

COALITION FOR ONLINE ACCOUNTABILITY

WWW.ONLINEACCOUNTABILITY.NET

1818 N STREET N.W., 8TH FLOOR • WASHINGTON, D.C. 20036-2406 • TEL: (202) 355-7906 • FAX: (202) 355-7899 • E-MAIL: INFO@ONLINEACCOUNTABILITY.NET

Comments of Coalition for Online Accountability (COA)

February 9, 2010

The Coalition for Online Accountability (COA) appreciates this opportunity to comment on the “Draft Proposal for Affirmation Reviews Requirements and Implementation processes” (the “Draft Proposal”). See <http://www.icann.org/en/public-comment/#affrev>.

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 a wide range of debates on ICANN governance and policy issues.

The Draft Proposal recommends how to implement the reviews mandated by ICANN’s September 30 “Affirmation of Commitments” (referred to in the Draft Proposal as “affirmation reviews”). COA’s comments focus on three issues: (1) the process used to decide how to implement the affirmation review, particularly the role of public comment; (2) the role of ICANN Supporting Organizations (SOs) and Advisory Committees (ACs) in the affirmation reviews; and (3) the fourth affirmation review, which will focus on Whois policy.

(1) Process issues/role of public comment

For at least the third time in the past two months, ICANN is deprecating the public comment process, which it pledged, in the Affirmation of Commitments, to strengthen.

First, in December, 2009, 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 comments 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).

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

Counsel: Steven J. Metalitz (met@msk.com)

Then, ICANN sought public comment on a skeletal version of its 2010-13 strategic plan, and scheduled Board adoption of the full plan for February 4, only two weeks after the close of the public comment period, thus ensuring that the fleshed-out strategic plan would not be made available for public comment at any point before Board consideration. See <http://forum.icann.org/lists/stratplan-2010/msg00021.html> (comment of COA).

Finally, on January 11, 2010, within days after seeking public comment on the Draft Proposal, and before more than a single such comment had been received, ICANN issued a “Call for Applicants for the Position of Volunteer Review Team Member,” which appeared to assume that all the basic features of the Draft Proposal had been adopted. See <http://www.icann.org/en/announcements/announcement-13jan10-en.htm>. This Call has a closing date of February 17, just a week after the end of the public comment period on the Draft Proposal, and it indicates that the ICANN Board Chair and the GAC Chair plan to select members of the review team for the first affirmation review within the following three days, i.e., by February 20. This chronology virtually dictates that any public comments received on the Draft Proposal can have no impact on the initial stages of the first affirmation review, including the selection of review team members. Ironically, one of the five topics for this review is whether ICANN is living up to its pledge to “continually assess and improve the processes by which ICANN receives public input.” Based on ICANN’s recent track record, the answer can hardly be yes.

COA recognizes that ICANN is under time pressures because it pledged, in the Affirmation of Commitments, to complete the first affirmation review by December 31, 2010. But this highly truncated timeline does not fully explain, and certainly does not justify, why the opportunities for meaningful public comment in designing the affirmation reviews have been so diminished. The ICANN Board and senior staff were aware before September 30, 2010, that the organization was committing to this accelerated review timetable; yet ICANN waited nearly three months before issuing the Draft Proposal. Furthermore, since similar problems have occurred in at least two other areas not subject to the December 31, 2010 deadline, it appears that the trend toward reducing meaningful public comment opportunities problem may be systemic. COA urges ICANN to halt and reverse this trend.

(2) Role of ICANN Supporting Organizations and Advisory Committees

The Affirmation of Commitments states that the review team for the first review must include “representatives of the relevant ICANN Advisory Committees and Supporting Organizations....”. (emphasis added) However, just how team members are to “represent” a Supporting Organization is not spelled out in the Draft Proposal. It is contemplated that each relevant Supporting Organization will “endorse candidates” subject to its own “governing rules and practices,” while leaving the authority for selection of team members in the hands of those parties specified in the Affirmation of Commitments (for the initial review, the GAC chair and the ICANN Board chair).

However, the “Call for Applicants” issued January 11 was not directed to Supporting Organizations (or Advisory Committees), but rather to the ICANN community at large. In it, ICANN “invite[d] interested individuals to express interest in serving as a volunteer review

member, representing a Supporting Organization or Advisory Committee.” In other words, applicants would self-identify as representatives of SOs or ACs. Applicants were “asked to apply through their Supporting Organizations or Advisory Committees,” but were provided a general ICANN e-mail address for doing so, and there is no indication of what role, if any, the SOs or ACs would play in this process.

Given the incoherence with which this topic has been approached, it is not surprising that the public comments received to date reflect considerable confusion about how SOs or ACs will be “represented” on review teams. Indeed, one commenter insists that ICANN “expend all possible efforts to make abundantly clear that RT participants are not ‘representatives,’” apparently unaware that ICANN has publicly committed to a review process that includes “representatives of the relevant ICANN Advisory Committees and Supporting Organizations.” See <http://forum.icann.org/lists/affrev-draft-processes/msg00002.html> (comments of auDA).

COA’s experience, as a long-time participant in activities of the Generic Names Supporting Organization, fully supports some of the observations submitted by the GNSO Council on this topic. See <http://forum.icann.org/lists/affrev-draft-processes/msg00008.html>. We agree that it will be extremely difficult to find one individual who can effectively “represent” the wide diversity reflected within the GNSO, which encompasses both parties with contractual relationships to ICANN and entities that stand outside that contractual relationship, and both commercial operations and not-for profits. It would also be counterproductive to devote time and resources to identifying that single representative, for a number of reasons, among them the breadth and range of issues that this initial review team is directed to review.

The Draft Proposal recommends that ICANN restrict the membership of this initial review team to only eight persons. The breadth of the issues this team is charged with reviewing provide the most cogent reason for ICANN not to don this strait-jacket. There is relatively little overlap among some of the five targets of this initial review. “Assessing the role and effectiveness of the GAC and its interaction with the Board,” for instance, has relatively little in common with “assessing and improving Board governance.” The review team could easily be twice as large as suggested in the Draft Proposal, comprised of three to five small subteams which could each concentrate on one or two of these complex and non-overlapping review topics.

This is simply one alternative structure for the review team. In any event, the review team’s effectiveness may well be enhanced, not compromised, if it were expanded to accommodate three or four participants from the GNSO community. At a minimum, the review team’s credibility in the eyes of that community would almost certainly be enhanced by such a decision.

(3) Whois review

The fourth review which ICANN committed to undertake is of particular interest to COA. It addresses “Whois policy and its implementation.” Preserving and strengthening public access to data on domain name registrants, and improving the reliability and accuracy of that data, are issues of paramount importance to the security and stability of the domain name system, and to accountability and transparency online. An independent review of “the extent to which Whois

policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust “ is a critical feature of ICANN’s Affirmation of Commitments.

The Affirmation calls for this review to be “organized” by September 30, 2010. The Draft Proposal seems to interpret this as requiring the review to be launched in the 4th quarter of CY 2010 (see Annex B). This should provide adequate time to solicit and consider public input on the composition of this review team and the draft terms of reference of its work. We urge ICANN to take advantage of this opportunity to improve considerably on the track record regarding public input that it is compiling with regard to the first affirmation review.

We look forward to providing detailed comments on this fourth affirmation review as planning for it accelerates over the next nine months. At this stage of the process, we will offer two general observations about the composition of the Whois review team.

First, ICANN’s Whois policy applies only to gTLDs. Thus the various GNSO perspectives must be adequately reflected in this review. As stated above, it would be difficult if not impossible to find one individual team member who could “represent” (in whatever sense that verb is used in the Affirmation of Commitments) the divergent viewpoints on Whois policy reflected in the GNSO Council. Thus, consideration should be given to appointing more than one GNSO “representative” to this team. Overall team size is not as much of a constraint here. While, as noted above, COA does not believe that the proposal to limit the size of review teams to eight or fewer is necessarily sound, in this instance it might be possible to accommodate greater GNSO participation without increasing the overall size of the review team very much, if at all. This is because fewer SOs or ACs may be “relevant” to the review of a policy which (1) applies only to gTLDs and (2) has no impact on IP address allocation.

Second, it is essential that the Whois review team reflect the viewpoint of those who regularly access Whois data in order to promote accountability and transparency online. While law enforcement representation on the team, as specifically called for in the Affirmation of Commitments, is important, the vast majority of the use of Whois data to try to make the Internet a safer, stabler and healthier place to learn, communicate, play or do business is carried out by private sector entities and individuals. In order to evaluate whether ICANN’s long-standing Whois policies are effective, and whether they are implemented in a way that promotes consumer trust, the perspective of these regular consumers of Whois data – such as intellectual property owners, anti-phishing or anti-fraud investigators, security researchers, and consumer protection advocates – will be indispensable.

Thank you for considering the views of COA.

Respectfully submitted,

Steven J. Metalitz, counsel to COA