

JOINT COMMENTS OF
American Intellectual Property Law Association (AIPLA)
Coalition for Online Accountability (COA)
International Trademark Association (INTA)

June 5, 2009

The undersigned organizations – the American Intellectual Property Law Association (AIPLA); the Coalition for Online Accountability (COA); and the International Trademark Association (INTA) -- appreciate the opportunity to comment on the new draft conflicts of interest (COI) policy for ICANN. See <http://www.icann.org/en/public-comment/#coi>. See below for descriptions of the commenting organizations.

A revised COI policy for ICANN is long overdue. The current policy has been in place for more than 10 years. See <http://www.icann.org/en/committees/coi/coi-policy-04mar99.htm>. Comments submitted by COA and INTA last year identified areas where the current policy seemed to be lacking. See <http://forum.icann.org/lists/bcoc/msg00002.html>, <http://forum.icann.org/lists/bcoc/msg00003.html>. We appreciate that the Board has been responsive to these concerns and is now considering revising the policy.

However, the draft revised COI policy does not adequately address some of our concerns. Indeed, in some areas, it may constitute a step backwards. One notable example is the question of when a Director should withdraw from Board deliberations on a particular matter.

The current COI policy at least encourages (although it does not explicitly require) a director who has a “material financial interest” in a matter coming before the Board for decision to recuse himself or herself, not only from voting on the matter, but also from participating in the board’s deliberations. Section 7.3 of the current policy sets forth a procedure under which a matter need not be referred to the Conflicts Committee for investigation if an “Interested Director” fully discloses any “material financial interest” and then “abstains from participation in the Board’s consideration” of the matter. By contrast, under section 2.4(c) of the proposed revised policy, it is clear that a Director who “identifies” any “direct financial interest” in a matter (presumably by disclosing it to the Board Governance Committee, although this is not specified) is free thereafter to “participate in Committee or Board deliberations” on the matter. The undersigned organizations believe there should be a duty, not only to abstain from voting, but also to withdraw from Board deliberations, in these circumstances.

The duty to withdraw from deliberations should also apply when a Director has a material financial interest that is not direct. The current policy encourages a Director to withdraw in these circumstances; the draft revised policy does not even suggest that a Director should withdraw from participation because of a material but indirect financial interest.

The revised policy (section 2.4(a)) is identical to the current policy (section 4.1) as to when an interested Director has a duty to abstain from voting –only when his or her financial

interest in the matter being voted upon is both material and direct, and when that interest will be affected by the outcome of the vote. We believe that this standard may be too narrow. It allows a Director to vote when he or she has a material financial interest that is not direct, or when the Director's financial interest will not be affected by the outcome of a vote (for example, when the Director is a consultant representing a party that would be affected by the decision, but the Director's compensation from the party will not be affected by the outcome of the vote). In our view, any material or direct financial interest should lead to abstention. Furthermore, the concepts of "material" and "direct" financial interest should be defined in the policy itself.

Beyond these issues of abstention or withdrawal from deliberations, the Board should consider improving the revised draft policy in other ways as well, including:

- All decisions under the revised policy regarding potential conflicts of interest are to be decided by the peers of the interested Director, sitting as the Board Governance Committee. The Board should consider the use of an independent third party, such as the ICANN Ombudsman, to make these decisions in some or all cases.
- Article VI on Periodic Reviews seems to have little if anything to do with conflicts of interest. While it certainly would be advisable for the Board to provide for such reviews, it should do so in some other policy document.
- Similarly, this draft revised policy does not address or even refer to COI issues involving non-Board members, notably senior employees of ICANN. While this may be dealt with elsewhere (e.g., in an employee code of conduct), some reference to it would be appropriate here.
- Section 4.1, on compensation, would seem to apply only to one Board member – the CEO. The reference to "voting" in this provision and in section 4.2 excludes the situation in which an employee is involved in determining his or her own compensation or the compensation of relatives or friends. This should be prohibited, but Article IV does not seem to do so. If this is handled in a separate policy, a cross-reference would be appropriate.

Thank you for considering our views.

Respectfully submitted,

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About the commenting organizations:

AIPLA is a national bar association whose more than 16,000 members are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the

practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property.

COA consists of nine leading copyright industry companies, trade associations and member organizations of copyright owners. COA and its participants have engaged actively in many aspects of ICANN's work since the inception of the organization.

INTA is a 131 year-old not-for-profit membership organization, of more than 5,500 trademark owners and professionals from over 190 countries. INTA's membership includes corporations, not-for-profit organizations, universities, advertising agencies, professional and trade associations, and law firms. INTA's membership is extremely diverse, crossing all industry lines and spanning a broad range of manufacturing, retail, and service operations. All of INTA's members, regardless of their size or international scope, share a common interest in trademarks and a recognition of the importance of brand identity to their owners, to the general public, to a competitive economy and the global marketplace