

COALITION FOR ONLINE ACCOUNTABILITY

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Comments of

COALITION FOR ONLINE ACCOUNTABILITY

July 14, 2010

The following comments to the Accountability and Transparency Review Team (ATRT) are submitted on behalf of the Coalition for Online Accountability (COA). See <http://www.icann.org/en/public-comment/#atrt> .

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.

COA participates frequently in the ICANN public comment process, and has done so (as COA and as its predecessor organization, the Copyright Coalition on Domain Names) from ICANN's earliest days. It is clear to us that this public comment process is broken. To the extent that the purpose of the public comment process is to enhance the accountability and transparency of ICANN's decision making process, it is failing.

There are at least three fundamental problems with ICANN's public comment process.

The first is the sheer volume of public comment periods. As of July 7, there were 20 open public comment periods. Public comment deadlines for eight of these were bunched between July 18 and July 26. Similarly, as of March 30, there were 9 public comment periods with the same deadline: April 1. These are not isolated snapshots, but the norm.

Of course, responding to any of these public comment opportunities would require review of lengthy documents – in some cases, hundreds of page – that consist to a considerable degree of links to yet other documents. While ICANN decisions have significant impacts on many organizations and individuals, it is simply not feasible for almost any organization or individual to keep up with this pace of public comment activity. This is particularly true for coalitions, associations, and membership organizations, in which any proposed comment must be reviewed and approved by some representative or delegated group. These are the types of

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Authors & Publishers (ASCAP)

Entertainment Software Association (ESA)

Software & Information Industry Association (SIIA)

Broadcast Music Inc. (BMI)

Motion Picture Association of America (MPAA)

Time Warner Inc.

Recording Industry Association of America (RIAA)

The Walt Disney Company

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organizations whose input ICANN should be most vigorously pursuing – since they may speak on behalf of scores, hundreds, or even thousands of affected entities – but they may be least likely to be able to participate meaningfully in the ICANN public comment “decathlon.”

Second, there have been several instances in the past year in which ICANN has done no more than go through the motions of seeking public comment on issues on which it had already decided upon at least the next step in a course of action. Three of these instances were summarized in a comment filed by COA on February 9, 2010, an excerpt from which is attached below. See <http://forum.icann.org/lists/affrev-draft-processes/msg00016.html> for the full text.

Third, as ATRT members heard from participants in the Commercial Stakeholder Group (CSG) meeting in Brussels last month, it is common for public comments received by ICANN to be digested and summarized by it in an incomplete and sometimes misleading fashion. It seems very likely that no one at ICANN, other than a very restricted number of staff charged with reviewing and summarizing public comments, ever reads more than a handful – if that many – of the actual comments submitted. Everyone else depends upon the staff-generated summary to learn what the public had to say about a particular issue. This includes ICANN senior staff and Board members, to the extent that they are aware of the contents of submitted public comments at all, and most members of the public. Thus, concerns about problems with these summaries must be taken seriously. If the ATRT is interested in quantifying the extent of this phenomenon, COA suggests that it commission a survey of a sample of recent comments (or at least of those exceeding one page in length), sending to the commenter the staff summary as published, and asking whether the commenter believes this summary was fair, accurate, and complete.

These facts may help explain why a large proportion of public comment periods expire with virtually no substantive comments received. Members of the public simply cannot keep up with the volume of public comment opportunities; they are skeptical whether public comment will have any impact on the outcome; and/or they are reluctant to comment because they believe past comments have been misinterpreted, misrepresented, or at least misunderstood. We recognize that it may be very difficult to quantify the impact of these factors on the overall public comment participation rate, and we also concede that other factors are likely involved. But the overall picture is of a system that, while reflecting good intentions to increase the transparency and accountability of ICANN decision-making, is failing to achieve or even to approach that goal.

Respectfully submitted,

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EXCERPT

Comments of Coalition for Online Accountability (COA)

February 9, 2010

The Coalition for Online Accountability (COA) appreciates this opportunity to comment on the “Draft Proposal for Affirmation Reviews Requirements and Implementation processes” (the “Draft Proposal”). See <http://www.icann.org/en/public-comment/#affrev>.

[snip]

(1) Process issues/role of public comment

For at least the third time in the past two months, ICANN is deprecating the public comment process, which it pledged, in the Affirmation of Commitments, to strengthen.

First, in December, 2009, the ICANN Board considered and approved a model for an “expressions of interest” phase in the new gTLD process from which any community input not received within a 16-day public comment window was excluded. See ICANN EOI Model paper, at 4 (<http://www.icann.org/en/topics/new-gtlds/eoi-model-18dec09-en.pdf>) (“the Board could not take all the comments into account before discussion”); see also, e.g., <http://forum.icann.org/lists/eoi-new-gtlds/msg00035.html> (Comment of COA); <http://forum.icann.org/lists/eoi-new-gtlds/msg00083.html> (comment of Microsoft Corporation); <http://forum.icann.org/lists/eoi-new-gtlds/msg00036.html> (comment of INTA Internet Committee).

Then, ICANN sought public comment on a skeletal version of its 2010-13 strategic plan, and scheduled Board adoption of the full plan for February 4, only two weeks after the close of the public comment period, thus ensuring that the fleshed-out strategic plan would not be made available for public comment at any point before Board consideration. See <http://forum.icann.org/lists/stratplan-2010/msg00021.html> (comment of COA).

Finally, on January 11, 2010, within days after seeking public comment on the Draft Proposal, and before more than a single such comment had been received, ICANN issued a “Call for Applicants for the Position of Volunteer Review Team Member,” which appeared to assume that all the basic features of the Draft Proposal had been adopted. See <http://www.icann.org/en/announcements/announcement-13jan10-en.htm>. This Call has a closing date of February 17, just a week after the end of the public comment period on the Draft Proposal, and it indicates that the ICANN Board Chair and the GAC Chair plan to select members of the review team for the first affirmation review within the following three days, i.e., by February 20. This chronology virtually dictates that any public comments received on the Draft Proposal can have no impact on the initial stages of the first affirmation review, including the selection of review team members. Ironically, one of the five topics for this review is

whether ICANN is living up to its pledge to “continually assess and improve the processes by which ICANN receives public input.” Based on ICANN’s recent track record, the answer can hardly be yes.

COA recognizes that ICANN is under time pressures because it pledged, in the Affirmation of Commitments, to complete the first affirmation review by December 31, 2010. But this highly truncated timeline does not fully explain, and certainly does not justify, why the opportunities for meaningful public comment in designing the affirmation reviews have been so diminished. The ICANN Board and senior staff were aware before September 30, 2010 [sic: should be 2009], that the organization was committing to this accelerated review timetable; yet ICANN waited nearly three months before issuing the Draft Proposal. Furthermore, since similar problems have occurred in at least two other areas not subject to the December 31, 2010 deadline, it appears that the trend toward reducing meaningful public comment opportunities problem may be systemic. COA urges ICANN to halt and reverse this trend.

[snip]