

COALITION FOR ONLINE ACCOUNTABILITY

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REPLY COMMENTS OF COALITION FOR ONLINE ACCOUNTABILITY

April 27, 2013

The Coalition for Online Accountability (COA) appreciates this opportunity to provide reply comments on the draft Public Interest Commitment Dispute Resolution Procedure. See <http://newgtlds.icann.org/en/applicants/agb/draft-picdrp-15mar13-en.pdf>.

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners (listed below). COA and its participants have engaged actively in many aspects of ICANN's work since the inception of the organization, including more than 20 formal submissions regarding the new gTLD program. For further information, see www.onlineaccountability.net.

PIC DRP Must Not Be Exclusive Enforcement Mechanism

As COA noted in its February 2013 comments on the draft new gTLD registry agreements, see <http://forum.icann.org/lists/comments-base-agreement-05feb13/msg00027.html>, in which it supported the principle of public interest specifications whereby certain representations made by new gTLD applicants in their applications could become contractually binding, "COA also supports in principle the proposal that binding commitments in new gTLD applications would be enforceable, not only by ICANN, but also via a dispute resolution process that can be triggered by third parties." In this regard, we share the concern expressed by the At-Large Advisory Committee (ALAC) in its previously submitted comments, see <http://forum.icann.org/lists/comments-draft-picdrp-15mar13/msg00007.html>, that the PIC Specs must be enforceable by ICANN, and that there must be "an ICANN compliance connection" and a capability for "ICANN itself [to] carry out enforcement." For this reason, we strongly urge that the PICDRP must be without prejudice to other means of enforcing PIC Specs, including but not limited to (a) informal consultation and discussion between the Registry Operator and a party believing that it has been harmed by failure to fulfill the PIC Spec¹, and (b) contract enforcement by ICANN of the undertakings the registry operator has made to it by

¹ For example, COA has urged applicants for strings that target sectors dependent on copyright protection to provide copyright owners in that sector a "seat at the table" in formulating and implementing policies to reduce the risks of copyright infringement in the TLD. See http://www.onlineaccountability.net/pdf/2012_Mar06_EnhancedSafeguards.PDF. Some applicants have agreed to do so through the formation of industry advisory councils. Any rigid requirement that the PIC DRP is the exclusive means of resolving disputes over compliance with PIC Specs would undermine the value of these councils. This outcome must be ruled out.

entering into an agreement that includes a PIC Spec. This assurance could be obtained by inserting the following at an appropriate point in the document:

“Nothing in this Procedure shall be construed to limit the authority of ICANN to enforce any provision of the Registry Agreement, including but not limited to Specification 11, or the ability of Registry Operator to voluntarily modify its policies, procedures or practices to cure non-compliance with a PIC Spec that has been brought to its attention by any party through any channel.”²

PIC PRS Must Not Be Mandatory Gateway

COA is also concerned that a currently non-existent PIC Problem Reporting System is proposed to act as a mandatory gateway to the dispute resolution procedure. The Whois Data Problem Reporting System on which the PIC PRS would be based is put forward as the model. This is problematic, or at best exceedingly premature. It is generally recognized across the community that over the past decade the WDPRS has been ineffectual in reducing the massive problem of Whois data inaccuracy, so much so that ICANN’s compliance staff has, within the past month, relaunched the entire system to try to cure many of its defects. See <http://www.icann.org/en/resources/compliance/update/update-mar13-en.htm>. This is certainly a positive sign, but does not yet provide a basis for instituting a similar system with regard to PIC Specs, much less making it mandatory for anyone seeking to invoke dispute resolution. In this regard we disagree with Valideus, whose initial round comment (see <http://forum.icann.org/lists/comments-draft-picdrp-15mar13/msg00004.html>) calls for the PIC PRS to be made mandatory.

We note that Valideus’ own filing references an alternative means to ensure that registry operators get the opportunity to put their own houses in order. Valideus points out that the PDDRP – one of the models for the PICDRP – includes a 30-day requirement for the parties “to engage in good faith discussions to resolve the issue prior to initiating [a proceeding]”. The most sensible approach here would be to require the complainant to demonstrate that it has brought the problem to the attention of the Registry Operator, and has engaged in (or at least sought) good faith discussions to resolve it, but has not received a satisfactory response after a reasonable period. This showing could be made either through the PICPRS, or in some other fashion. Section 7.2.3(f) could be expanded to cover this, by adding, “or that the Complainant has otherwise brought to the attention of the Registry Operator the specific act(s) or omissions(s) involved and that the problem has not been remedied within a reasonable period [or stated number of days].”

Finally, we commend to ICANN’s attention the comments of the Intellectual Property Constituency, which COA generally supports.

Thank you for considering the views of COA.

Respectfully submitted,

Steve Metalitz, counsel to COA

² We recognize that Section 20.3 of the document preserves the right of ICANN to impose contractual remedies but believe the first part of the formulation above may be clearer and less ambiguous. At a minimum, the phrase “including but not limited to non-compliance with anything in Specification 11 of the Registry Agreement” should be added to Section 20.3.

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