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Submitted to: comments-draft-new-bylaws-21apr16@icann.org

May 20, 2016

Samantha Eisner
Associate General Counsel
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Draft New ICANN Bylaws

Dear Ms. Eisner:

The International Trademark Association (INTA) is pleased to submit the attached comments regarding the Draft New ICANN Bylaws. We are encouraged that that the Draft Bylaws have substantially followed the recommendations of the CCWG Final Report. However, we do have concerns about particular language regarding Recommendations 2 and 11 and, accordingly, have submitted proposed alternative language.

We also congratulate the drafting team for doing such a thorough job so quickly but remain concerned, as with earlier comment periods, that 30 days is insufficient to adequately analyze the potential outcomes of the accountability measures including the new bylaws. We strongly encourage further comment periods as revisions are made in order to ensure maximum community input on this critical matter of ICANN's governance.

Should you have any questions about our comments, I invite you to contact Lori Schulman, INTA's Senior Director of Internet Policy at 202-261-6588 or at lschulman@inta.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Etienne Sanz de Acedo". The signature is fluid and cursive, with a long horizontal stroke at the end.

Etienne Sanz de Acedo
Chief Executive Officer

INTA Comment on the Draft ICANN New By-laws

May 20, 2016

The International Trademark Association (INTA) submits the following comments regarding the Draft ICANN Bylaws dated 20 April 2016¹ that were posted for public comment (“Draft Bylaws”). INTA appreciates the work of the legal drafting teams and acknowledges their complex task.

INTA has reviewed the Draft Bylaws with a view to ensuring that they align with the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (“CCWG Final Report”). In our view, the Draft Bylaws generally embody the CCWG Final Report. Our specific comments on the Draft Bylaws and some suggestions for their amendment, are set out below.

We ask that the drafting team take particular note of our comments regarding Recommendations 2 and 11 as we are concerned about the overuse of redaction in independent reports and the still murky language around the requirements of the Board rejecting GAC advice.

Recommendation 1 – Establishing an Empowered Community for Enforcing Community Powers

Section 6.1

Section 6.1(a) refers to the Empowered Community (“EC”) as a “nonprofit association” whereas the CCWG Final Report calls it an “unincorporated association.” We suggest that the Draft Bylaws use whichever is the appropriate term under the California Commercial Code (CCC).

Recommendation 2 – Empowering the Community Through Consensus: Engagement, Escalation, and Enforcement

Section 22.8 (Independent Investigation)

This Draft Bylaw gives the Board two important powers: (i) to select the independent firm to investigate the alleged fraudulent activity or gross mismanagement of ICANN; and (ii) to redact the independent firm’s report without limitation. INTA suggests that the Decisional Participants be required to agree to the choice of independent firm, which could be achieved by amending the Bylaw to read “...*ICANN shall retain a third-party, independent firm, to which the Decisional Participants mutually agree*, to investigate such alleged fraudulent activity or gross mismanagement”.

¹ <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>.

Second, we recommend that the redaction of the firm’s report be required to “be reasonably necessary to” achieve the goals listed in the bylaw, namely “*to preserve attorney-client privilege, work product doctrine or other legal privilege or where such information is confidential.*” Further, we strongly recommend that this section be more fully considered by the community and NTIA before the final by-laws are adopted as this issue is crucial to ICANN operating in an open and transparent manner. Any right to redact should be very narrow in scope. We would not want redaction used to cloud transparency of a process, that, by its nature, requires candor and openness.

Recommendation 4 – Ensuring Community Engagement in ICANN Decision-making: Seven New Community Powers

- 1) Section 7.12 (Recalling Board), incorrectly refers to Section 7.11(a)(ii), as the paragraph permitting Board recalls. This should be changed to sub-paragraph 7.11(a)(iii).
- 2) Section 7.12(b) creates a delay of 5 days between the date the Board is recalled and the date the EC appoints Interim Directors to fill the vacancies. Since it is a legal requirement for ICANN to have a Board and necessary operationally, we suggest that the EC be required to name the Interim Directors on the same day the Board is recalled.
- 3) Paragraph 98, Annex 4 of the CCWG Final Report states that “*The ICANN Bylaws will state that, except in circumstances of where urgent decision are needed to protect the security, stability and resilience of the DNS, the Interim Board will consult with the community through the SO and AC leadership before making decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN’s strategy, policies or management, including replacement of the serving President and CEO.*”

These obligations on the Interim Board do not appear in Sections 7.11 or 7.12 of the Draft Bylaws. Unless they are covered elsewhere, we recommend that they be added.

Recommendation 5 – Changing Aspects of ICANN’s Mission, Commitments and Core Values

- 1) Limited Scope of Mission

The CCWG Final Report recommended that ICANN’s Mission Statement be amended to clarify that ICANN’s powers are enumerated. Section 1.1(b) of the Draft Bylaws states

that “ICANN shall not act outside of its Mission.” However, there is no language stating that ICANN’s powers are limited to those enumerated in Section 1.1(a). We recommend amending Section 1.1(a) to make this clearer.

2) Section 1.1

INTA’s interest in how ICANN defines its Mission is informed by INTA’s own mission as an association “dedicated to supporting trademarks in order to protect consumers and to promote fair and effective commerce.”¹ At their core, trademarks are market mechanisms that create accountability. They do that by identifying and distinguishing the goods (or services, if a service mark) of their owner from those of others, which in turn creates an incentive for their owner to maintain a predictable, consistent quality of goods. That consistency protects consumers by assigning responsibility: without trademarks, low-quality, faulty, or unsafe products would be untraceable, leaving consumers without any recourse. And it promotes efficient markets by enabling consumers to make quick, confident, and safe purchasing decisions.

Since its founding, ICANN has striven to achieve those same two objectives – protecting consumers and promoting efficient markets – in its operation of the Internet’s unique identifier systems. As noted in the “Green Paper”:

*The Internet succeeds in great measure because it is a decentralized system that encourages innovation and maximizes individual freedom. Where possible, market mechanisms that support competition and consumer choice should drive the technical management of the Internet because they will promote innovation, preserve diversity, and enhance user choice and satisfaction.*²

Because trademarks are just that – “market mechanisms” that “support competition and consumer choice” – it is not surprising that many different provisions from the current RAA and RA protect them. Examples from the current (2013) RAA³ include, but are not limited to:

- ¶3.18.1 provides that “Registrar shall maintain an abuse contact to receive reports of abuse involving Registered Names sponsored by Registrar, including reports of Illegal Activity.”; ¶1.13 in turn defines “Illegal Activity” as “conduct involving use of a Registered Name sponsored by Registrar that is prohibited by applicable law and/or exploitation of Registrar’s domain name resolution or registration services in furtherance of conduct

¹ <http://www.inta.org/About/Pages/Overview.aspx>.

² <https://www.ntia.doc.gov/legacy/ntiahome/domainname/dnsdrft.htm>.

³ <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

involving the use of a Registered Name sponsored by Registrar that is prohibited by applicable law.”

- ¶3.18.1 also provides that “Registrar shall take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse.”
- ¶3.7.7 provides that “Registrar shall require all Registered Name Holders to enter into an electronic or paper registration agreement with Registrar.”
- ¶3.7.7.9 in turn provides that “The Registered Name Holder shall represent that, to the best of the Registered Name Holder's knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly used infringes the legal rights of any third party.”
- ¶3.8 requires Registrars to comply with the UDRP and URS (or their replacements).

Examples from the current new gTLD RA¹ include, but are not limited to:

- ¶2.8 provides that “Registry Operator must specify, and comply with, the processes and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth Specification 7 . . .”; Spec. 7 in turn provides that “Registry Operator shall implement and adhere to the rights protection mechanisms (‘RPMs’) specified in this Specification.” Those RPMs include the TMCH, URS, and PDDRP.
- Specification 11 requires Registry Operators to only use ICANN accredited registrars that are party to the 2013 RAA.
- ¶3(a) of Spec. 11 also requires Registry Operators to include a provision in their Registry-Registrar Agreements that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from committing, among other things, piracy, trademark infringement, fraudulent or deceptive practices, and counterfeiting, or otherwise engaging in activity contrary to applicable law.
- ¶3(a) of Spec. 11 also requires Registry Operators to include a provision in their Registry-Registrar Agreements providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

Given this background, and given its mission, INTA is committed to ensuring that these specific provisions from the RAA and RA – and the more fundamental solicitude and respect for the importance of trademarks that informed them – remain firmly within ICANN’s Mission. INTA was therefore pleased to see that Recommendation #5 from the CCWG Final Report recognized that “ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments (‘PICs’), with

¹ <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>.

contracted parties in service of its Mission.” INTA was also pleased to see Recommendation #5 follow that general statement with this specific instruction to the drafters of ICANN’s new Bylaws:

[T]he language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN’s Bylaws or exceed the scope of its Mission. This means that the parties who entered/enter into existing contracts intended (and intend) to be bound by those agreements. It means that until the expiration date of any such contract following ICANN’s approval of a new/substitute form of Registry Agreement or Registrar Accreditation Agreement, neither a contracting party nor anyone else should be able to bring a case alleging that any provisions of such agreements on their face are ultra vires.

Despite these drafting instructions, there remained a concern that the new ICANN Bylaws – if not precisely worded – might introduce ambiguity as to whether the trademark-related provisions from the RAA and RA mentioned above would remain within ICANN’s Mission. More specifically, INTA’s concern was that the language in the new Bylaws reflecting the general principle that ICANN should not regulate Internet content (a general principle with which INTA agrees) if drafted too broadly might suggest that RPMs such as the TMCH, URS, UDRP, PDDRP, and RRDRP, or contractual provisions such as RAA ¶¶3.7.7 and 3.18.1 and RA ¶2.8 and Specs. 7 and 11 somehow counted as “regulation” of content.¹

Having now reviewed Section 1.1 of the Draft Bylaws on ICANN’s Mission, INTA is pleased to see that it has been drafted to confirm that the trademark-related provisions from the RAA and RA fall within the scope of ICANN’s Mission. Specifically:

- Section 1.1(d)(iv) of the Draft Bylaws notes that “ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.”
- Section 1.1(d)(ii)(A)(1) notes that all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on, or undergoing negotiation as of October 1, 2016, may not be challenged by any party in any proceeding against, or process involving, ICANN on the basis that such terms and conditions conflict with,

¹ For example, the CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations suggested that ICANN could “effectively become a regulator of conduct and content on registrant websites” by virtue of “strongly” enforcing RAA ¶3.18.1.

or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers.

- Section 1.1(d)(ii)(A)(2) then extends the “grandfathering” of 1.1(d)(ii)(A)(1) not just to the current RAA and RA, but also to any future RAA or RA “that is based on substantially the same underlying form” as the current RAA and RA.

Moreover, INTA was also pleased to see that the prohibition against ICANN regulation of content was drafted in a specific, narrow manner that should remove any doubt as to whether existing trademark protections fall within the scope of ICANN's Mission.

Section 1.1(c) of the Draft Bylaws reads:

ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority, and nothing in the preceding sentence should be construed to suggest that it does have authority to impose such regulations.

This specific language should foreclose any potential argument that the RPMs and contractual provisions mentioned above somehow count as “regulation” of content, for at least three reasons:

- 1) The Draft Bylaws define “regulate” as “impose rules and restrictions on.” “Impose” implies an element of coercion or compulsion: to “impose” is to cause something to affect someone or something by using authority; to establish or create something unwanted in a forceful or harmful way; to force someone to accept something.¹ It is difficult to see how RPMs developed through an open, transparent, bottom-up multi-stakeholder process, or contractual provisions negotiated in an arms-length transaction, could somehow be construed as “imposing” anything.
- 2) The Draft Bylaws added the second sentence reaffirming that ICANN does not hold any “governmentally authorized regulatory authority.” This addition – as with the choice of the word “impose” – requires an element of compulsion that would not implicate the RPMs or contractual provisions discussed above.
- 3) The Draft Bylaws cross-referenced Section 1.1(a), which in turn cross-referenced Annexes G-1 and G-2 to note that certain issues, policies, procedures, and principles “shall be deemed to be within ICANN's Mission.” Those include but are not limited to resolution of disputes regarding the registration of domain

¹ See, e.g., <http://www.merriam-webster.com/dictionary/impose> (emphasis added).

names (which would cover the URS and UDRP) and principles for allocation of registered names in a TLD (which would cover the TMCH).

Section 1.1 of the Draft Bylaws therefore confirms that existing trademark-related provisions from the RAA and RA fall within the scope of ICANN's Mission and, on this basis, INTA supports it. However, we note that items (B) to (E) in Section 1.1(d), additional documents which are grandfathered, do not appear in Recommendation 5 of the CCWG Final Report. It also appears that item (F) of Section 1.1(d), which grandfathers renewals of agreements in listed in items (A) to (E), may be overly broad in that, as drafted, it would grandfather any new and different terms added to the documents listed in (A) to (E) at renewal. We recommend that this aspect of the Draft Bylaw Section 1.1(d) be reviewed for alignment with the CCWG Final Report.

Section 1.1(a)(i). The following language does not appear in the CCWG Report:

“...coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains (“gTLDs”).”

It is not appropriate to alter the Bylaws by including language which has not been subject to the prior CCWG-Accountability process. This new language could be read to allow ICANN to interfere with a registry's right to set its own registration rules. This could have profound effects on .Brand TLDs which need to withhold registrations from third parties in order to maintain safety for consumers and also for .Geos who need to maintain boundaries in order for the TLDs to have meaning. We suggest the following alternative language:

“...coordinates the development and implementation of policies concerning the registration of, but not the qualifications for, second-level domain names in generic top-level domains (“gTLDs”). For the avoidance of a doubt, registries retain the right to set their own registration qualifications.”

Section 1.1(d)(ii). The following language does not comport with the CCWG Report: “Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (F) below, and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers pursuant to these Bylaws (“Bylaws”) or ICANN's Articles of Incorporation (“Articles of Incorporation”)”

As written, this language could be misused to exclude Registries and Registrars from the benefits of Accountability reforms. Essentially, Registries and Registrars are asked to participate in ICANN after the Transition under the accountability scheme currently in place. Now, the USG serves as backstop but without the USG as a backstop after Transition the conditions for Registries and Registrars must transition as well. Importantly, subsection (F) makes it clear that this second class status will follow Registries and Registrars forever and will never sunset. Further, it is unclear what affect this new Bylaws provision will have on the explicit references to ICANN's Mission found in the Registry Agreement (see sections 3.1 and 7.6) and the Registrar Accreditation Agreement (see Section 6.5.1). We proposed the following alternative language:

*“Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (F) below, and ICANN’s performance of its obligations or duties thereunder, may not be challenged by any **third party who is not a party to the relevant agreement(s)** in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN’s Mission or otherwise exceed the scope of ICANN’s authority or powers pursuant to these Bylaws (“Bylaws”) or ICANN’s Articles of Incorporation (“Articles of Incorporation”)”*

This change makes it clear that contracted parties are not banned from claiming that ICANN has violated its Mission in its “performance of its obligations or duties” under their agreements with ICANN. This is also consistent with the unilateral right of registrars and registries to self-terminate their agreements should they come to the conclusion that the agreements themselves are outside the scope of ICANN’s Mission. Section 1.2(a)(i).

The following language is not found in the CCWG Report:

“...the administration of the DNS...”

This language could be read to indicate that part of ICANN's Commitment and Core Values is to preserve and enhance its own administration of the DNS. In other words, this language allows ICANN to commit, and holds as a core value, ICANN's own position of power. This language should be deleted or clarified. If clarified, an additional public comment period will be necessary to ensure that the drafting team has adequately addressed the issue.

Section 1.2(a)(ii). This language is not in the CCWG Report:

“Maintain the capacity and ability to coordinate the DNS at the overall level and work for the maintenance of a single, interoperable Internet.”

In fact, it is not even clear what this language means. What is “the overall level”? This language should be deleted or clarified. If clarified, an additional public comment period will be necessary to ensure that the drafting team has adequately addressed the issue.

Section 1.2(b). There is no specific prohibition against capture as anticipated by the CCWG report. The bylaws should include an explicit anti-capture provision.

3) Commitments and Core Values

The CCWG Accountability recommended several additions and revisions to ICANN’s Commitments and Core Values. These changes appear to be adequately addressed in the Draft Bylaws. INTA would have liked to have seen some of the Core Values amended to add the words “while adequately addressing issues of consumer protection, consumer trust, consumer choice and rights protection in the DNS market.” However, unfortunately, this language was not adopted in the CCWG Final Report.

Recommendation 6 – Reaffirming ICANN’s Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission

We suggest that in Section 27.3(b), the text describing the process for accepting the FOI-HR be simplified by referencing the process for adopting Work Stream 2 recommendations, as set out in Section 27.2(c). The paragraph would then read:

The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights (“FOI-HR”) is approved by the CCWG Accountability and the Board in accordance with the process for adoption of Work Stream 2 recommendations set out in Section 27.2(c).

We also suggest that the last few words in Section 27.3(b) be changed from “for actions of ICANN or the Board that occurred prior to the effectiveness of the FOI-HR”, to “for claims related to human rights stemming from the actions or inactions of ICANN or the Board that occurred prior to the date the FOI-HR takes effect.” This change is important as the language, as currently written, could be misused exculpate ICANN from its obligations outside of the human rights sphere.

Recommendation 7 – Strengthening ICANN’s Independent Review Process

We suggest the following amendments to Section 4.2 and 4.3 of the Draft Bylaws relating to the Independent Review Process (IRP):

- 1) Section 4.2(q) “...and (ii) not offer new evidence to support an argument made in the Requestor’s original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.”
- 2) Section 4.3(a)(ix). The following language is not found in the CCWG Report:

“Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.”

While this may be a good outcome, the language does not make it clear whether or not the drafting team means that the IRP is exclusive, i.e., that it is **the** alternative to court action or **an** alternative to court action. This is an important distinction as we do not wish to create a scenario in which ICANN can argue claim preclusion should an aggrieved party not take advantage of the IRP. We suggest that this language either be deleted or clarified to make it clear that the existence of an IRP option does not work to exclude court action. If clarified, an additional public comment period will be necessary to ensure that the drafting team has adequately addressed the issue.

- 3) Section 4.3(h) – *“After a Claim is referred to an IRP Panel, the parties are urged to participate in conciliation discussions for the purpose of attempting to narrow the issues that are to be addressed by the IRP Panel, and shall advise the IRP Panel of any such efforts, including CEP, via a joint submission.”*
- 4) Section 4.3(i) – *“Each IRP Panel shall conduct a de novo examination of the Dispute based on the record of the proceedings.”*
- 5) Section 4.3(i)(iv) – *“With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’s obligations under the IANA Naming Function Contract such that the alleged breach has resulted in material harm to the Claimant.”*
- 6) Section 4.3(j)(i) – *“There shall be an omnibus standing panel of at least seven members (the “**Standing Panel**”) each of whom shall possess significant relevant legal expertise in ~~one~~ two or more of the following areas: international law, commercial law, intellectual property law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, as a result of experience or study”*

developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures. Members of the Standing Panel shall also receive at a minimum training from ICANN on the workings and management technical and administrative operation of the Internet's unique identifiers."

7) Section 4.3(k)(iv) – ~~"Upon request of an IRP Panel, the Panel shall have access to ICANN shall at its own expense provide the Panel with access to independent skilled technical experts. All substantive interactions between the IRP Panel and such experts shall be conducted on the record, except when public disclosure could materially and unduly harm participants, such as by exposing trade secrets or violating rights of personal privacy."~~

8) Section 4.3(o)(i) – Suggest revising to read: "Determine that a Dispute has been brought by a party that lacks standing, lacks bona fide substance or is otherwise frivolous or vexatious, or that the IRP Panel has no jurisdiction over the Dispute; and to summarily dismiss any such Dispute, provided such summary dismissal and the reasons therefore are promptly posted on the website;"

9) Section 4.3(o)(vi) – Suggest revising to read: ~~"Determine the timing Manage scheduling matters for each IRP proceeding."~~

10) Section 4.3(r) – "ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may direct shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous, vexatious or abusive."

11) Section 4.3(u) – Suggest revising to read: "All IRP Panel proceedings shall be conducted on the record, except for settlement negotiation or other proceedings that could materially and unduly harm participants if conducted publicly. Similarly, documents filed in connection with IRP Panel proceedings shall be posted on the Website subject to the same considerations, except that to the extent any such materials are withheld from publication, only such information as is necessary to insure the protection of participants shall be withheld or redacted and the remainder shall be published. The Rules of Procedure, and all Claims, petitions, and decisions shall promptly be posted on the Website when they become available. Each IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding and the foregoing restrictions on limiting publication are applied."

Recommendation 11 – Board Obligations with Regard to Government Advisory Committee Advice (Stress Test 18)

INTA continues to have grave concerns with the amendment relating to GAC Consensus Advice, now embodied in Section 12.2(a)(x) of the Draft Bylaws. The CCWG Final Report, Annex 11, par. 7, contained the following note to drafters of the Bylaws:

"This recommendation is intended only to limit the conditions under which the ICANN Board and GAC must "try to find a mutually acceptable solution", as required by ICANN's bylaws. This recommendation shall not create any new obligations for the ICANN Board to consider, vote upon or to implement GAC advice, relative to the Bylaws in effect prior to the IANA Stewardship Transition. This recommendation does not create any presumption or modify the standard applied by the Board in reviewing GAC Advice."

Draft bylaw Section 12.2(a)(x) implicitly requires a vote of 60% of the Board to reject GAC Consensus Advice. It also implies that if less than 60% of the Board supports rejecting GAC Consensus Advice, the advice must be implemented. In our view, there remains a disconnect between the proposed Bylaw and the drafting note in Recommendation 11 of the CCWG Final Report.

To accurately reflect the CCWG Final Report's assertion that the 60% threshold limits the condition under which the ICANN Board and the GAC must try to find a mutually acceptable solution, the following revision is recommended:

The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. In the event that the Governmental Advisory Committee advice is approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, and the ICANN Board determines to take an action that is not consistent with such Governmental Advisory Committee consensus advice, and where such action passes by a vote of less than 60% of the Board, then the ICANN Board will try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

If the framework of Section 12.2(a)(x) is to remain, we would recommend the following changes for clarification:

12.2(a)(x) ... "*may only be rejected by a vote of no less than 60% of the Board.*"
12.2(a)(xi) "*If GAC Consensus Advice is rejected by the Board pursuant to Section 12.2(a)(x) and if no such mutually acceptable solution can be found, the Board will state in its final decision...*"

Recommendation 12 – Committing to Further Accountability in Work Stream 2

INTA notes that, for the most part, the Draft Bylaws reflect and embody the concepts in the CCWG Final Report relating to Work Stream 2 Recommendation. There are a few drafting and substantive issues we wish to raise:

- 1) Section 27.1 - In the introduction to the Transitional Article in Section 27.1, we suggest giving further consideration to the definitions of the "Old Bylaws" and the "New Bylaws", in part to ensure these definitions are consistent with others used in the Draft Bylaws.
- 2) The Work Stream 2 Recommendations are not a transitional matter in the strict sense, like the other two topics dealt with under Transitional Article Section 27 (human rights and membership of task forces). This makes the introduction to the Work Stream 2 language, in Section 27.1, somewhat awkward. If the introductory language in Section 27.1 must remain, we suggest revising it to better reflect the nature of the bylaws specific to the Work Stream 2 Recommendations, which are found in Section 27.2.
- 3) Section 27.2(b)(iii) - The CCWG Final Report does not expressly state that the improved processes for accountability, transparency and participation [of the SOs and ACs] "must be helpful to prevent capture". Unless this language has its source in Recommendation 12, we recommend that it not be used.
- 4) Section 27.2(b)(iv) - In the first line, "enactments" should be "enhancements."
- 5) Section 27.2(b)(vi) – We suggest amending the topic "Addressing jurisdiction related questions", to the more specific "Jurisdiction-related questions, including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN's accountability."

- 6) Section 27.2(b)(viii) and (ix) - The two issues mentioned here, namely guidelines for standards of conduct for exercising removal of individual ICANN Board Directors and Reviewing the CEP - are not expressly listed as Work Stream 2 matters in Recommendation 12 of the CCWG Final Report. Recommendation 12 states that the list of issues therein is a closed list and that further accountability issues can be dealt with through the accountability review process or through specific, ad hoc, cross community working group initiatives. Therefore, it seems inappropriate to include these matters in this section of the Bylaws.

- 7) Section 27.2(b)(c) - The reference of the Board's "2014.10.16.16" resolution should be amended to read "2014.10.16." Also in this paragraph, with respect to the statement that the "Board shall consider consensus-based recommendations from the CCWG-Accountability on Work Stream 2 Matters...", we suggest specifying the meaning of "consensus based" in the same way it is described in the CCWG Final Report. That Report elaborates on the concept of consensus, stating that "CCWG-Accountability Work Stream 2 Recommendations, when supported by full consensus or consensus as described in the CCWG-Accountability Charter, and endorsed by the Chartering Organizations, be considered in a similar status to Work Stream 1 Recommendations."

About INTA

INTA is a 137 year-old global, not-for-profit association with more than 5,700 member organizations from over 190 countries. One of INTA's goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last decade, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA's Internet Committee is a group of over 200 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.