

COALITION FOR ONLINE ACCOUNTABILITY

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Comments of Coalition for Online Accountability (COA)

CCWG-Accountability Third Draft Proposal

December 21, 2015

Introduction

The Coalition for Online Accountability (COA) appreciates this opportunity to comment on the Third Draft Proposal on Workstream 1 Recommendations, published by the Cross-Community Working Group (CCWG) – Accountability on November 30, 2015 (“Third Draft”). See <https://www.icann.org/public-comments/draft-ccwg-accountability-proposal-2015-11-30-en>.

COA consists of nine leading copyright industry companies, trade associations and member organizations of copyright owners. They 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); NBC Universal; the Recording Industry Association of America (RIAA); the Software and Information Industry Association (SIIA); Time Warner Inc.; and the Walt Disney Company. COA and its predecessor organization, the Copyright Coalition on Domain Names, have participated actively in ICANN since 1999, including through the Intellectual Property Constituency of the GNSO.

While COA continues to support much of what is in the Third Draft, we remain concerned about two fundamental issues, both of which we highlighted in our comments on the Second Draft last September (see http://www.onlineaccountability.net/assets/2015_Sept12_comments_CCWG_Accountability.pdf). These are: (1) the risk that ICANN will fail to enforce its contracts consistently and transparently, and (2) the need to ensure that the post-transition ICANN remains a U.S.-based non-profit entity subject to U.S. law. We also object to the inadequate time frame afforded for public comments on the Third Draft.

A. Re: Recommendation #5: Mission, Commitments, Core Values

On the first issue, we appreciate and welcome the proposal to make reference in ICANN’s Mission Statement to the organization’s “ability” to enter into and enforce contracts within the scope of its mission. This is an important improvement to the accountability proposal. However, to achieve its purpose, this language should be strengthened to make it clear that ICANN has a “responsibility” to enforce such contracts. Otherwise there is a serious risk that

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Software & Information Industry Association (SIIA)

Time Warner Inc.

The Walt Disney Company

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the changes recommended by CCWG-ACCT will be used to undermine enforcement of existing obligations on which many stakeholders depend.

This issue goes to the heart of ICANN’s claim to represent a concrete working model of the multi-stakeholder process. The cornerstone of that multi-stakeholder model is the substitution of contracts for government regulation as the chief mode of managing critical Internet resources such as the Domain Name System. But that cornerstone crumbles if those contracts are not vigorously enforced in the public interest. That there is a real, not merely a hypothetical, risk of ICANN’s failure to do so is exemplified by the current failure to enforce critical provisions of the 2013 Registrar Accreditation Agreement that require accredited registrars to respond appropriately to well-founded reports of abusive uses of the domain names they sponsor to carry out illegal activities. Unless this positive commitment to contract negotiation, interpretation and compliance is appropriately enshrined in the ICANN bylaws, the enhanced accountability mechanisms provided by the CCWG may be unavailable to address situations in which ICANN fails, to the detriment of the public interest, to enforce its contracts.

In this regard, we are disappointed that the misleading stress tests 29 and 30, which posited contract enforcement as a threat to ICANN rather than as essential to fulfillment of its mission, have not been eliminated from the Third Draft of the document. We note the observation in the revised stress tests that it is “unlikely” that the enhanced Independent Review Process (IRP) can successfully be used to block contract enforcement, but are at a loss to know what significance can be attributed to this “conclusion.” If these tests are not eliminated, the text should be further revised to make explicit reference to the proposed new by-laws provisions regarding contract enforcement, as strengthened by a reference to ICANN’s “responsibility” to enforce its contracts.

B. Re: Recommendation #9: Incorporation of Affirmation of Commitments into ICANN’s Bylaws

In its Affirmation of Commitments (section 8(b)), ICANN pledged to remain a US-based not-for-profit entity. COA strongly believes that the substance of this commitment must be incorporated into ICANN’s chartering documents as a fundamental bylaw, which the board cannot change without community approval. Allowing the board to unilaterally move ICANN to a new legal regime would threaten the stability of the contractual framework so critical to ICANN and to the multi-stakeholder model, and would likely raise a huge red flag for the U.S. Congress that could complicate and delay the IANA transition.

We recognize that ICANN’s Articles of Incorporation state that ICANN is a California not-for-profit corporation, and that the accountability proposal does not recommend any change to this provision. But it appears that the Articles, like the by-laws, are subject to amendment at the board’s instigation, and without the affirmative approval of the ICANN community. Unless it can be clarified that this is not the case, COA maintains the position that section 8(b) of the AOC should be made into a fundamental by-law of the post-transition ICANN.

C. Process and Timetable

Finally, COA joins the chorus of voices within the community objecting to the exceptionally rushed process for accepting and considering public comments on the Third Draft. There is simply no compelling justification for according to this fundamental and consequential set of complex issues barely half the time ICANN routinely allots for public comment on far less significant matters. This inadequacy is especially prejudicial to organizations like COA that themselves consist of other organizations and associations, and for whom it is often challenging to reach consensus positions even during the “normal” 40-day public comment period. Accordingly, COA explicitly reserves the right to submit further and more detailed comments on the Third Draft itself, as well as on the modifications and mutations to the Third Draft that have emerged on the CCWG-ACCT list, and from dialog between the Working Group and the ICANN Board. These changes have continued to appear even in the three weeks since the Third Draft was published.

Thank you for considering the views of COA.

Respectfully submitted,

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