

COALITION FOR ONLINE ACCOUNTABILITY

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March 31, 2011

VIA E-MAIL ONLY – IANAFunctions@ntia.doc.gov

Ms. Fiona M. Alexander
Associate Administrator
Office of International Affairs
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, N.W., Room 4701
Washington, DC 20230

Re: NTIA Notice of Inquiry: Request for Comments on the Internet Assigned Numbers Authority (IANA) Functions, 76 Fed. Reg. 10,569 (February 25, 2011)

Dear Ms. Alexander:

The Coalition for Online Accountability (COA) appreciates this opportunity to respond to the above-referenced Notice of Inquiry (NOI) issued by the National Telecommunications and Information Administration (NTIA) in anticipation of the forthcoming (September 30) expiration of the IANA functions contract between NTIA and the Internet Corporation for Assigned Names and Numbers (ICANN).

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 a member of the Intellectual Property Constituency of ICANN's Generic Names Supporting Organization (GNSO). COA and its participants have engaged actively in many aspects of ICANN's work since the inception of the organization. We have also worked closely with NTIA with regard to issues concerning ICANN, including by submitting extensive written and oral presentations in conjunction with the mid-term review of the Joint Project Agreement with ICANN that NTIA conducted in 2008, and in response to NTIA's NOI in anticipation of the expiration of the JPA in 2009. See

<http://www.onlineaccountability.net/pdf/FINAL%20COA%20submission%20to%20NOI%20021408.PDF>;
http://www.ntia.doc.gov/frnotices/2008/ICANN_transcripts_080228.pdf;
http://www.onlineaccountability.net/pdf/2009_June08_COA_NOI_submission.pdf.

American Society of Composers
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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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In preparation of this response, we have reviewed not only the above-referenced NOI, but also the extensive comments filed by ICANN on March 25, 2011. See <http://www.ntia.doc.gov/comments/110207099-1099-01/comment.cfm?e=273CB4D8-1EF6-4172-B96E-EF609E04F8BE>. We note that the ICANN filing stresses that “the White Paper’s stated goal of transitioning the IANA functions to the private sector remains unfulfilled.” ICANN submission, at 3. COA believes there is a very good reason for this: the private-sector entity to which DOC could responsibly transfer these functions does not yet exist. As we stated in our 2009 submission: “Although ICANN continues to make significant progress toward it, it has not yet reached its goal: a private-sector led organization that acts with transparency, that is subject to strong and tested accountability mechanisms, and that carries out its mission through a comprehensive system of contractual agreements that are widely respected, fully implemented, and vigorously enforced.” This statement remains true, in our view. Under these circumstances, it would be irresponsible for the U.S. government to step away from its oversight role of the critical functions embodied in the IANA contract.

This is particular true regarding the IANA role in the domain name system (essentially, the second function listed in the NOI). In 2005, NTIA issued a statement of principles on the Internet’s Domain Name and Addressing System, in which it pledged to “maintain its historic role in authorizing changes or modifications to the authoritative root zone file.” http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.pdf. In 2008, the Acting Administrator of NTIA wrote to ICANN to underscore that the US Government “has no plans to transition management of the authoritative root zone file to ICANN.” http://www.ntia.doc.gov/comments/2008/ICANN_080730.html. NTIA should take this opportunity to re-affirm this prudent and responsible position.

We recognize, of course, that ICANN in its submission does not now propose that these functions be turned over to it without a continued U.S. government role. It does, however, advocate that “the DOC evolve the IANA functions framework following the model set forth the Affirmation of Commitments” into which DOC and ICANN entered in 2009. ICANN submission, at 4. COA strongly disagrees. To the extent that the Affirmation of Commitments was based upon the development of a “multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users,” see Affirmation of Commitments at paragraph 4, ICANN has not yet implemented that model.

For evidence, one need look no further than ICANN’s impending decision to launch an unlimited roll-out of new generic Top Level Domains (gTLDs). The new gTLD program ICANN is poised to implement is not an action being taken “for the benefit of global Internet users.” It has been greeted with strong opposition from many of those users, and the fundamental questions being raised about it by governments around the world, who represent those users, remain unanswered. The new gTLD process, like so much of ICANN’s agenda, has been “led” by only a small slice of the private sector, chiefly the registries and registrars who stand to profit from the introduction of new gTLDs. The voices of the broader business community have been largely marginalized in this process. In short, developments in the 18 months since the Affirmation of Commitments was adopted do not justify an “evolution” of the USG position toward a “relinquish[ment] of its oversight role,” as ICANN’s submission seems to suggest. ICANN submission, at 4.

ICANN proposes that the IANA contract be superseded by a cooperative agreement. ICANN submission at 5. In this regard, we note, however that the governing law cited in the ICANN submission authorizes a procurement contract relationship, even when the principal purpose of the instrument is not to “acquire ... property or services for the direct benefit or use of the United States Government,” in circumstances in which “the agency decides in a specific instance that the use of a procurement contract is

appropriate.” 31 USC 6303. Furthermore, ICANN seems to overlook that, at least as to that segment of the IANA functions that covers administration of the Internet DNS root zone, the services provided by ICANN may be considered as being acquired “for the direct benefit and use of the United States Government.” As summarized in the NOI, these functions include “receiving delegation and redelegation requests, investigating the circumstance pertinent to those requests, and making recommendations and reporting actions undertaken in connection with processing requests.” NOI at 10570. In sum, under this part of the IANA contract, ICANN provides valuable advice and assistance to USG in furtherance of the continuing USG responsibilities with regard to the authoritative root zone file. Since those responsibilities remain ultimately with the U.S. government, a procurement relationship for such services may remain appropriate.

With regard to specific questions posed in the NOI, COA takes no position on whether the functions now covered by the IANA contract should be unbundled and perhaps allocated to different entities (question 1), or whether the role of non-ICANN entities in developing policies relevant to performance of some of these functions should be specifically referenced in the contract or other instrument that the USG and the IANA functions operator(s) enter into (question 2). These questions should be assessed in terms of whether such changes would, in the words of the 2005 Statement of Principles, “adversely impact the effective and efficient operation of the DNS,” and not in terms of their impact on ICANN as a corporate entity. With regard to question 3, ICANN’s suggestions for greater transparency in the process for responding to root zone management requests for ccTLDs should be seriously considered.

Finally, with regard to reporting of performance metrics, a topic addressed by both questions 4 and 5, we are skeptical about ICANN’s suggestion that “the IANA functions operator establish performance metrics and transparency in their reporting,” rather than specifying these in the agreement. ICANN submission at 13. Allowing any entity to write its own report card is inherently problematic; and ICANN’s track record in this area does not give rise to confidence. For example, in 2008, when ICANN evaluated itself on whether it had achieved the stated goals of the Joint Project Agreement then in force between NTIA and ICANN, it in effect gave itself straight A’s, asserting it had fully executed its responsibilities and the JPA was “no longer necessary.” The reality was otherwise, as COA demonstrated (see 2/14 08 comments at <http://www.onlineaccountability.net/pdf/FINAL%20COA%20submission%20to%20NOI%20021408.PDF>). NTIA agreed, reporting a “general consensus that while ICANN had made significant progress in several key areas, important work remains.” See Acting Administrator Baker 2008 letter at http://www.ntia.doc.gov/comments/2008/ICANN_080730.html. As active participants in ICANN activities, we see no evidence that the organization’s capacity for candid self-evaluation has dramatically improved since then.

Thank you for considering the views of the Coalition for Online Accountability. If there are any questions or you need further information, please contact the undersigned.

Respectfully submitted,

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