

COALITION FOR ONLINE ACCOUNTABILITY

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Comments of COALITION FOR ONLINE ACCOUNTABILITY

January 27, 2010

The Coalition for Online Accountability welcomes this opportunity to comment on the discussion draft prepared by ICANN staff on “Aspects of an Expressions of Interest and Pre-Registration Model,” posted at <http://www.icann.org/en/public-comment/#draft-eoi>. In these comments we will refer to this as the “EOI Model Paper.”

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 the introduction of new gTLDs.

In COA’s most recent comment submission on this topic, on December 11, 2009, COA recognized that “an EOI process is worth considering,” and that it could deliver significant benefits. But as we noted then, “the critical questions are when an EOI procedure might be instituted, and how it would operate.” We now have the ICANN staff’s answers to these two critical questions. In both cases, we believe, they have picked the wrong answer.

Whatever the merits of an EOI phase at a later point in the new gTLD process, it would be irresponsible to hold it in the manner the staff now proposes. In essence, the staff proposes to sell slots at the starting line of a race, for \$55,000 each. But no one can authoritatively state the most basic facts about the race: who is eligible to run, what shoes or other equipment they may use, how long the race course will be, whether or not it will involve hurdles or steeplechasing, where the finish line will be located, when the starting gun will be fired, and even exactly what prizes will be awarded to the winners. All that we know is that those who do not pay for their slots now will be relegated to the sidelines.

It seems self-evident that this set-up is more likely to attract gamblers and speculators than real athletes.¹ Many companies, organizations or other entities that are seriously

¹ The staff seems to be aware of this, and in fact they are open to speculator participation; the EOI Model Paper welcomes pre-registrants to “flip” their slots to higher bidders, so long as such “transfers are carried out in a way that does not harm the security or stability of the DNS.” EOI Model Paper at 8-9.

American Society of Composers
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Recording Industry Association of America (RIAA)

The Walt Disney Company

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considering applying to operate new gTLDs will simply be unable to commit to do so under the staff's proposed model. These potential applicants would not know with enough certainty what hurdles they need to surmount with respect to evaluation, objection procedures, string contention, and other aspects of the application process, nor what their obligations would be with respect to intellectual property issues, deterring malicious activity, dealing with ICANN-accredited registrars, and other issues, in the new gTLDs they seek to operate.

We recognize, of course, the public comment pages are filled with would-be applicants who state that they really do want to run new gTLD registries, and who aver their readiness to make non-refundable payments in order to buy their slot and to exclude would-be competitors who are more cautious. In part, this is because, as experienced participants in ICANN, they feel confident making predictions about how the unresolved issues will be resolved; and they know that potential applicants more distant from ICANN, who find the entire process opaque and mystifying, will be more reluctant to gamble on these questions. More importantly, though, these would-be new gTLD applicants realize, that, once they have put their (mostly) non-refundable money down, they will constitute an irresistible force for ensuring that the new gTLD process is launched as rapidly as possible, under ground rules that are as advantageous to them as possible. Indeed, the trump card they would hold under the staff's model is that if ICANN does not open the application window within 18 months after they step forward, ICANN will be obligated to refund millions of dollars in pre-registration fees.

To limit the competition for new gTLDs to those entities who are prepared to step forward long before the race's ground rules are set creates a series of perverse incentives, and risks deforming all further new gTLD planning. The EOI Model Paper acknowledges a number of these risks, but it consistently minimizes them, notably by classifying them as "perception risks" that can be managed through skillful public communications.

The EOI Review Paper lists, on pages 8-10, ten "risks considered". But its analysis of many of them is superficial at best, and in some cases wholly implausible. For example:

- (1) "Possibility of transfers." The paper deprecates this risk by noting that "gTLDs can be 'transferred' after delegation." EOI Model Paper at 8. Of course, the risk that a delegated new gTLD might be "flipped" to an incompetent or illegitimate third party is precisely why this has been identified as a major flaw in the proposed draft registry agreement. See <http://forum.icann.org/lists/3gtld-guide/msg00110.html> (Comments of Intellectual Property Constituency on DAG v.3), at page 9. But the staff bootstraps on this deficiency to assert that "flipping" of slots does nothing more than "shift these scenarios to an earlier stage." In any case, the paper argues, such "flipping" may be "beneficial and in the public interest." This is a curious reading of the "public interest" standard that ICANN has trumpeted as a key element of its new "Affirmation of Commitments."²

² This stance also undermines the stated value of the EOI process as "enabling an early start on the due diligence portion of the evaluation." EOI Model Paper at 14.

- (2) “Perception risk: moving too quickly.” If the staff’s proposal “may be perceived as moving forward without having resolved the overarching issues,” that perception seems valid: that is precisely what is proposed. To give only the most basic example: ICANN’s failure to adequately address the issue of the impact of the new gTLD launch on competition and consumer choice means that no final decision has been made on how to manage the scope and pace of the launch. If, as many people believe and have argued, the only credible evidence of consumer demand comes from the IDN sector, for what purpose would ICANN sell slots to would-be ASCII gTLD applicants before that question has been resolved? And if it did so, would that not tend to guarantee that, regardless of the merits, the question would be answered in a way that would preserve the entitlement of the slot-buyers to compete in the race? The same concern applies to many other central but unresolved questions about the new gTLD launch, including but by no means limited to those reflected in the five “overarching issues” identified by ICANN staff as needing resolution before the launch may occur. Since this is a real problem, not merely one of perception, ICANN’s solution of “messaging to convey the need to get it right before launching” is wholly inadequate.³
- (4) “Distraction risk.” Here the staff acknowledges that creating a cadre of pre-registered applicants might distort the dynamic of how all the remaining open issues will be resolved. It asserts that this risk could be mitigated by “managing the process to a time certain conclusion or keeping some aspects confidential.” The first alternative means that ICANN’s prudent and sound decision, announced at the Seoul meeting, to refrain from setting a target date for the new gTLD launch that it cannot responsibly meet, would be reversed. The second choice relies on introducing greater opacity, at a time when ICANN is obligated to demonstrate in the Affirmation Review process that it is enhancing transparency. Neither is sufficient to deal with the perverse incentives that the staff’s proposal creates to cater to the pre-registered applicants who have put their money down and who will assert an entitlement to run the race.⁴
- (7) “Creation of conflicts for ICANN Staff and Board members.” The paper asserts that “this risk factor is somewhat dependent on how the program is structured,” but provides no details on how it could be mitigated.
- (8) “Timing risk.” Someone who buys a slot in the starting blocks of the race knows only one thing for certain: if the starting gun does not fire within 18 months, he will get all his money back. As the staff acknowledges, under this system, “it can be construed

³ The paper also observes that “there is precedent for an EOI process with the launch of the IDN ccTLD fast track.” (EOI Model Paper at 9). That EOI bore no resemblance to the one the staff proposes here. To cite just one difference, stepping forward at the EOI phase was never a prerequisite to applying for a fast track IDN ccTLD. See <http://www.icann.org/en/announcements/announcement-10feb09-en.htm>

⁴ Despite its label, this identified risk does not include the diversion of resources from resolution of the “overarching” and other issues to designing and implementing an EOI process. The staff denies this has yet occurred. EOI Model Paper, at 8. The lack of visible progress on most of the identified “overarching issues” since the Seoul meeting suggests the contrary. But in any case, most of the work of implementing an EOI process lies ahead, so that even if the diversion of resources has not occurred yet, it is likely to do so in the near future.

that ICANN will rush the remaining implementation steps in order to keep revenue.” It proposes no solution to this risk, perhaps because there is none, other than extending the refund date to the point where decisions can be made based on the merits, rather than on the calendar.

- (9) “Subsequent amendment of Applicant Guidebook.” Of course, as the EOI Model Paper notes, pre-registrants would be notified of this risk, and an “open and public process” would be used to complete the Guidebook. But neither is likely to be sufficient to overcome the incentive to complete the guidebook in a way that does not disqualify or even disadvantage a pre-registrant. We agree with the staff that this risk would be somewhat diminished if the questions of who can compete for a new gTLD, and what character strings would be eligible for delegation, were definitively resolved prior to any EOI phase. But these unresolved questions are, in reality, much more complex than simply deciding about “vertical integration and IDN 3-character rules,” as the paper implies.
- (10) “Litigation risk.” One “outcome” from an early EOI process that could easily invite litigation is that extremely controversial proposed character strings – and/or extremely controversial applicants – will be in the public eye for extended periods of time, during which ICANN will, under its procedures, be powerless to respond to a storm of criticism. The paper proposes that ICANN make a “clear statement that ICANN will not respond to or act on any such [public] comment [on an identified pre-registrant or character string] until the gTLD application submission process is underway.” EOI Model Paper, at 15. Surely ICANN cannot believe that any such “clear statement” will forestall litigation or otherwise calm the gale.

COA agrees with the staff’s stated intention that “the Guidebook be as functionally complete as possible before ICANN receives any information from participants,” including “expressions of interest” that actually constitute pre-registrations. EOI Model Paper at 15. Even after the vertical integration and 3-character issues are resolved, the Guidebook will be far from approaching “functional completeness,” and thus an EOI phase as outlined by the staff would be premature.

At the point at which an EOI phase does become viable, COA once again urges ICANN to consider the model sketched out by the French government. See <http://forum.icann.org/lists/eoi-new-gtlds/msg00073.html>. Under this model, a potential applicant who steps forward during the EOI phase to express interest in one or more new gTLD strings would be qualified to pursue its application, but other applicants for the same string (or strings) would not be precluded from competing for it. No additional strings other than those identified by EOI applicants would be considered for delegation in the first round.

The French proposal could be the starting point for designing an EOI phase that meets most, if not all, of the criteria spelled out in the EOI Model Paper as objectives. EOI Model Paper, at 7. It would allow ICANN to gauge the level of interest in the program; determine in advance all the strings to be requested; and assist with the resolution of open issues (although fewer issues would remain open if the EOI phase were deferred until later in the process. It would also assist with operational readiness planning, except that ICANN would not be able to

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predict the full extent of string contentions for which it should prepare. This shortcoming could be ameliorated by requiring competitors for any string identified by an EOI filer to step forward relatively quickly after the EOI window closed (in effect, the EOI phase would be bifurcated, with the second deadline coming soon after the first). The brief summary of previous comments that is contained in the EOI Model Paper does not specifically address the French proposal. COA urges that it be given serious consideration.

Thank you for considering the views of COA.

Respectfully submitted,

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