

Comments of Coalition for Online Accountability

December 2, 2010

COA appreciates this opportunity to comment on the proposed recommendations of the Accountability and Transparency Review Team. See <http://www.icann.org/en/public-comment/#atrt-draft-proposed-recommendations>.

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); the Recording Industry Association of America (RIAA); the Software and Information Industry Association (SIIA); Time Warner Inc.; and the Walt Disney Company. COA is an active participant in the GNSO Intellectual Property Constituency and has engaged fully in a wide range of debates on ICANN governance and policy issues, including through the public comment process. We filed formal comments to the ATRT on July 14, 2010.

In general, COA welcomes the ATRT proposed recommendations and commends the Team for its efforts. In view of the limited time available to review the proposal, COA restricts its specific comments to certain aspects of sections A and C of the proposed recommendations.

A. ICANN Board of Directors (Board) governance, performance and composition

COA strongly supports proposed recommendation A.1., calling for “formal mechanisms for identifying the collective skill-set required by the ICANN Board.” We note that legal skills, including a demonstrated understanding of intellectual property law in the online environment, should be part of this collective skill-set. The needed skill-set should be identified as specifically as possible. We especially support the integration of these requirements into the Nominating Committee’s call for nominations (proposed recommendation A.1.d).

We also support the proposed recommendation A.3 to increase the transparency of Nominating Committee deliberations, while still maintaining the confidentiality of deliberations. One way to do this, as the recommendation notes, is to “clearly articulate the timeline and skill-set criteria at the earliest stage possible.” Indeed, the specific skill-set criteria should be given priority over some of the more general and ethereal “requirements” traditionally announced by the Nominating Committee in its call. In the recruitment and the orientation of Nominating Committee members, the importance of seeking to fulfill the “collective skill-set” requirements for the ICANN board should be emphasized. In fact, in order to raise the accountability level of the Nominating Committee above its current level – which is essentially zero – the proposed requirement (which COA supports) that the Nominating Committee “explain the choices made” should be phrased in reference to fulfillment of the announced “collective skill-set” criteria.

All ICANN’s efforts to enhance accountability and transparency are hamstrung by the fact that ICANN chooses the majority of its Board members in a way that lacks all accountability and transparency. The proposed recommendations could be important first steps to address this paradox.

COA commends proposed recommendation A.6, to clarify which decisions are made at Board level. However, A.6 does not state who should provide this clarification. To the extent that there are issues currently decided at Board level that will no longer receive such treatment in the future, the “clarification” should also spell out where they will be decided instead.

Proposed recommendation A.10, if fully implemented, would greatly enhance accountability and transparency by requiring, for “each decision-making process,” an explanation of “how input was considered and how and why it was adopted or discarded.” However, such an explanation should also be required for major decisions made by the ICANN staff, not just those decisions made by the Board.

C. Public input processes and the policy development process

COA strongly supports proposed recommendation C. 17, that the public notice and comment periods should be “stratified and prioritized,” and that a reply comment cycle be instituted, at least for major (high priority) items. COA appreciates that ATRT has heard and responded to the concerns we have expressed (as have many others) that the current public comment process is broken. We agree that these recommendations, along with proposed recommendation C.20 (Board to identify the main public comments it rejected and “articulate the rationale for rejecting relevant public comment in reaching its decision”), should, if fully and fairly implemented, be a first step toward repairing the process. We emphasize again that these reforms should apply not only to decisions taken by the Board, but also to decisions taken by staff.

One issue that is not directly addressed in the proposed recommendations is the sheer volume of public comment proceedings, which is a textbook case of obsessive adherence to “transparency” mechanisms having the practical effect of diminishing effective transparency. Perhaps as part of the “prioritization” process, consideration should be given to analyzing past public comment proceedings with an eye toward identifying those that are unnecessary or that can be batched together.

We recognize that stratification and prioritization of the public comment process could be a complex challenge, but it must be undertaken in order to ensure that public comments received are actually read and considered by decision makers or those recommending decisions to the Board, and that the impact of such comments on the ultimate decision is fully and fairly explained.

Respectfully submitted,

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