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Submitted to: comments-ccwg-accountability-03aug15@icann.org

September 12, 2015

Ms. Grace Abuhamad
Public Policy Manager
ICANN
801 17th Street, NW, Suite 400
Washington, DC 20006

Re: Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1)

Dear Ms. Abuhamad:

The International Trademark Association (INTA) is pleased to submit the attached comments regarding Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1).

INTA thanks the working group for all of its hard work and dedication during this intense process. We are pleased that significant progress has been made on the proposal for transforming ICANN into a more accountable organization. However, we remain concerned that there are significant gaps in details surrounding how certain reforms will be implemented and that the voices of intellectual property interests remain marginalized to the detriment of the consumers that they are meant to protect. Our suggestions for improvement to the proposal have been incorporated as appropriate.

Should you have any questions about our comments, I invite you to contact Lori Schulman, INTA's Senior Director of Internet Policy at 202-261-6588 or at lschulman@inta.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Etienne Sanz de Acedo". The signature is fluid and cursive, with the first name "Etienne" being the most prominent part.

Etienne Sanz de Acedo

**INTA Comment on the Second CCWG Accountability Draft Proposal
September 12, 2015**

I. Introduction

The International Trademark Association (“INTA”) submits the following comments related to the Second Draft Proposal (the “Proposal”) of proposed enhancements to ICANN’s accountability framework that has been developed by the Cross Community Working Group on Enhancing Accountability (“CCWG”). INTA welcomes this opportunity to provide feedback on these important issues and thanks the CCWG for its extensive and thoughtful work.

II. General Comments and Specific Responses to Questions Posed by CCWG-Accountability

The Proposal represents a significant investment of time and resources by the CCWG and INTA appreciates these efforts and diligence of the CCWG. We encourage and support the CCWG to continue its thoughtful review and analysis of community feedback and to consider the interests of trademark and intellectual property rights holders as the transition becomes more imminent. As a general matter, INTA believes that ICANN is at a critical juncture and that adopting proper accountability mechanisms now is imperative to ICANN and the Internet community’s future. The transition of the IANA function from the U.S. government’s control to (presumably) ICANN requires that ICANN adopt proper accountability measures now in order to ensure that this transition is a positive change for the community.

However, because the Proposal still includes certain aspects of the accountability measures that are not yet fully defined, INTA reserves its ability to amend or oppose any aspect of the accountability proposals at a later stage. INTA also respectfully objects to the highly leading way in which comments to this Proposal were solicited. ICANN’s request for comments was in the format of three broad questions to the community on a report that was nearly 200 pages long. While INTA recognizes that commenters can certainly go beyond the three questions in their response, the practical reality is that most commenters will focus their efforts on the three questions and not respond with as much detail as could be achieved with a more open-ended format or one with more specific questions. INTA encourages ICANN to solicit comments to future proposals in a format that is more open-ended to obtain the broadest range of comments from the community as possible. INTA’s response to the three questions posed by the CCWG follows.

A. Do you agree that the CCWG-Accountability proposal enhances ICANN’s accountability?

INTA agrees that mechanisms must be put in place to give stakeholders more oversight of ICANN decisions to ensure that voices of the community members are heard and that ICANN meaningfully considers the feedback it receives. The mechanisms set forth in the Proposal, including the ability to remove individual directors, up to and including the entire Board of Directors, veto changes to ICANN’s Bylaws, Mission, Commitments, and Core Values, and reject Board decisions on the Strategic Plan and budget, make significant progress toward enhancing ICANN accountability and INTA supports them.

Certain aspects of the Proposal will significantly improve ICANN accountability. For instance, and as noted in INTA’s comments to the CCWG’s first report submitted in June, incorporation of the Affirmation of Commitments (“AoC”) within ICANN’s bylaws is an important step in improving overall accountability. Further, INTA continues to support the Membership Model and in particular the Sole Membership Model that the CCWG has proposed. The Sole Membership Model would allow members of the community to effectively monitor and work within known legal mechanism established under California law to ensure that ICANN remains accountable to its stakeholders.

Reiterating our comments submitted to the CCWG in June, INTA generally supports the creation of a set of “fundamental bylaws.” INTA also believes that it is incumbent on ICANN to provide adequate advance notice of all bylaw changes regarding (i) Board members, (ii) Mission Statement, (iii) AoC, and (iv) Core Values. Board decisions on the Strategic Plan and budget should be published with adequate advance notice prior to enactment to accommodate review, and, if necessary, protest or appeal procedures by the IPC and other stakeholder organizations.

B. Are there elements of this Proposal that would prevent you from approving its transmission to Chartering Organizations?

The CCWG has made significant progress moving these complex issues towards a workable solution. However, certain elements that we deem essential to the Proposal should be defined as much as possible prior to transmission, as these elements are important to meeting the shared goals of community stakeholders and ICANN.

One of these would be assurance that ICANN will remain subject to U.S. jurisdiction as a corporate entity. INTA believes that at all times that ICANN must commit that each IANA function will remain subject to the governing law of and exclusive jurisdiction for complaints in an individual state in the United States such as California where ICANN is domiciled. We take this view because the Proposal’s community empowerment mechanisms have been specifically designed to fit within and utilize all the powers available to membership organizations under California law. A future relocation to a

different jurisdiction could therefore cause dilution or even negation of those powers, as well as resulting uncertainty and confusion. While INTA understands that the current Proposal supports having ICANN remain a California nonprofit public benefit corporation, the Proposal has declined to include this as a fundamental bylaw. As the entire voting structure is dependent on the premise that voting will take place within the parameters allowed by California's statutes, INTA remains unconvinced this is wise and does not support the Proposal's decision to not include this as a fundamental bylaw.

Another essential element is to assure that terms crucial to the accountability process are defined in an unambiguous manner. For example, clarification is needed to support the position that the creation and enforcement of mutually acceptable contractual provisions between ICANN and contracted parties (registries and registrars) does not imply nor create "regulation" of their services or content. Effective contractual compliance is the cornerstone of the multi-stakeholder model enforcement. However, the Independent Review Panels scope is limited to "enforce compliance with the Articles and Bylaws through meaningful, affordable, accessible expert review of ICANN actions." (See Proposal at p. 39) In order to achieve the necessary threshold of accountability measures to ensure its support of the transition of IANA functions, ICANN's bylaws must include provisions addressing ICANN's responsibility to enter into, interpret and enforce contracts to fulfill its mission.

In its comment on the First Draft of the CCWG's proposal, INTA indicated that it does not support the proposed weighting of "community influence." In the current SO/AC structure business interests, except that of the contracted parties, are marginalized. INTA recommended that, given the prevalence of trademark issues in the domain name system business interests, and, in particular, trademark interests and advice be provided greater Community weight. INTA is concerned that depending on how voting is structured, the voice of the trademark Community, and specifically the voice of the Intellectual Property Constituency, may be marginalized or not heard at all.

C. Does this Proposal meet the requirements set forward by the CWG-Stewardship?

The Proposal for the IANA Stewardship Transition relies heavily upon this CCWG Proposal and the accountability of ICANN with respect to oversight of IANA operations. The issues related to the IANA transition and operations in particular – and the accountability of ICANN in that regard - are of the utmost importance to INTA and the community stakeholders in general. Because of these dependencies, it is essential that the Proposal adequately and fully address the Cross Community Working Group's (CWG Stewardship) requirements without ambiguity and that the mechanisms to meet these requirements are fully reviewed, vetted and adopted *before* the IANA transition takes place. Simply allowing the transition to occur before this is settled is not acceptable in INTA's viewpoint. While INTA does believe that the Proposal addresses each of the CWG-Stewardship requirements, there are some areas in which the Proposal can and

should be more fully developed, with input from stakeholders, before we would consider the CWG-Stewardship requirements for accountability adequately met.

Specifically, the Proposal indicates that several of the processes and proposed bylaws to meet CWG requirements are “agreed-on” but the Proposal does not fully set forth the mechanisms for putting these requirements in place or the specific proposed bylaws that will address these concerns. These include the requirements relating to Separation Process, the IANA Function Review and Special IANA Function Review, the Customer Standing Committee, and Post-Transition IANA (PTI) Governance, each of which is crucial to the success of the IANA transition and the accountability of ICANN during and after transition.

Drafting, review, and approval of these specific bylaws and specifications must be done prior to the IANA transition and with adequate time for review, comment and approval from stakeholders on these important matters. While being mindful of the fact that transition matters are time sensitive, INTA encourages ICANN, the CCWG and the CWG to be deliberate and thorough in ensuring that transition matters are handled appropriately and that accountability measures are fully vetted and in place before the IANA transition occurs. This may require an extension of time or revision of the current transition deadlines and INTA supports those extensions as necessary to ensure that transition and post-transition concerns are adequately addressed. The transition schedule should be driven by the amount of time needed to fully and fairly address all issues and concerns, and not by ICANN’s schedule.

In addition, INTA has concerns about the adequacy and effectiveness of some of the Proposal’s Community Empowerment mechanisms, which are essential to community oversight over transition and post-transition matters. With respect to the Independent Review Process (IRP), while we applaud the efforts of the CCWG in setting forth a thoughtful and enhanced IRP that will result in binding decisions with respect to ICANN action, we do have concerns that the costs of pursuing an IRP may be prohibitive. As a result, interested and effected stakeholders may be deterred from undertaking a challenge, even when such challenge may be warranted.

Along these lines, INTA encourages the CCWG to consider alternative dispute mechanisms that might be less burdensome on challengers. This method of mediation or consultation between the interested parties could be used as a “middle step” between vetoing Board decisions and taking steps to remove Board members or recall the Board. Such a step would allow the parties to engage in productive dialogue and move towards a resolution rather than disrupting important work with removal or recall procedures.

This type of mechanism, which should be clearly defined and set forth in any final Proposal, would be especially helpful for dealing with issues related to challenging ICANN decisions relating to IANA functions, including implementation of recommendations coming out of an IFR or Special IFR. Importantly, the current Proposal provides that the community can use the IRP to challenge a decision by the board “not to implement a recommendation coming out of an IFR” as a way to meet the CWG’s requirement with

respect to oversight of ICANN decisions relating to IANA Function Review (IFR) or Special IFR recommendations.

However, INTA is concerned that the Proposal does not fully and adequately address the CWG requirement, because it only takes into consideration situations when the Board refuses to implement a recommendation from an IFR or Special IFR. It does not address community oversight as to how an IFR or Special IFR recommendation is implemented by ICANN. An IRP would likely be an overly burdensome and costly way of addressing this type of review with respect to IFR recommendations that may be implemented by ICANN, but in a way that is detrimental to stakeholders or does not fulfill the spirit of the IFR recommendation. A “middle step” dispute mechanism or mediation would be a beneficial resource for addressing implementation concerns that deal with how ICANN meets IFR or Special IFR recommendations.

III. Conclusion

In conclusion, INTA appreciates the work of the CCWG and believes that we are closer to a realistic and workable accountability model. However, there is still much work to be done in order for ICANN to be ready to assume the IANA stewardship functions without further governmental oversight. As the Proposal still includes aspects of the accountability measures that are not yet fully defined, INTA reiterates that we reserve our ability to amend or oppose any aspect of the accountability proposals at a later stage. INTA respectfully asks that ICANN consider these comments and thanks ICANN for the opportunity to submit them.

IV. About INTA

INTA is a 137 year-old global not for profit association with more than 5,700 member organizations from over 190 countries. One of INTA’s goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last decade, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA’s Internet Committee is a group of over 200 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.