

Official Comment of the Motion Picture Association of America on Enhancing ICANN Accountability

The Motion Picture Association of America¹ appreciates the opportunity to participate in the critical effort of enhancing ICANN accountability. The MPAA and its member companies are actively engaged in ICANN's bottom-up, multistakeholder policy development process and are committed to supporting the organization's continued evolution and improvement.

The U.S. Government's decision to transition out of its legacy role as the administrator of the IANA Functions contract has brought ICANN to an inflection point. While the "backstop" function provided by the U.S. Government may not be directly replicable in the multistakeholder setting, its impending absence creates a vacuum that must be filled. ICANN's continuing stability and global legitimacy will depend on building a comprehensive accountability framework upon which all stakeholders can rely.

This comment period represents an important first step toward developing the framework that will support the next stage of ICANN's development. While many of the functional details of the new accountability framework will need to be developed through the bottom-up, multi-stakeholder community consultation process, we believe that certain core principles should animate both the accountability framework, and the process that creates it.

Core Principles for New ICANN Accountability Framework

Independence

The significance of the U.S. Government's backstop function within the ICANN ecosystem lies in the fact that – among all of the checks and balances within the ICANN process – it is the only one that is fully independent of the ICANN staff and Board of Directors. While ICANN cannot, and should not, seek to directly replace the U.S. Government's existing contractual relationship, it can and should develop an independent mechanism for review and redress of ICANN actions and decisions. As stakeholders from every corner of the ICANN community have reiterated, accountability requires that ICANN is accountable to someone, for something. While the who and what of that equation will no doubt be the focus of intense debate in the coming months, consensus has already begun to solidify around the need for a new, independent accountability body. As a baseline this new body should be

¹ The Motion Picture Association of America, Inc. (MPAA) serves as the voice and advocate of the American motion picture, home video and television industries from its offices in Los Angeles and Washington, D.C. Its members include: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

empowered to review the ICANN Board's adherence to the bylaws, and to provide meaningful redress in instances of violation.

Stability

In order to provide effective independent oversight, a new ICANN accountability body or mechanism should be minimally dependent on the largess and disposition of the ICANN Board. Once established, the new body or mechanism should be autonomous and self-governing within the narrow scope of its remit, and not easily altered or swayed by Board vote. Unanimity, or at a minimum a substantial supermajority vote, of the ICANN Board based on significant community input should be required to make any material changes to the accountability function or its core role as well as ICANN's core obligations in its Bylaws that establish ICANN's obligation to the community. Similarly, ICANN should establish an independent, transparent and inviolate funding mechanism to support the continued operation of the new body.

Transparency

The new accountability body should be tasked with ensuring that the ICANN community receives fair, complete and timely access to all materials relevant to the ICANN decision-making process. On behalf of community members, the body should be empowered to request and publish policy documents, briefings, memos and e-mails produced by staff as part of the policymaking process. We support the proposal to create a formal "freedom of information" mechanism within ICANN to ensure such access. The new body should also monitor the timeliness with which relevant information is posted on the ICANN site and be empowered to seek redress in the event that deadlines are systematically missed. Finally, the accountability body should be tasked with ensuring that ICANN maintain routine, rigorous reporting on its contractual compliance, to include not just actions filed, but resolutions and procedural latency.

Nexus

Although not part of the ICANN process, the U.S. Courts currently provide a de facto check on ICANN's adherence to its bylaws, and the rule of law. Litigation represents extreme last resort to be used only in the event of a catastrophic failure of the multistakeholder process, but the mere existence of that option has a stabilizing effect. While ICANN has indicated that it does not intend to change its headquarters or legal designation, its commitment to operating under the rule of law, in legal jurisdictions that support effective redress, should be codified as part of the accountability process. In the event that ICANN ever does change its jurisdiction or legal status, the new accountability body should be empowered to ensure that such changes maintain or enhance ICANN's current level of legal accountability.

Prerequisite

MPAA appreciates the commitment of ICANN to running the IANA transition process and enhancing accountability process concurrently and interdependently. The success of the IANA transition will hinge, in large part, on the strength of the

accountability framework the ICANN community develops to support it. Rather than simply linking the processes, ICANN should make a firm commitment to complete and codify the improvements of the enhancing accountability process before finalizing any IANA Transition recommendation.

A Note on Process

The natural tendency of ICANN when faced with a challenge as broad as enhancing accountability, is to organize into steering committees and working groups, a process which is already underway in this instance. While this is an inevitable – and useful – dynamic, MPAA requests that special care be taken to ensure the broadest possible inclusion of ICANN’s diverse community and recommend that experts in intellectual property rights and in the rule of law on the Internet must be added to the subject matter areas currently listed in the “[Enhancing ICANN Accountability](#)” [document](#). Particularly on this topic, it is critical that any steering or drafting committee include representation from all major stakeholder groups with participation determined by the community and not dictated by ICANN.