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Comments of Coalition for Online Accountability (COA)

CCWG-Accountability Second Draft Proposal

[https://community.icann.org/pages/viewpage.action?pageId=53783460&preview=/53783460/54887691/CCWG-2ndDraft-FINAL-3August.pdf]

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Introduction

The Coalition for Online Accountability (COA) appreciates this opportunity to comment on the Second Draft Proposal on Workstream 1 Recommendations ("Proposal") published by the Cross-Community Working Group (CCWG) – Accountability on August 3, 2015.

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners. They 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 and its predecessor organization, the Copyright Coalition on Domain Names, have participated actively in ICANN since 1999, including through the Intellectual Property Constituency of the GNSO.

The CCWG-Accountability proposal reflects an enormous amount of thought and hard work, and COA supports much of it. But we believe that it is fundamentally flawed in its approach to ICANN's responsibility to negotiate, interpret and enforce its contracts for management of key aspects of the Domain Name System. This flaw must be corrected, along with other shortcomings of the Proposal with respect to incorporation of critical provisions of the Affirmation of Commitments; the voting allocations for the Sole Member Community Mechanism; and other issues, before it can honestly be said that the Proposal represents the substantial enhancement of ICANN's accountability mechanisms that must accompany any plan for transition of the IANA functions to ICANN's control.

A. Contract Negotiation, Interpretation and Enforcement

The fundamental flaw in the Proposal was identified by the Intellectual Property Constituency (IPC) in its comments on the previous version of the CCWG document: It does not effectively address the risk of ICANN's failure to enforce its contractual agreements consistently

and transparently.[1] Since this risk is real and immediate, not theoretical or speculative, the continued failure to address it in the framework for enhanced accountability mechanisms undermines the integrity of the entire Proposal.

The cornerstone of the multi-stakeholder model is the substitution of contracts for government regulation as the chief mode of managing critical Internet resources such as the Domain Name System. But that cornerstone crumbles if those contracts are not vigorously enforced in the public interest. We already see disturbing signs of this, in ICANN's continued failure to enforce provisions of the 2013 Registrar Accreditation Agreement that require accredited registrars to respond appropriately to well-founded reports of abusive uses of the domain names they sponsor to carry out illegal activities, including (but by no means limited to) pervasive copyright piracy and trademark counterfeiting.

This issue surfaced during the last round of comments on the CCWG Accountability proposal. Several commenters highlighted the need to ensure that proposed amended by-laws restricting ICANN from "regulating services or content" were made explicitly inapplicable to ICANN contract compliance efforts. The CCWG declined to make any changes, because it "concluded that the prohibition on regulation of services that use the Internet's unique identifiers or the content that they carry or provide does not act as a restraint on ICANN's contracting authority." See pp. 25-26 of the Proposal.[2] With all due respect, this bland conclusion is entirely undermined by other sections of the self-same Proposal.

The CCWG-Accountability appears to have accepted as the basis for a legitimate "stress test" (#29, page 112) the assertion that ICANN could "become a regulator of conduct and content on registrant websites" simply by enforcing, or at least by "strongly enforcing" (apparently "weak enforcement" would be less stressful?), the exact RAA provisions that ICANN is currently failing to enforce, to the immediate detriment of intellectual property owners and other parties worldwide. Stress test #29 goes on to posit (without foundation) that the same "regulatory" evil would flow from ICANN actions to "insist that legacy gTLD operators adopt the new gTLD contract upon renewal." Stress test #30 (page 113) asserts that there must be an enhanced accountability mechanism to prevent ICANN not only from enforcing the contracts it has entered into, but also from imposing the remedies for breach specifically contemplated by those contracts. Rather than rejecting these specious "stress tests," the CCWG proposal caters to them, by advocating that ICANN's contractual partners enjoy (in addition to safeguards or defenses under the contracts themselves) the benefits of enhanced IRP mechanisms, whenever they believe that enforcement against them of the contracts they have voluntarily signed with ICANN would amount to "regulation of conduct and content." Notably, there is no indication that the same privilege would be extended to non-parties to the contract who are directly injured by ICANN's failure to adequately and transparently enforce these same contractual provisions.

This is entirely backwards, and takes the proposal in precisely the wrong direction. Rather than being targeted as a risk that must be guarded against, contract enforcement should be identified as one of ICANN's core responsibilities, and one which goes to the essence of the

[1] See http://static1.1.sqspcdn.com/static/f/585526/26314448/1434390243647/IPC+comments+on+CCWG-Accountability.pdf?token=3nrBvu6xyPF0xsuCrkqKQRnPFz4%3D

[2] Unless otherwise noted, all page or paragraph citations are to the Proposal.

multi-stakeholder model. It seems apparent that this is less an interpretive question which might be settled by a clarification (which the second draft Proposal declines to provide in any case), and more a fundamental gap in the accountability structure designed by the CCWG.

COA believes that the best way to fill this gap is to specifically and explicitly confirm, in ICANN's organic documents, the organization's authority to enter into contracts to carry out its mission, and its concomitant responsibility to ensure that its negotiation, interpretation and enforcement of those contracts is carried out in the public interest and in support of the rule of law. Unless this positive commitment to contract negotiation, interpretation and compliance is appropriately enshrined in the ICANN bylaws, the enhanced accountability mechanisms provided by the CCWG will be unavailable to address situations in which ICANN fails, to the detriment of the public interest, to enforce its contracts. Since this situation is occurring now, is likely to recur, and undermines ICANN's claim to provide a successful multi-stakeholder model for management of key Internet functions, the failure to address this issue in the accountability enhancement exercise raises serious questions about ICANN's readiness to obtain full stewardship over those functions.

Explicit authority to contract, and explicit responsibility to enforce those contracts, is also needed to fulfill the stated principles that were "agreed [upon] to guide the CCWG," as set forth on page 17 of the Proposal:

(a) "ICANN accountability requires that it comply with its own policies, rules and processes": tolerating (or worse, encouraging) ICANN failure to enforce its contracts would present a textbook case of such non-compliance.

(b) "ICANN should be accountable to achieving certain levels of performance": contractual negotiation, interpretation and enforcement are primary mechanisms for an organization like ICANN to set these performance levels.

(c) "ICANN should be accountable to ensure that its decisions are for the benefit of the public": contract enforcement is squarely in the public interest, and the "decision" embodied in a contractual provision that is inadequately or opaquely enforced lacks any accountability to the public.

Unless the positive obligation to enter into, interpret and enforce contracts is enshrined in ICANN's core missions, values, and bylaws, the enhanced accountability mechanisms proposed by CCWG may be unavailable to those injured by ICANN's compliance omissions or shortfalls (see p. 39 for scope of enhanced IRP, which requires a complaint "that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws"). Ironically, the CCWG proposal in its current form privileges challenges to ICANN contractual authority (as spelled out in the response to stress tests #29 and 30) while relegating failure to exercise that authority to much weaker review mechanisms such as reconsideration. As noted above, this is entirely backwards. This fundamental flaw in the Proposal must be corrected.

B. Incorporation of Affirmation of Commitments into Bylaws

COA strongly supports the concept of incorporating into the ICANN Bylaws key provisions of the 2009 Affirmation of Commitments (AOC) signed by ICANN and the U.S. Department of Commerce (see https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en). However, we have significant concerns about some aspects of how this concept is implemented in the current Proposal. These concerns include the following:

1. Incorporation of section 8(b). In section 8(b) of the AOC, ICANN committed to "remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community." This commitment is critical to ICANN's accountability and to the continued applicability of U.S. law to its major agreements and contracts. Previous comments from the IPC (and others) called for the substance of section 8(b) of the AOC to be included as a Fundamental Bylaw of ICANN, which can only be changed with the support of a supermajority of the community. This has not been done. The explanation provided for failing to do so (see p. 36) is not persuasive.

The Proposal does not explain how a corporation with a Single Member can be reconciled with the statement in the Articles of Incorporation that changes to the Articles "must be ratified by a two-thirds majority of the members voting" (see paragraph 246). This is not the same thing as saying that "the Community Mechanism as Sole Member must approve with 2/3 vote any change to ICANN's Articles of Incorporation" (see paragraph 254). Furthermore, if the commitment to maintain status as a U.S. non-profit corporation is relegated to the status of a normal (as opposed to Fundamental) bylaw, then it can be changed by the ICANN Board, even if a majority of the community (as constituted in the Community Mechanism as Sole Member) disagrees. COA urges that the substance of section 8(b) be embodied in a Fundamental Bylaw.

2. Incorporation of Section 7. Section 7 of the AOC commits ICANN to several critical transparency and accountability mechanisms, including "to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and …. to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied." Inexplicably, section 7 is omitted from the list of "relevant ICANN commitments" that would be enshrined in the ICANN Bylaws (p. 72, para. 504). Why? While some of these commitments might be covered by other existing or proposed bylaws provisions, the Proposal fails to identify any of these or provide any other reason for the omission.

3. Incorporation of AOC Reviews into ICANN Bylaws. COA has identified the following problems with the way in which the Proposal would carry forward into ICANN Bylaws the four recurring reviews mandated by the AOC:

a. Accountability and Transparency Review. While COA agrees it may be appropriate to include in this review's recommendations changes in the *scope or timing* of other periodic reviews, or to propose *new* reviews, we remain concerned about giving this review the power to *abolish* any of the reviews to which ICANN committed in the

AOC. The fact that public comment would be allowed on such a recommendation (see paragraph 550, p. 77) provides a very weak safeguard; and the fact that the "subsequent Bylaws change would be subject to IRP challenge" (id.) offers little comfort, given the limited grounds on which that enhanced accountability mechanism can be invoked.

b. Whois/Directory Services Policy review. COA is pleased to see that CCWG calls for carrying over from AOC to bylaws the Whois /directory services policy review (p. 81). We also welcome and will review a similar formulation put forward in the past several days by the Board Vice Chair. However, recent public statements by ICANN's board chair expressing hostility toward ICANN's current AOC obligation to carry out a second Whois review underscore the need for caution in empowering subgroups such as the new ATR review team to recommend terminating this review.

c. Composition of Review Teams. While COA applauds the concept of enabling "community stakeholder groups [to] appoint their own representatives to review teams" (para. 508, page 72) we strongly object to several aspects of the CCWG's specific proposal, as set forth in para. 514, page 74. First, the Proposal concentrates the power to appoint members of review teams in "the group of chairs of the participating SOs and ACs," not in the stakeholder groups or constituencies themselves. (We are also at a loss to understand how the GNSO – the Supporting Organization in which COA primarily participates, through the IPC – would be represented in this "group," since the GNSO has no chair and never has had one. It has only a chair of its Council, a body whose mandate is limited to management of the policy development process, not the conduct of reviews.) Second, CCWG proposes to cap at 3 the maximum number of members on the review team from any single Supporting Organization. At least in the case of the GNSO, this would represent a drastic reduction in representation from the status quo, and would virtually guarantee that the total exclusion to date of IPC representatives from all the AOC Review Teams would continue. This problem must be fixed, not perpetuated. Third, it appears that GNSO members, no matter how chosen, would be far outnumbered by members from other parts of the organization, even on review teams whose subject matter exclusively or primarily impacts the gTLD environment (e.g., the Whois/Directory Services Policy review, as well as the Competition, Consumer Trust, and Consumer Choice review, which focuses primarily on gTLD expansion). Taken together, these changes threaten to degrade whatever value these reviews have had for COA participants under the current AOC regime. The Proposal's entire approach to the constitution of review teams needs to be rethought, in order to remedy the exclusion of IPC and other affected constituencies from the process, not to exacerbate it, as the current Proposal would do.

d. Action on Review Team Recommendations. The bylaws provision should retain the AOC requirement that the Board act upon recommendations of the review teams within a time certain (currently, 6 months), not that it should simply "consider" doing so (see p. 76, para. 534).

e. Impact on Current or Pending Reviews. While we do not think it was CCWG's intention to propose applying any of the new rules regarding these mandatory

reviews (especially those on team composition) to the AOC reviews (Whois and CCT) scheduled to be launched during the current fiscal year, this should be spelled out in the Proposal before it advances further.

C. Sole Member Community Mechanism

COA supports in principle the concept of a "community mechanism for legitimacy and enforceability" (see p. 8), and believes that the Sole Member Community Mechanism could be an effective way of implementing this concept. However, the current Proposal shares with the earlier versions some problems which, though identified in previous comments from IPC and others, have not yet been satisfactorily addressed.

The main concern remains the voting allocation within the Sole Member Model (see p. 51), which seems somewhat arbitrary and certainly is subject to abuse, especially when an issue mainly involves only one sector of the ICANN community. Consider, for example, a hypothetical amendment to the Bylaws provisions regarding the GNSO (Article X of the current Bylaws) that is strongly opposed by the GNSO itself. Once the Bylaws change was approved by a 2/3 majority of the Board, a 2/3 vote within the Sole Member Mechanism would be required for the community to override it. But in order to achieve this, even if the GNSO's opposition was unanimous and it cast all 5 of its votes to override, it would need to find 9 other votes from the 15 allocated to the ccNSO, ASO, and At-large (assuming that these were the only participating entities (see para. 314)), or perhaps up to 15 of 23 non-GNSO votes (if all 7 entities ultimately participated). In other words, in the first scenario, as few as seven "no" votes, or abstentions, would suffice to squelch the override effort. If the ASO abstained (a rational position if the Bylaws amendment has no impact on the numbers community), then only two negative or abstention votes would need to be found from the ten ccNSO and At-Large votes together, in order to frustrate the efforts of GNSO to defend what that SO perceives as its fundamental interests. A similar scenario could be spelled out with regard to an issue that only directly affected the ASO, or the ccNSO.

Any rigid and unchanging allocation of votes, such as the one contained in the Proposal, risks producing similar inequitable results, and invites gaming in the form of bidding and horse-trading for the votes of enfranchised parties who really have no little or no stake in the outcome. Either more flexibility must be built into the system, or else the allocation should be adjusted to reflect more accurately the relative proportion of issues likely to be presented for action within the Sole Member Model. Another possibility would be to distinguish among "no votes, abstentions or non-participation," which currently are "all [proposed to] be treated the same way" (para. 346, page 52); the argument would be that indifference should be treated differently from outright opposition in calculating whether thresholds had been achieved. The Proposal is correct in suggesting that such alternatives could "add significant complexity," but the flaws in the currently proposed vote allocation are sufficiently concerning that these other approaches should be given more consideration.

On a number of issues regarding Community Powers, the details of the Proposal once again fail to take into account some of the peculiarities of the bicameral structure of the GNSO. For instance there are several references to a "simple majority in the SO" as needed to trigger director recall procedures (pp. 58-59). But the GNSO as a whole does not select any directors;

that responsibility has been devolved separately to each of the two Houses making up the GNSO council. And even assuming that the GNSO Council is the appropriate body to vote on, e.g., petitioning to remove a director appointed by the Nominating Committee (p. 59), a function that seems far removed from "management of the policy development process," each House always votes separately and votes are tallied separately; so it will need to be specified whether a "simple majority" of the Council means a "simple majority" of each of the two Houses.

D. Comments on stress tests

1. Stress Test #18 (p. 103): COA agrees that the obligation of the ICANN Board to take extraordinary steps to try to find a mutually acceptable solution should apply only where GAC Advice is supported by a GAC consensus, and that this principle should be incorporated in the Bylaws. Of course, other GAC advice should be given careful consideration as well by the Board; but to allow any relaxation of the consensus requirement to give the same status to advice backed only by a majority vote within the GAC, for instance, could upset the delicate balance of the proper role of governments within a multi-stakeholder organization like ICANN.

2. Stress Test #21 (p. 94): COA agrees with the conclusion (para. 731) that "proposed measures do not adequately empower the community to address this scenario" (ccTLD re-delegation outside scope of established policies), and refers to its comments on the IANA Transition Proposal pointing out this significant gap in oversight/review mechanisms.[3]

3. Stress Tests #29 and 30 (pp. 112-113): As previously noted, these are not legitimate stress tests as presented. "Strong" or at least adequate ICANN enforcement of its contracts should be a goal, not a "stress" that must be countered. The CCWG's response to these new "stress tests" is also indicative of a serious imbalance, since it contemplates enhanced accountability review(through the IRP) for ICANN actions to enforce the contracts, but could foreclose such review where ICANN fails to enforce the contracts adequately or at all. The latter is a far more realistic scenario than the former.

4. Stress Test #33 (NTIA-2) (p.116): The risk of "internal capture" is real, and in fact may be a reality already within the GNSO, whose structure ensures dominance by contracted parties. The responses propounded by CCWG in paras. 984-86 seem inadequate, especially if the trend continues of excluding "structural" considerations from the periodic reviews undertaken. The chance that the Board would effectively reconsider a decision to follow the recommendation, adopted through facially valid procedures, of a "captured" AC or SO seems slight. Whether the IRP would provide an adequate accountability mechanism could depend on the willingness and capacity of arbitrators to look past procedural compliance to assess whether that captured entity actually exhibits a "bottom-up, consensus-based, multistakeholder process."

E. Other issues

1. "The community": Some references to "the community" as taking certain actions are obscure and need clarification. For example, who exactly would nominate (or select, subject to Board ratification) IRP panelists (p. 41, item 14(c))? Who exactly enjoys standing before the

[3] See http://www.onlineaccountability.net/assets/2015_Sept08_Comments_on_IANA_transition.pdf .

IRP under item 7, page 40? As this is listed separately from an IRP initiated by the Sole Member (item 6, page 40), some different process seems to be meant here.

2. Human rights commitment: COA does not believe that the Proposal persuasively demonstrates that ICANN needs to include "a Commitment related to human rights, within ICANN's stated mission, in the ICANN Bylaws." The Proposal acknowledges that there is nothing in the IANA functions transition itself that demands this, but references "recurring debates" about the topic in unspecified ICANN fora. See para. 149, page 24. This provides an insufficient base upon which to rest a recommendation that ICANN venture into these deep waters in Work Stream 1. COA agrees that the relationship between human rights and ICANN's mission is a legitimate subject for discussion, but suggests that this discussion is not yet sufficiently well developed to call for a specific new bylaw provision at this time. If such a provision is ultimately included in the accountability package, COA prefers as a starting point the second wording option provided in para. 151 (p. 25), since it references "internationally recognized fundamental human rights," a phrase more likely to have a stable and settled meaning than a cherry-picked list of specific rights could achieve.

Thank you for considering the views of COA.

Respectfully submitted,

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