

COMMENTS of COALITION FOR ONLINE ACCOUNTABILITY (II)

The Coalition for Online Accountability (COA) appreciates this opportunity to comment on the issue of soliciting formal “expressions of interest” (EOIs) from those planning to apply to operate new generic Top Level Domains (gTLDs). See <http://www.icann.org/en/public-comment/#eoi-new-gtlds>. This supplements our initial comments filed November 25. See <http://forum.icann.org/lists/eoi-new-gtlds/msg00035.html>).

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 has participated actively in all phases of the development of the new gTLD process.

COA believes that an EOI process is worth considering. An appropriately crafted EOI procedure, instituted at the proper point in the run-up to the opening of the new gTLD application window, could benefit ICANN, potential new gTLD applicants, and the community as a whole. Among other benefits, an EOI procedure could be used by ICANN to plan more realistically about the volume and character of the applications that will be received once the application window opens; could enable applicants to try to build momentum and public support for their proposals; could provide particular communities with advance intelligence about potential applications targeted to them; and could educate the public at large about both the potential upsides and downsides of a significant and relatively rapid expansion of the new gTLD space.

The critical questions are when an EOI procedure might be instituted, and how it would operate. COA believes the answer to the first question is clear: now is not the time to solicit EOIs, except perhaps in the most general fashion. If the EOI procedure were constructed in a way that involves significant costs to those stepping forward, or that confers significant advantages to those who step forward (such as by limiting the ultimate pool of applicants to those who “pre-reserve” their candidacy through an EOI), then it is simply too early in the process to conduct it. This is because there are too many unresolved questions about the criteria that will be applied to new gTLD applications, and even about the scope and pace of the new gTLD rollout. These unresolved questions include but are by no means limited to those reflected in the five “overarching issues” identified by ICANN staff as needing resolution before the new gTLD launch. Whether they concern issues for which solutions have been proposed within the current version of the Draft Applicant Guidebook (DAG), or whether they are being debated for now outside the bounds of the DAG, these unresolved issues are central to the ground rules that will ultimately apply to the new gTLD launch. Until these issues are closer to being resolved, it would be unfair to require potential applicants to pay any substantial EOI fee, and unfair to the community to restrict the ultimate pool of applicants to those who step forward now.

Regarding the question of how an EOI procedure might operate, COA first reiterates its concerns, expressed in its November 25 submission, about the environment in which this public

comment period is taking place. In our November 25 submission, we urged ICANN to make a clear public statement that the ICANN board would take no action on the “expressions of interest” topic, or on the EOI plan that it asked the staff to prepare for its eyes only, until after all comments received throughout this public comment period had been fully considered. It is disappointing that no such public statement has been forthcoming.

Without having seen what the staff has proposed to the Board, we will necessarily restrict our comments at this point to those models for an EOI procedure put forward in the public comment period so far. Three of these models deserve a response.

First, a number of commenters support the basic approach laid out in the “Expressions of Interest Working Group” paper released last month (see <http://forum.icann.org/lists/eoi-new-gtlds/msg00015.html>). This approach more closely resembles a “pre-application” phase than a real “expressions of interest” exercise. It requires applicants to pay a substantial fee (which may be credited against the ultimate application fee), and in return rewards them by excluding from the entire new gTLD launch process any competitor that did not pre-apply in this fashion. We have already explained why we think this approach is untenable, at least at this point in the process. Many companies, organizations or other entities that are seriously considering applying to operate new gTLDs will simply be unable to commit to do so at this point. They cannot 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. Furthermore, if those who participate in the EOI process are guaranteed to be eligible to submit applications once the window formally opens, ICANN will be under enormous pressure to avoid any resolution of the open issues that would make a particular “pre-application” unviable, even if it would clearly be in the public interest to do so. ICANN should not tie its own hands in this way at this stage of the process.

At the other end of the spectrum is the approach advocated by Michael Palage, see <http://forum.icann.org/lists/eoi-new-gtlds/msg00018.html>, which allows EOIs to be submitted for a nominal fee, but solely for the purpose of allowing ICANN to make better predictions about the anticipated volume of applications and range of potential applicants. Under this approach, neither the would-be applicants nor the broader community would receive any direct benefit from the EOI phase (since applicants would not even be asked to specify the string(s) in which they are interested, and only summary information about EOIs received would be made public). While this approach may more closely conform to how ICANN has used EOIs in the past, the statistics Palage provides indicate that their use in the 2000 “proof of concept” new gTLD round did not produce reliable statistics about demand. The predictive value of the EOIs received prior to the just-opened IDN ccTLD “fast track” process remains to be seen. While COA sees little downside to this approach, its value is also likely to be quite limited. (That value could be increased if the proposal were modified so that the EOIs were all made public.)

The third approach is proposed by the French government. See <http://forum.icann.org/lists/eoi-new-gtlds/msg00073.html>. Under this model, the EOI process would be focused on the proposed new gTLD strings, and not solely on the applicants prepared

to step forward. A potential applicant who steps forward 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. COA believes that it is worth considering an EOI phase based on the French proposal, at some point later in the new gTLD process. This model has the potential to maximize the advantage of the new EOI process, not only for applicants who are prepared to step forward early (the primary beneficiaries of the “EOI Working Group” approach), and not only for ICANN (the main beneficiary of the Palage approach), but also for the community at large.

The French proposal is only a starting point, of course, and some modifications would be needed if it were to realize its full potential. These would not necessarily be limited to the EOI phase itself. For instance, by revealing the full universe of proposed strings that would be in play, the French proposal would likely increase the frequency of string contention in the new gTLD process. If the EOI phase is to achieve the goal of “foster[ing] a transparent competition for high-value common names,” as the French proposal advocates, the means of choosing among various applications in a string contention set would have to be modified, since at present the default method for making this choice is an auction.

COA wishes to emphasize that we do not agree with the French proposal to seek to achieve a formal consensus proposal on an EOI process within the next two months. For the reasons stated above, we believe it would premature to insert an EOI phase in the new gTLD process until further progress is made on the remaining major unresolved issues. Furthermore, diverting time and attention of ICANN participants (many of them volunteers) into the consensus-development process on EOIs at the same time that resolutions are being sought on the “overarching” and other unresolved new gTLD issues could be an unproductive distraction.

COA looks forward to participating in further discussions regarding the possibility of adding an EOI phase to the new gTLD process.

Respectfully submitted,

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