

¹⁹ Cal. Corp. Code § 18030.

²⁰ NRO, Memorandum of Understanding sects. 3, 14.

²¹ AFRINIC is a Mauritius private company limited by guarantee; APNIC is an Australian proprietary company limited by shares; ARIN is a Virginia nonstock corporation; and RIPE NCC is a Dutch *Rechtspersoon*.

²² “About LACNIC,” <http://www.lacnic.net/en/web/lacnic/acerca-lacnic>.

organization are not required.”²³ Nevertheless, there needs to be some objective evidence of an agreement to associate, preferably though not necessarily written.²⁴

In the NRO’s case, there is clear evidence of an agreement to join together, in the form of the memorandum of understanding, signed by all the parties, specifying the members, purposes, responsibilities, and rights of the association and its members. The memorandum itself designates the organization as an unincorporated body. There is, therefore, more than sufficient evidence that the NRO meets the third criterion for unincorporated-association status under California law.

4. For a Common Lawful Purpose

The scope of permitted purposes for an unincorporated association is quite broad. The drafters of the Revised Uniform Unincorporated Nonprofit Association Act suggest that, for unincorporated nonprofit associations, the permitted purposes should mirror those for nonprofit corporations.²⁵ In any case, the California courts have suggested that only exclusively unlawful activities—for example, those of a criminal street gang—would disqualify an organization from being recognized as an unincorporated association.²⁶

As noted above, the NRO has stated its organizational purposes in its memorandum of understanding.²⁷ All of those purposes, which could be summarized as assisting in the technical administration of the Internet, are lawful, reflecting purposes similar to those set out in the memorandum of understanding between the U.S. Department of Commerce and ICANN for the purpose of privatizing the administration of the Internet.²⁸ Consequently, the NRO also meets the fourth criterion for an unincorporated association.

So with regard to each criterion necessary for association status, it can be clearly demonstrated that the NRO possesses the necessary characteristics, and so we are of the opinion that the NRO would be recognized as an unincorporated association under California law.

²³ Barr v. United Methodist Church, 153 Cal. Rptr. 322, 328 (Cal. Ct. App. 1979).

²⁴ See Rev. Unif. Uninc. Nonprofit Ass’n Act § 2 cmt. 8 (“Although the agreement to form a UNA can be quite informal and sketchy, there must be some tangible, objective data such as the use of the organization’s name in communications to its members or third parties, or the existence of a bank account or of a mailing (or internet) address in the name of the UNA or similar ‘conduct’ indicating that, in fact, there is an actual agreement.”).

²⁵ Rev. Unif. Uninc. Nonprofit Ass’n Act § 2 cmt. 8.

²⁶ People *ex rel.* Reisig v. Broderick Boys, 59 Cal. Rptr. 3d 64, 73-75 (Cal. Ct. App. 2007).

²⁷ NRO, Memorandum of Understanding sect. 2.

²⁸ Memorandum of Understanding Between ICANN and U.S. Department of Commerce sect II.B. (Nov. 25, 1998).

Note on Other Law

California's definition of an unincorporated association is in line with the modern legal treatment of unincorporated associations and accords in the main with the Uniform Unincorporated Nonprofit Association Act,²⁹ adopted in 12 states, and the Revised Uniform Unincorporated Nonprofit Association Act,³⁰ adopted in a further four jurisdictions,³¹ as well as contemporary common-law definitions adopted by many states' courts.³²

Based on the preceding analysis, we believe that the NRO would also be found to be an unincorporated association in the uniform-act states and in other jurisdictions with similar statutory or common-law definitions.

Alternative Characterizations

To test this conclusion, it is perhaps useful to ask: if the NRO's status as an unincorporated association were challenged, what would the NRO then be?

Is the NRO merely a committee or other sub-body of ICANN? No, the NRO is an autonomous organization, comprising five independent member organizations, with its own governing document. Its relationship with ICANN is governed by a memorandum of understanding entered into nearly a full year after the NRO was formed. At the time the NRO was formed, the question was apparently raised whether the NRO would replace the ASO or even ICANN itself. The NRO responded to those questions with an FAQ that explained that "The NRO is a stand alone body that will negotiate the ASO MoU with ICANN."³³ Finally, the ASO MoU itself recognizes that the NRO and ICANN are distinct entities and disclaims that it imposes any special relationship or duty on either party, "including as an agent, principal or franchisee of any other party."³⁴ Thus, the history and public pronouncements of the NRO plainly demonstrate that it is an independent legal entity, not simply a creature of ICANN's governance.

²⁹ Unif. Uninc. Nonprofit Ass'n Act § 1(2) ("Unincorporated nonprofit association' means an unincorporated organization, other than one created by a trust, consisting of [two] or more members joined by mutual consent for a common, nonprofit purpose.").

³⁰ Rev. Unif. Uninc. Nonprofit Ass'n Act § 2(8) ("Unincorporated nonprofit association' means an unincorporated organization consisting of [two] or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes.").

³¹ Not included in the four jurisdictions mentioned are Arkansas and the District of Columbia, which each adopted both uniform statutes in succession.

³² See, e.g., *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992) ("An unincorporated association is a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective.") (Texas has since adopted the Uniform Unincorporated Nonprofit Association Act); *Associated Press v. Montana Senate Republican Caucus*, 951 P.2d 65, 69 (Mont. 1997) (same definition).

³³ NRO Memorandum of Understanding FAQ.

³⁴ ICANN ASO MoU sect. 11.

There are two other entity types that merit consideration as possible legal characterizations of the NRO: a general partnership or a joint venture. While there is some older authority that conflates associations with partnerships,³⁵ it is well established under the modern statutes that there are significant differences between associations, particularly nonprofit associations, and partnerships. Under California law, which mirrors the Uniform Partnership Act, a partnership is an “association of two or more persons to carry on as coowners a business for profit.”³⁶ The NRO’s memorandum of understanding leaves no question that its members are not co-owners and that its activities do not constitute a business conducted for profit. Similarly, a joint venture is essentially a general partnership undertaken on a one-time basis.³⁷ Accordingly, the same distinctions can be drawn to distinguish the NRO from a joint venture. Based upon the facts as we understand them, we do not believe the NRO could be characterized as any kind of business association or as anything other than an unincorporated association. It bears emphasis, however, that this conclusion is not a necessary precondition to establishing the NRO’s status as a designator of ICANN directors. Even if the NRO were found to be a partnership or a joint venture, it would still be eligible to function as a California nonprofit corporate designator, as discussed below. The same conclusion holds true if ICANN were to become a membership corporation: the NRO could likewise serve as a member of a restructured ICANN.

Definition of Designators

In the California Nonprofit Public Benefit Corporation Law the concept of the designator is well established if not systematically defined. Designators are simply those parties provided in a corporation’s articles or bylaws as having the power to appoint some or all of the corporation’s directors.³⁸ The statute offers no further definition of “designators,” nor are there any specific qualifications or characteristics necessary to hold that status. Consequently, the bare fact that ICANN’s governing documents assign the NRO the powers of a designator gives the NRO that status, without regard to whether it is an unincorporated association. Hence, even if, contrary to the position outlined here, the NRO were found not to be an unincorporated association, it could nevertheless serve ICANN as a designator because the NRO would remain described in ICANN’s governing documents as a designator. Of course, as the foregoing discussion makes clear, it is our opinion that the NRO *is* an unincorporated association and, therefore, a legal person eligible to serve as a designator of nonprofit

³⁵ *Mosby*, 117 Cal. Rptr. at 593.

³⁶ Cal. Corp. Code § 16101(9).

³⁷ *Franco Western Oil Co. v. Fariss*, 66 Cal. Rptr. 458, 472 (Cal. Ct. App. 1968) (“A joint venture is an undertaking by two or more persons jointly to carry on a single business enterprise for profit, an enterprise in which they have a community of interest. Usually both a sharing of profits and of losses is involved.”).

³⁸ Cal. Corp. Code §§ 5220(d); 5222(e)-(f).

corporate directors under the California Nonprofit Public Benefit Corporation Law, which defines the term “person” to include “any association.”³⁹

The NRO as a Member of ICANN

Teams working for the CCWG have been considering a number of new accountability mechanisms for ICANN that could entail a restructuring of the corporate governance of ICANN.⁴⁰ One proposal is to add a membership structure to ICANN. That proposal raises the further question, could the NRO serve as a member of a restructured ICANN? The California Nonprofit Public Benefit Corporation Law defines a “member” of a California public benefit corporation as any “person” with certain rights specified in the corporation’s governing documents over elements of the corporation’s governance, like the election of directors, the amendment of governing documents, or the approval of fundamental corporate transactions, like mergers.⁴¹ As we have seen above in the discussion of an unincorporated association’s serving as a nonprofit corporate designator, the nonprofit-corporation law’s definition of person includes “any association.”⁴² Because we are confident in our conclusion that the NRO is an unincorporated association for California corporation-law purposes, we are likewise certain that the NRO could serve as a member of ICANN were it reconstituted as a membership corporation.⁴³

Publicly Formalizing Association Status

The law in California does not require any public filing or registration to establish an unincorporated association. So the fact that the NRO has not made any filing with California has no bearing at all on its status as an unincorporated association. The state does offer one mechanism to give notice of associations’ existence. Specifically, the California association statute permits an unincorporated association to file with the Secretary of State a statement of the association’s principal address in California or a statement of the name and address in California of an agent for service of process on the association.⁴⁴ The NRO may consider making that optional filing in the future, but as noted above this is not necessary to establish its status as an unincorporated association.

³⁹ Cal. Corp. Code § 5065 (citing Cal. Corp. Code § 18).

⁴⁰ *See, e.g.*, Memorandum from Sidley Austin LLP and Adler & Colvin to Legal Sub-team of the Cross Community Working Group on Enhancing ICANN Accountability re “Legal Assessment: Executive Summary, Summary Chart and Revised Governance Chart” (Apr. 23, 2015).

⁴¹ Cal. Corp. Code § 5056(a).

⁴² Cal. Corp. Code § 5065 (citing Cal. Corp. Code § 18).

⁴³ Again, the definition of “person” is so broad under the nonprofit-corporation law that if the NRO were held to be a partnership or some other kind of business entity, it is likely that it could still serve as a member of ICANN in that form.

⁴⁴ Cal. Corp. Code § 18200(a).