

COALITION FOR ONLINE ACCOUNTABILITY

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The Coalition for Online Accountability provides the following comments on ICANN's draft Strategic Plan for 2010-2013. See <http://www.icann.org/en/public-comment/#strat-plan-2010>.

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); 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 an active participant in the GNSO Intellectual Property Constituency and has engaged fully in the debates over ICANN's strategic direction since ICANN's inception.

The document on which ICANN is seeking public comments can best be described as "skeletal". The document is six pages long (excluding the cover page). Four of these pages consist of a few sentences about a very generally stated topic (e.g., "Preserve DNS stability and security"), followed by the following: "[Details of staff work will be provided in the final plan.]"

As a result it is difficult to prepare constructive and actionable comments on this document. For instance, on the page entitled "Promote competition, trust, choice and innovation," ICANN declares its intention to "continue to develop and implement policy to strengthen consumer trust in the domain name registration system." Among the "strategic objectives" listed on this page is "[increased valid registrations]." The document never explains what is an "invalid registration" for purposes of this document. Is it a registration of a domain name that fails to resolve? Is it a registration of a domain name for which the registrar ultimately does not receive payment from the registrant? Is it a registration of a domain name on behalf of a registrar for warehousing or speculative purposes? Is it registration of a domain name for the purpose of carrying out malicious activity, or promoting copyright piracy, or actionable as a "bad faith" registration as defined by the Uniform Domain Name Dispute Resolution Procedure? Any of these situations might fit the definition of an "invalid registration," and thus provide the mirror image to a "valid registration"; but the document never explains which of these definitions – or of a dozen or more other equally plausible definitions – it is employing.

American Society of Composers
Authors & Publishers (ASCAP)

Entertainment Software Association (ESA)

Software & Information Industry Association (SIIA)

Broadcast Music Inc. (BMI)

Motion Picture Association of America (MPAA)

Time Warner Inc.

Recording Industry Association of America (RIAA)

The Walt Disney Company

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Furthermore, is the objective really to increase the absolute number of “valid registrations”? If so, then the objective would be achieved if “valid registrations” increased by 10% while “invalid registrations” increased by 100%. What is the connection between that objective and the stated goal of “strengthen[ing] consumer trust in the domain name registration system”? If, on the other hand, the objective is to increase the proportion of all registrations that are “valid” and to decrease the proportion that are “invalid,” it is impossible to evaluate whether that objective is realistic, and whether anything ICANN plans to do will advance it, so long as the objective remains undefined and the means of achieving it remain entirely absent from the document.

This example is by no means an isolated one. For instance, on the same page, the following “strategic objective” is articulated: “[everyone connected]”. This is more a slogan than an objective that can be critically evaluated or discussed. If it is meant as an objective, it far exceeds the scope of ICANN’s charter.

It is true that on the second page of the document, a few bullet points are provided regarding “community work,” “strategic projects,” and “staff work” under the rubric of “Promote competition, trust, choice and innovation.” But these provide almost no additional information. It appears that the only work the ICANN staff will do in this area is (1) “Compliance,” and (2) “Supporting Organization and Advisory Committee support.” While COA has always supported ICANN’s contract compliance work and has consistently called for greater resources to be devoted to it, there is nothing meaningful to which we can react simply by seeing the single word “compliance” listed on this page.

It seems apparent that what ICANN has put forward for public comment is not a “draft strategic plan,” but a hastily assembled first sketch of what might ultimately evolve into a draft strategic plan. The most troubling aspect of this is that ICANN appears to be poised to adopt a strategic plan that will be at least somewhat more detailed than this document, but without providing the public with any real opportunity to comment on it. This at least is what we glean from ICANN’s statement (in the explanatory material accompanying the public comment notice) that “a final version of the strategic plan will be submitted to the Board for approval at their February meeting.” Since that meeting will take place February 4, only two weeks after the close of the public comment period, and since the community has frequently been told that any proposal for action by the Board must be submitted to it well in advance, it follows that whatever is inserted in the “final” plan to replace “[Details of staff work will be provided in the final plan.]” -- a sentence that now appears on two-thirds of the document’s pages -- will not be made available for public comment at any point before Board consideration.

ICANN was not always so opaque in its process for development of its strategic plans. The document at issue here provides far less detail than ICANN provided regarding the three-year strategic plan in previous planning cycles. Indeed, at earlier stages of previous cycles, ICANN invited the community to comment on far more detailed expositions of ICANN’s strategic plan. See <http://www.icann.org/en/strategic-plan/strategic-plan-draft-2009-2012-01dec08-en.pdf> (December 2008); <http://www.icann.org/en/strategic-plan/draft-strategic-plan-2009-2012-en.pdf> (October 2008); <http://www.icann.org/en/public-comment/public-comment-200711.html#stratplan-2008> (October 2007).

It is especially distressing that ICANN's failure to provide any meaningful opportunity for public comment on its 2010-2013 strategic plan is not an isolated recent instance of ICANN deprecating the public comment process. Last month, the ICANN Board considered and approved a model for an "expressions of interest" phase in the new gTLD process from which any community input not received within a 16-day public comment window was excluded. See ICANN EOI Model paper, at 4 (<http://www.icann.org/en/topics/new-gtlds/eoi-model-18dec09-en.pdf>) ("the Board could not take all the comment into account before discussion"); see also, e.g., <http://forum.icann.org/lists/eoi-new-gtlds/msg00035.html> (Comment of COA); <http://forum.icann.org/lists/eoi-new-gtlds/msg00083.html> (comment of Microsoft Corporation); <http://forum.icann.org/lists/eoi-new-gtlds/msg00036.html> (comment of INTA Internet Committee). Even more recently, ICANN posted a request for public comments regarding a "discussion draft" on the process for carrying out the reviews it pledged in last year's Affirmation of Commitments to undertake, only to issue, 18 days before the end of that public comment period, and before more than a single public comment had even been received, a "call for applicants" that apparently assumed that everything in the "discussion draft" would be adopted. See <http://www.icann.org/en/public-comment/#affrev> and <http://www.icann.org/en/announcements/announcement-13jan10-en.htm>.

While in isolation none of these incidents might have been cause for great concern, taken together they do not bode well for ICANN's ability to fulfill its recent highly public commitment to "continually assessing and improving the processes by which ICANN receives public input." Affirmation of Commitments, <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>, paragraph 9.1; see also id. at paragraph 7 ("ICANN commits to ... responsive consultation procedures...."). If anything, the trend of ICANN's recent actions has been in the wrong direction with respect to reform of the public comment process.

Respectfully submitted,

Steven J. Metalitz, counsel to COA