

COMMENTS OF COALITION FOR ONLINE ACCOUNTABILITY

July 31, 2008

The Coalition for Online Accountability (COA) appreciates the opportunity to comment on the documents generated by the ICANN President's Strategy Committee (PSC) under the heading "Improving Institutional Confidence in ICANN."

About COA

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 is a member of the Intellectual Property Constituency of ICANN's Generic Names Supporting Organization (GNSO).¹ COA and its participants have engaged actively in many aspects of ICANN's work since the inception of the organization.

General Comments

COA submitted extensive comments to the mid-term review of ICANN's Joint Project Agreement with the U.S. Department of Commerce earlier this year. See <http://www.onlineaccountability.net/pdf/NTIA%20JPA%20MidTerm%20Review%20Submission.PDF>. In our view, the progress of ICANN toward fulfillment of the JPA objectives has not changed significantly over the ensuing five months. As we stated in our mid-term review comments:

Members of the independent business community – including but by no means limited to copyright and trademark owners – who are not in contractual relationships with ICANN simply lack confidence that their voices will be heard and heeded when ICANN comes to make decisions that can profoundly affect their businesses. It has happened on some occasions, but a reliable, consistent mechanism for this input has yet to be found. Until such a mechanism is developed and implemented, as called for in point 6 of the Affirmation of Responsibilities, it cannot be said that the vision of a private-sector-led entity to manage the DNS has been realized. While there may be other challenges that ICANN must meet before the relationship between the U.S. government and ICANN can transition successfully from the current model (as reflected in the JPA), this is surely one of the most critical. COA urges NTIA to identify this as a principal task to be undertaken during the remaining 18 months of the current term of the JPA.

In this regard, we note that the PSC document "recognizes that there was a very clear message in the JPA Midterm review that ICANN needs to strengthen its relationships with the

¹ COA's counsel currently serves as president of that constituency. However, this submission is not made on behalf of the Intellectual Property Constituency.

business community given the private sector's historic investment and reliance upon the Internet as an economic driver. There is also a very clear need to improve business user input to the policy development process and the organization in general." COA believes that, to the extent this formulation focuses on businesses other than ICANN-accredited registrars or TLD registries, it correctly summarizes what must be a key priority for ICANN's activities over the remaining 14 months of the JPA term.

The PSC document states that "these issues can be addressed immediately through improved outreach at ICANN meetings and engagement of private sector representative organizations." We assume this is a reference to the "business stream" of events at the most recent ICANN meeting last month in Paris, and to ICANN's discussions there with the International Chamber of Commerce (ICC). While these steps may have made some contribution to addressing the serious problem of reaffirming private sector leadership within ICANN, it must be recognized that they were small steps.

The value of the business stream events has already been the topic of comments in this proceeding, and COA is in agreement with the comment that "the efforts in Paris represent – at best – a tentative first step toward encouraging true broad-based business participation in the ICANN process." See <http://forum.icann.org/lists/iic-consultation/msg00002.html>. With respect to the ICC, of course its input is of value and should be encouraged, and its broad outreach abilities should be utilized to promote greater business participation in ICANN. But, as the ICC itself would probably concede, its ability to represent the interests of independent business users – those which, like COA participants and their member companies, are not in a contractual relationship with ICANN – is quite limited, to the extent that those interests do not coincide with those of ICANN's contract partners. Thus, reliance on ICC as the sole or even the main "private sector representative organization" to which ICANN relates would be insufficient.

The Board's action on the GNSO restructuring proposals discussed in COA's February comments will be viewed as a bellwether of the depth and credibility of ICANN's commitment to "improv[ing] business user input to the policy development process." COA is pleased that the ICANN board decided in Paris not to adopt the most problematic of the proposals before it on this topic. In response to the Board resolution, a working group of representatives of GNSO constituencies, as well as two other members of the GNSO Council who do not represent constituencies, devoted most of the month of the July to developing an alternative proposed structure, which achieved consensus support for most of its features. We hope that the board will give serious consideration to this alternative proposal when it decides on GNSO restructuring. But, as noted by COA's counsel in his capacity as a member of this working group (representing the GNSO Intellectual Property Constituency), "All the alternative GNSO structural proposals before the Board – including the one submitted today -- are viewed as steps in the wrong direction; all diminish the role of the "non-contracted" private sector. The issue of this diminishment is not going away. At this rate, if the issue does go away, it will be because the independent business community has given up on ICANN and is seeking alternatives."

Comments on Specific Proposals

COA offers the following comments on some of the specific proposals posted for public comment:

- Should ICANN prohibit “voting by the same individual or organization in more than one of the related Advisory or Supporting Organizations”? The PSC proposes this as a way to prevent “capture [of ICANN] by any one party.” While this proposal may have merit, COA does not view this as a significant issue with regard to preventing “capture” of ICANN. A single organization certainly might have legitimate interests in more than one aspect of ICANN’s activities, and it seems counterproductive to discourage participation in multiple fora at a time when “‘apathetic’ capture” has already been identified as a concern. Furthermore, ICANN’s concept of capture may be too narrowly conceived. The clearly dominant role today of contracted parties in ICANN’s work itself presents a threat of potential capture by one interest or viewpoint, even if not by “any one party” such as “a government, an organization or any other entity.”
- COA supports the development of “alternative sources of funding to lessen dependence on current registry and registrar funding.” However, since this dependence is likely to persist for the foreseeable future, a higher priority must be to adopt stronger safeguards in ICANN’s structure and processes that would reduce the risk that “he who pays the piper calls the tune.”
- COA supports confirmation that ICANN’s headquarters will remain in the United States. The reference in this proposal to “implementing the root server management transition,” and to an agreement between ICANN and Verisign in 2006 called the “Root Server Management Transition Completion Agreement,” is entirely opaque to COA, since we have been unable to locate any such agreement on ICANN’s website (or anywhere else). We would welcome the chance to review it before commenting on this proposal.
- To the extent that the “Transition Action Plan” is premised on the assumption that the JPA itself, rather than its current term, “concludes in September 2009,” COA urges that this premise be re-examined. If the conclusion is predicated on fulfillment of all the objectives ICANN set for itself at the time the JPA was entered into in 2006, that predicate has not been achieved, and to assume that it will be achieved is imprudent in light of ICANN’s past track record and its current status vis-à-vis these benchmarks.
- The “Transition Action Plan” document poses three questions, which COA would answer as follows:
 - (Q1) Have the key elements required for an un-capturable, accountable, internationalized, stable and secure ICANN post-JPA been accurately and sufficiently identified?
 - (A1) No, to the extent that these elements do not focus on the need to incorporate a leading role for private sector entities and institutions – including copyright and

trademark owners – which do not have contractual relationships with ICANN but whose interests could be deeply affected by decisions that ICANN and its contracted parties make.

- (Q2) Are the initiatives described sufficient to meet the objectives?
- (A2) Unclear. For example, initiative 2.4 states that ICANN should “enhance and expand contractual compliance and enforcement.” COA’s February submission in the mid-term review was largely devoted to documenting the conclusion that “ICANN is beginning to do what is necessary to take on this crucial issue... but to date, it has ‘achieved’ very little.” Events of the ensuing five months have not fundamentally changed this assessment. Accordingly, it is impossible to evaluate whether the seven words in item 2.4 (quoted above) describe an initiative that is “sufficient” or not.
- (Q3) Is the timeline set out sufficient to allow sufficient community consultation and bylaw changes and other implementation steps to occur?
- (A3) Not to the extent that it seems to end the consultation process in December 2008, five months from now. As COA noted in its February submission, the entire “remaining timeframe of the current JPA (through September 2009) should be dedicated to robust discussion about the next step in the relationship between ICANN and the U.S. government, keeping in focus the need to realize the original vision of a private-sector-led system for administering the domain name and addressing systems.”
- Finally, COA supports the recommendation for a “special Expert Advisory Group,” especially if it includes appropriate representation from businesses not under contract to ICANN, but questions whether it can be organized, launched, and make an effective contribution to an initiative that is scheduled to be completed before the end of this calendar year.

COA appreciates this opportunity to comment, and thanks ICANN for considering our views. We hope to provide further input as the consultation process develops.

Respectfully submitted,

Steven J. Metalitz
Counsel to COA
c/o Mitchell Silberberg & Knupp LLP
1818 N Street, NW, 8th Floor
Washington, DC 20036 USA
Tel: (+1) (202) 355-7902; Fax: (+1) (202) 355-7899
E-mail: met@msk.com