Comments of COALITION FOR ONLINE ACCOUNTABILITY (COA)

July 20, 2009

The Coalition for Online Accountability (COA) appreciates this opportunity to comment on some of the "excerpts" of version 3 of the Draft Applicant Guidebook, and on certain explanatory memoranda, all released by ICANN on May 31, 2009. See http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm#matrix.

COA consists of nine leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); the Business Software Alliance (BSA); 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 strongly supports the comments submitted by the Intellectual Property Constituency, especially in support of the decision to require thick Whois services from all new gTLDs. We also repeat our recommendation for provisions in the draft registry agreement that obligate registries to take steps to ensure compliance with Whois-related obligations by ICANN-accredited registrars within the new TLD. See COA Comments on DAG v.1, at 9-10 (http://forum.icann.org/lists/gtld-guide/msg00148.html). To our knowledge, ICANN has never responded to this proposal. We call ICANN's attention once again to the precedent for such provisions found in the .asia registry agreement.

The remainder of these comments focus on the issues addressed in Section II of our December 2008 comments on DAG v.1 (http://forum.icann.org/lists/gtld-guide/msg00148.html) and on pages 3-5 of our April 2009 comments on DAG v.2 (see http://forum.icann.org/lists/2gtld-guide/msg00072.html). These issues include:

- community-based gTLD applications;
- the community objection procedure;
- the comparative evaluation procedure (re-labeled in the excerpts as "community priority"); and
- post-delegation obligations of successful applicants.

These issues are addressed mainly in the "excerpts" dealing with modules 3 and 4, and in the explanatory memorandum on Registry Restrictions Dispute Resolution Procedure (RRDRP), associated with module 3.

1. Community-based applications

COA continues to believe that it would be beneficial and efficient to recognize a category of gTLD applications that would be open for registration only by persons or entities standing in a specified relationship with a particular company (such as its employees, suppliers and/or

distributors). Under ICANN's current typology, many such applicants may be tempted to shoehorn their applications into the "community" TLD category. This is not the intended purpose for recognizing the "community" application category, and could have inadvertent detrimental consequences for legitimate community applicants. Thus, a category such as "corporate gTLD" should be recognized (although a different label might be used).

ICANN's staff analysis of the comments on DAG v.2 discusses this issue at some length, raises a number of concerns about it (notably feared difficulties in contract compliance efforts), and concludes that "the ICANN community should continue to discuss TLD categories." http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf, at page 33. COA would welcome guidance from ICANN about when and where that discussion will take place, and how it might best be brought to a substantive conclusion prior to the time that the applicant guidebook takes final form.

2. Community objection standards

COA appreciates the improvements that have been proposed in section 3.4.4 that will restrict the applicability of the "complete defense" when a challenged community applicant can prove that it would have had standing to challenge (on community objection grounds) another hypothetical application for the same string. Despite these improvements, it apparently remains the case that the applicant who can prove such standing will invariably prevail against a challenger who would otherwise be successful in its objection, no matter whether the challenger represents precisely the same community or one that is substantially or totally different from the one as to which the applicant would have standing. As a result, a large and well-defined community will have no option but to tolerate a TLD that clearly refers to it but that is operated by someone that it deems unqualified. The same result would occur if the objectionable TLD is operated for the benefit of a substantially or wholly different community, even one that is much smaller and less clearly delineated. This outcome reflects far too much conclusive bias in favor of awarding every possible TLD character string to the first minimally qualified applicant who seeks it, regardless of countervailing considerations. It also means that a community cannot defend itself against such an outcome unless, at great expense to itself, it applies pre-emptively for the same gTLD character string, even if it has no real interest in operating it. Significant communities may well be injured if this is the rule.

ICANN asserts that the "complete defense" is needed to "avoid placing ICANN and the DRSP panel in the position of judging which of two competing institutions is the legitimate representative of a community. If both institutions apply for the same community-based gTLD, the string contention procedure (rather than the dispute resolution procedure) will determine which applicant obtains the gTLD." DAG v.2 Comment Analysis at 132, see http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf (hereafter "Comment Analysis"). This does nothing to explain why the "complete defense" could be invoked by an applicant even if no other community-based application for the same string had been received, or even if the challenger represents a community that is defined completely differently from the community defined by the applicant Furthermore, even in the circumstance described in the comment analysis, all the "complete defense" does is to shift the locus of judging relative legitimacy from the community objection DRSP to the "comparative evaluator" at a later stage in the process. COA urges ICANN to reconsider the "complete

defense," and to modify it so that proof of the applicant's (hypothetical) standing to bring a challenge is only one factor to be considered by the DRSP in resolving a real community objection challenge.

COA reiterates its view (also supported by IPC in its comments) that when a challenger has shown that it meets the criteria of community delineation, substantial opposition, and targeting, detriment to the community should be presumed, unless the applicant can show otherwise. A legitimate community representative is in the best position to determine whether its community will be harmed by recognition of a gTLD that targets it. We also note that ICANN proposes to take into account the "level of recognized stature or weight among sources of opposition," and urge that the representative nature of community institutions be considered as a factor here (i.e., an entity empowered to speak by a large number of individuals or entities should be accorded a high "level of recognized stature or weight").

Finally, with regard to standing to bring a community objection, COA notes the proposal to state that determining standing will be the result of "a balancing of …factors." Proposed amended section 3.1.2.4. We have no objection to this statement; but we think its inclusion underscores the need for greater clarity and specificity on the issue of standing. We note ICANN's agreement that "more clarity can be provided" regarding standing (Comment Analysis at 132), but we question whether the excerpts deliver substantially on the pledge "to do so in the next version of the Applicant Guidebook." (Id.) We hope that the final version of DAG v.3 will fulfill this pledge when it is released in September. It would also be enlightening to all parties to provide examples of challengers who may possess or lack standing. While we understand the reluctance to do so in advance of particular cases, it should be possible to provide examples that use existing gTLD strings, so as not to prejudice any future application or any challenge thereto.

Further, as noted in our December 2008 comments on DAG v. 1, established trade associations or membership/affiliate organizations for a particular creative or economic sector must be assured of standing in this community objection process. Additionally, for efficiency and comprehensive coverage of all relevant issues, such organizations should be encouraged to join together to file objections, and should be able to cumulate their qualifications for standing purposes. We urge ICANN to spell this out in the final version of DAG v.3.

3. Community Objection Procedures

COA applauds ICANN's statement (in the Comment Analysis) that it "will .. encourage the DRSPs to allow for consolidation [of challenges] whenever possible." (page 128-9) We look forward to seeing how this encouragement is operationalized, for example in the final text of DAG v.3, and whether it is specified (as it should be) that this encouragement applies to consolidation of objections filed by the same party against multiple applicants for the same or highly similar character strings.

We are also glad to see that "ICANN will consider and will discuss with the DRSPs a process whereby a running list of objections is published as objections are filed during the filing period." Id., at 129. This could minimize the risk of needless duplication in objection procedures. We hope that this will be spelled out as a requirement in the final version of DAG v.3, to be released in September.

4. Comparative Evaluation ("Community Priority")

COA appreciates the efforts made by ICANN to present the comparative evaluation criteria in a more granular fashion in the "excerpts." This helps to clarify some of the criteria. However, our basic concern remains: as currently structured, comparative evaluation (or the "community priority" process, as it is relabeled in the "excerpts") will too often serve simply as the anteroom to an auction as a means of awarding a TLD string to one of the competing applicants.[1] This gives insufficient weight to the goal of according preference to community-based applications as against "open" proposals.

We recognize that the "excerpts" propose to reduce the threshold for avoiding an auction to 13 rather than 14 points (of a possible 16) in the comparative evaluation. We commend ICANN for making this change. It apparently remains the case, however, that any community application which has been the subject of a community objection, by an objector with standing, automatically loses 2 points, under criterion 4B ("strong and relevant opposition"), even though by definition it has vanquished the objection.[2] Once that occurs, there are many pitfalls which could cause the application to lose two more points and thus slip below the threshold required. This would occur, for instance, if any two of the following were true:

- The community represented is long-standing, but not of "considerable size" (criterion 1B);
- The community represented is of "considerable size," but lacks sufficient longevity (same);
- The string has some "other significant meaning beyond identifying the community" (for example, "Polish" identifies a community of persons with connections to Poland, but the same character string has numerous other meanings in English as both a noun and a verb) (criterion 2B);
- The application, while tightly regulating who may register in the TLD and how they may use that registration, does not regulate (on grounds of the "articulated community-based purpose") what names a second-level registrant may use for its registration (criterion 3B);
- The community represented by the application is "clearly delineated and pre-existing," but is deemed insufficiently "organized" to justify a top score on the delineation factor (criterion 1A).

This high threshold for surviving comparative evaluation seems particularly unjustifiable in the circumstance in which there is only one community-based application for a particular

[1] COA maintains its strong opposition to auctions as a means of awarding new gTLDs.

[2] Criterion 4B should also be clarified to account for the situation in which an unsuccessful challenger, with standing, defines the community substantially differently than the applicant. Does this still constitute "strong and relevant" opposition?

string.[3] ICANN has never explained why the evaluation process must be equally rigorous in such a case, as it would be when two community-based applications are contending for a single string. While a further relaxation of the 13-point threshold ought to be considered across the board, it seems essential in this situation.

Some of the specific criteria themselves also need clarification. For example, criterion 3A provides only two options: "eligibility [for registration] restricted to community members," and "largely unrestricted approach to eligibility." There are likely to be situations that fall between these two stools. For example, an application for .library might define "membership" in the community as restricted to the operators of libraries, but might also wish to allow suppliers of services to libraries to register at the second level. It is quite unclear how this situation would be scored. As noted above, criterion 2B also needs clarification. Relatively few character strings (in Latin characters at least) that identify communities would not also be identical to words with completely different meanings in some language. If that counts as "other significant meaning, " criterion 2B would rarely be satisfied.

5. Post-Delegation Obligations

COA commends ICANN for proposing a process whereby third parties (including but not limited to members of affected communities) could instigate investigations of alleged failures of community-based registries to live up to the commitments they made in the new gTLD evaluation process, and that are enshrined in their registry agreements with ICANN. However, we agree with the IPC that the proposal for an RRDRP raises many questions, and we look forward to ICANN's responses to these.

On page 5 of its April 2009 comments on DAG v.2, COA called for changes to the draft registry contract to ensure that ICANN has full authority to audit registries for material misrepresentations made in the application, as well as material statements that are no longer true, regardless of whether these representations concern the relationship to a defined community. ICANN's Comment Analysis acknowledges this concern but does not respond substantively to it. (Comment Analysis at 164-65). We urge ICANN to do so.

Respectfully submitted,

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[3] This scenario is quite likely to occur because community-based applicants must choose at the time of initial application whether to request comparative evaluation, and virtually all such applicants are likely to do so, since otherwise they forfeit any advantage accorded to community applicants. The applicant has no way of knowing then whether there will be any other community-based applicants for the same or a similar string, or whether there will be any string contention at all by the time the application reaches this stage in the process.