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INTA Comments on ICANN's Draft Proposal:
Affirmation Reviews Requirements and Implementation Processes
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INTA has prepared comments on each section of ICANN's Draft Proposal: Affirmation Reviews Requirements and Implementation Processes, which pertains to the Affirmation of Commitments (AoC) between ICANN and the US Government. INTA's comments largely focus on recommendations to improve objectivity, transparency and balance during the review process. A few additional recommendations are provided in order to improve the logical organization of the document and clarification of terminology.

Section 1 - Preamble: Affirmation Review Requirements

INTA has no substantive comments on Section 1. Following INTA's substantive comments on the remaining sections, please note that a few comments are provided regarding the organization and recommended reordering of Section 1.

Section 2 – Review Methodology

This section is extremely thorough and ICANN staff is to be commended for breaking down the review methodology into such detail. Because of this, there are only a few comments on this section:

- Adoption of Review Processes – INTA agrees that the review teams should make the final decision on the review processes to be adopted. However, there is no indication that the adopted review processes will be published for the public, unless they will be included as part of the report. INTA recommends publication of the processes prior to the data gathering to allow for more transparency.

- Selection of the Consultant – INTA has two concerns regarding the selection process. First, there is a concern that the RFP and selection process will take a great deal of time, thus significantly decreasing the amount of time available for actual work by the review team. In addition, for the sake of transparency, INTA recommends that once consultants are chosen, the names of the consultants be published so there is notice as early as possible. We also recommend an efficient objection process in the event that a member of the community believes that the

chosen consultant has an undisclosed conflict of interest which could affect the consultant's objectivity.

- Definition of Review Terms of Reference – As above, there is no indication that the adopted definitions will be published for the public, other than perhaps as part of the reporting phase. Publication of the adopted definitions early in the review process is important for transparency.

- Intermediate Analysis of Findings/Fine Tuning of the Methodology – The draft proposal wisely allows for broadcast of review team meetings at different points in the review process. INTA recommends that any meeting or conference call related to this phase of the process also be broadcasted to maintain transparency.

Section 3 - Preliminary Activities

INTA believes the cornerstone for transparency is ICANN's willingness to engage in practices that truly allow for participation and process review by the wider community. It is therefore counterproductive that ICANN has suggested limiting review and comment periods for the selection of review team members. INTA offers the following suggestions to make this process more transparent, rather than less:

- Comment periods must be long enough for stakeholders to consider carefully and comment on the questions raised. Therefore, for ICANN to be accountable it should not simply make information about its comment review practices available for viewing and comment by the public; rather, ICANN needs to engage in a meaningful dialogue with DNS stakeholders about how the team members are selected. ICANN should also make every possible effort to ensure comment periods are of sufficient length for stakeholders to reasonably submit comments.

- Although ICANN frequently uses public comment periods to attempt to engage stakeholders about important issues, such comment periods are ineffective because they lack transparency as to how such comments are considered. The perception is that comments are ignored. This discourages community participation and reduces transparency. Even assuming that an adequate review period is permitted, it is still unclear how any comments will be considered by ICANN. In many previous instances, ICANN has gone through a benchmarking and review process and then moved forward without a transparent explanation. It is unacceptable that there is presently no transparent mechanism proposed for reviewing community input. Without meaningful review and action on public comment there is no incentive for private sector participation through the comment process. To be consistent with the principle of private, bottom-up coordination, ICANN must create a process for encouraging, reviewing, considering and incorporating public comments regarding the composition of review teams.

- INTA has previously commented that ICANN must take actions to eliminate conflicts of interest. It is unacceptable that any review team members with a conflict of interest would still be permitted to participate in discussions on the topic on which they are conflicted. Preventing a review team member with a conflict of interest from participating is important. Any conflicted member should be prohibited from all related discussions. It appears that ICANN's proposed selection process does nothing to resolve concerns regarding conflicts of interest among review team members.

- While INTA believes expert consultants may be necessary for review teams to utilize, ICANN should provide a transparent process for the selection of such experts. ICANN should also provide for the community review of any expert reports that are created. There is currently no explanation as to the process that will be utilized for the selection of experts, how reports will be reviewed, who will manage such experts, or how expert findings will be utilized. ICANN transparency cannot be achieved unless there is a mechanism for meaningful community review of expert findings.

- INTA believes that there must be a more transparent process for how Selectors are chosen, and the basis for the teams they select. Ideally, representatives from the intellectual property/ brand owner community would be included whenever possible; however, at a minimum, Selectees must be objective, neutral and serve as consensus builders.

Section 4 - Timeline: Preparatory Activities and First Review

We incorporate by reference our comments on the proposed preparatory activities and methodology (Sections 2 and 3) in commenting on this timeline. The timeline appears to be aggressive. At a minimum, INTA believes that too little time is spent on selection, public comment and finalization of review team members. Composition of the teams will be critical to ensuring that stakeholders have a proper role and voice in the process. Given the importance of constituting appropriate teams, it seems prudent to allow more time to select the right team and obtain comments on team composition before commencing the review process. Hence, we would propose that the identification of volunteers and the finalization of team composition be lengthened somewhat to allow for more public comment and any necessary adjustments in response to said comments.

Section 5 - Draft Terms of Reference for First Review

This section is critical to the proper function of the review process and INTA offers the following observations:

- The review team is comprised of the GAC Chairman, the Chairman of the ICANN Board, and a representative from the U.S. Department of Commerce. The Affirmation of Commitments document states that other members will be added to the review team. Given the inclusion of the three "permanent" members

of the review team and the small number of review team members anticipated, INTA is concerned that review teams may be narrow in their make-up and perspective. INTA recommends that representatives from the ICANN Board should serve only in an advisory or administrative role, rather than in a voting capacity, due to potential conflicts of interest. While the Affirmation requires the Chairman of the Board to be a team member, it does not require that he be a voting team member.

- The review standards which require the team to base its findings on "evidence" lack any objective standard or metric as to what constitutes "evidence." Without specific evaluation metrics and standards, there is no way to be sure that any review adequately considers the interests of all Stakeholder groups, including the trademark community.

- The review "working methods" state that the team shall execute its duties in a way such that it refrains from "bringing to the discussion any political commercial considerations that could undermine the analysis of findings." Such a goal is more easily articulated than achieved and may not be realistic. Review team members will need to take care to evaluate the GAC and the ICANN Board objectively, which may prove challenging. It is likely that representatives from ICANN and from the U.S. Department of Commerce will have different perspectives on what the so-called "evidence" means and how it should be reflected in the team's findings. Asking members of the ICANN Board with a fiduciary duty to the Board to refrain from bringing their individual commercial or political interests to the evaluation process is an unrealistic goal. Moreover, it is counterproductive to place such a limitation on members of the review team from other organizations who may have been selected because of their expertise or background. A better approach would be a balanced review team with sufficient outside representation and skills to meaningfully undertake an unbiased review.

Comments on Organization of Document

First, INTA recommends reordering Section 1 in the following manner:

- 1.1) Four Periodic Reviews
- 1.2) Composition of Review Teams and Selection of Members (currently 1.5)
- 1.3) Review Cycle
- 1.4) Performance Indicators (currently 1.2)
- 1.5) Review Cycle: a Participatory Effect (currently 1.4).

By making these changes, the reader is set up to more fully understand the review and review teams before a substantive discussion on how the reviews are conducted is presented.

We also would recommend that the overall text be re-written to be more reader friendly for those who are not regular ICANN participants. For example, instead of starting section 1.2. with a definition from the American Evaluation Association, the document would be better served by a definition of evaluation in layman's terms, supplemented by the AEA definition.

Conclusion

Overall, INTA believes the review process falls short of assuring that it assesses and improves the procedures by which ICANN's decisions are made and accepted by the public and the Internet community. There is no mechanism to ensure a balanced review team, unbiased consultants, and that "evidence" is given its proper weight in the review process. Moreover, there are no mechanics which assure that ICANN is accountable for its decision-making or that remedies for any shortcomings identified in the review process are promptly implemented.   Thus, INTA recommends refining the review process, as indicated above, to improve both balance and transparency.

Thank you considering our views on these important issues. Should you have any questions regarding our submission, please contact External Relations Manager, Claudio DiGangi at: cdigangi@inta.org

ABOUT INTA
The International Trademark Association (INTA) is a 131-year-old not-for-profit association of over 5,600 member organizations from over 190 countries. One of INTA's key goals is the promotion and protection of trademarks as essential elements of national and international commerce. During the last decade, INTA has served as a leading voice for trademark owners in the development of cyberspace, including as a founding member of ICANN's Intellectual Property Constituency.