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## **MPAA Comments on the Cross Community Working Group (CCWG) Accountability 2<sup>nd</sup> Draft Proposal for Public Comment**

The Motion Picture Association of America<sup>1</sup> appreciates the continued opportunity to comment on the draft proposal of the Cross Community Working Group on Accountability and once again thanks the participants for their continued hard work and dedication toward building a comprehensive and significant accountability framework upon which all stakeholders can rely. For additional context the previous two comments filed by the MPAA on the topic of ICANN Accountability can be found at the following links

- [June 5, 2014 - Initial Comments](#)
- [June 19, 2015 – Comments on Initial Report](#)

Our comments on the 2<sup>nd</sup> Draft Proposal of the CCWG, detailed below, use the [questions and framework suggested in the request for feedback published by CCWG-Accountability team.](#)

### **Do you agree that the CCWG-Accountability proposal enhances ICANN's accountability?**

The MPAA and its member companies continue to support the U.S. Government's decision to transition its legacy role as the administrator of the IANA Functions contract to the global multi-stakeholder community with the understanding that a comprehensive and proper accountability framework, developed, agreed to and

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<sup>1</sup> The Motion Picture Association of America, Inc. (MPAA) serves as the voice and advocate of the American motion picture, home video and television industries from its offices in Los Angeles and Washington, D.C. Its members include: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

approved by the multi-stakeholder community be in place in advance of finalizing any IANA transition recommendations.

The MPAA believes the proposal, based on the Community Mechanism as Sole Member (CMSM) plan and as modified in keeping with our comments below, could significantly enhance the accountability of ICANN to the community it serves.

**Are there elements of this proposal that would prevent you from approving its transmission to Chartering Organizations?**

The MPAA is concerned with several elements of the current proposal that we feel warrant continued discussion and analysis.

- 1) *Ensuring ICANN's ability to actively enforce its contracts with Registries and Registrars and enter into new contracts that similarly are used to implement consensus policies.*

The MPAA is concerned that updates that limit the scope of ICANN's Mission, specifically those proposed in paragraph 188, i.e.

~~“ICANN shall not undertake any~~ **have no power to act other than in accordance with, and as reasonably appropriate to achieve its** Mission ~~not specifically authorized in these Bylaws.~~ Without in any way limiting the foregoing absolute prohibition, ~~it is expressly noted that~~ ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide.”

may explicitly prevent ICANN from actively enforcing important obligations, including Section 3.18 of the 2013 RAA and Public Interest Commitments, with registries and registrars and from using contracts as a tool to implement consensus policies in the future. This concern is heightened by the addition of Stress Tests #29 and #30 which imply that current contracts and their enforcement are inconsistent with ICANN's mission.

While legal experts in the CCWG-Accountability group assert that contract enforcement will not be regarded as regulation of service or content, the MPAA believes the current bylaws text is ambiguous on this topic and thus the CCWG must make its view explicit and the text should be revised. Specifically, the bylaws should be clear that the enforcement and creation of ICANN's contracts and Public Interest Commitments with registries and registrars, as developed through community consensus, is not to be construed as service or content regulation and is well within the scope of ICANN's updated Mission and Core values.

Further, ICANN's compliance with and enforcement of its contracts is essential to the success of the multi-stakeholder model and thus the concepts of accountability, transparency and predictability should be regarded as inherently consistent with its mission. To cast doubt on whether ICANN can or should be expected to uphold and enforce mutually agreed contractual obligations is unhelpful to all stakeholders.

## 2) Updates to ICANN Core Values

- MPAA believes that ensuring consumer trust should be a fundamental goal of ICANN and thus properly captured in its core values. As such we recommend that Paragraph 219 (p. 32) should be amended as follows:

*“Depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market **that enhances consumer trust and choice.**”*

- The first draft proposal from the CCWG (released May 4, 2015) indicated the language in Paragraph 337 of that report would become a commitment specified in the Core Values
  - e.g. *“ICANN will ensure that as it expands the Top-Level Domain (TLD) space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.”*

While some of this language is reflected in Paragraph 199 (*security, stability and resiliency*) and Paragraph 218 (*competition*) of the second draft report we note that the important concepts of *“consumer protection, malicious abuse issues, sovereignty concerns and rights protection”* are not addressed in the Core Values as recommended previously. As the proposed Independent Review Process will judge the merits of cases it reviews against the standard of ICANN's Mission, Commitments and Core Values, the MPAA believes that the recommendation made in the May 4<sup>th</sup> report has not been properly implemented, and that it should be implemented now.

## 3) Human Rights

The MPAA believes ICANN's current Articles of Incorporation already include a commitment to human rights and further work in this regard is unnecessary. However, as the CCWG has agreed on including further human rights related language into the bylaws, the MPAA supports the BC proposed amendment to Section 4 of ICANN's Articles of Incorporation, as indicated in the underlined and bold addition below:

4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions, **including internationally agreed human rights principles**, and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.

The MPAA believes that the [Universal Declaration of Human Rights](#) is the most appropriate and comprehensive statement of human rights for ICANN. Any statement that selectively commits to certain human rights while excluding others is the wrong approach. Finally we do not support having ICANN commit to the [United Nations Guiding Principles on Business and Human Rights](#), which was proposed by some sub-group members. ICANN is not a business and would be a poor fit with the limited view of human rights originally developed by the UN for businesses in the resource extraction industry.

#### *4) Location of ICANN Headquarters Must be a Fundamental Bylaw*

In our previous comments on the CCWG initial report the MPAA asked that Article 18, Section 1 of the existing ICANN bylaws be made a “fundamental bylaw”. While the CCWG did not agree that this bylaw be made fundamental, we would like to re-iterate our support for doing so.

Article 18 should be designated a Fundamental Bylaw, requiring a supermajority community voting approval for any change. CCWG’s proposal relies upon statutory powers to recall the Board and other actions, as necessary, to ensure that the ICANN Board and staff remain accountable to the community. The legal analysis indicating that these powers are available to Members of the organization was predicated on the understanding that ICANN would remain a non-profit organization organized under California Law.

While we acknowledge that ICANN’s *Articles of Incorporation* also state that ICANN “is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes.”, we believe this declaration is not the same as an explicit and affirmative commitment to remain headquartered in the USA. MPAA therefore continues to advocate that Article 18 of current bylaws be designated as a *Fundamental* bylaw.

#### *5) Transparent Interaction with Government Officials*

The MPAA notes that our request that a bylaw be added that requires ICANN or any individual acting on ICANN’s behalf to make periodic public disclosure of their relationship with any government official, as well as activities, receipts and

disbursements in support of those activities on behalf of ICANN, was considered not ripe for Work Stream 1 and was instead moved into Work Stream 2 for later consideration. We are disappointed that this important bylaw change will be delayed into the future and respectfully request that the CCWG re-consider and accept this proposal under the auspices of Work Stream 1 to ensure a transparent and thus accountable ICANN in a timely manner.

**Does this proposal meet the requirements set forward by the CWG-Stewardship?**

Generally, the MPAA believes the current proposal will meet the requirements set forward by the CWG-Stewardship assuming consideration of the concerns raised above and that the accountability proposal continues to represent a framework developed, agreed to and approved by the global multi-stakeholder community.

Thank you again for the opportunity to comment.

Respectfully Submitted,

**Alex Deacon**

Senior Vice President, Internet Technology  
Motion Picture Association of America