

JOINT COMMENTS OF AIPLA, COA AND INTA

October 1, 2011

The undersigned organizations – the American Intellectual Property Law Association (AIPLA); the Coalition for Online Accountability (COA); and the International Trademark Association (INTA) -- appreciate the opportunity to comment on the proposed revisions to ICANN's conflicts of interest policy. See <http://www.icann.org/en/public-comment/bylaws-amend-vi-coi-policy-01sep11-en.htm>. These same organizations previously commented jointly on the topic of ICANN conflicts of interest policy in 2009, see [http://www.onlineaccountability.net/pdf/COA-INTA-AIPLA%20joint%20submission%20re%20COI%20policy%20060509%20\(2260704\).PDF](http://www.onlineaccountability.net/pdf/COA-INTA-AIPLA%20joint%20submission%20re%20COI%20policy%20060509%20(2260704).PDF), and have also made individual submissions on this topic in the past. Brief descriptions of the three organizations are appended to the end of this comment.

The issue of whether ICANN's current conflicts of interest (COI) and other ethical policies are either sufficient or adequately complied with is on the front burner of public discussion. The precipitating factor for much of this discussion is the decision by ICANN's former Board chair, within days after leaving that post, to take a high-profile position with a company whose primary business focus is the commercial exploitation of a major ICANN policy decision – the new gTLD launch – taken by the Board under its ex-Chair's leadership just days before the end of his term. However, the fact that ICANN lacks any “revolving door” policy to prevent such actions is only one aspect of a much broader spectrum of issues ICANN must face about ethics in general, and conflicts of interest in particular.

In this environment, it will be striking to many that ICANN has proposed to amend its COI policy, not to address any of these burning questions, but solely to enable Board members to participate in decisions and vote on questions of their own compensation. This sends a counter-productive (even if unintended) message about ICANN's priorities, and about its responsiveness to public criticism about the ethical gap which many perceive to be exemplified by the recent events just described. .

The undersigned organizations are aware that compensating Board members was an important recommendation of the Accountability and Transparency Review Team, and that the Board has proposed the pending amendments in that context. We generally support the ATRT recommendations, but do not take any position in this submission on the specific issue of directors' compensation. We present our limited comments on the specific proposed COI changes at the end of this document.

With regard to the broader issues, we urge the Board to expand the proposed revision of the COI policy so that it also covers the following issues:

- Mandating abstention, not only when a Board member has a material financial interest that will be affected by the outcome of a vote, but also when the Director's financial interest will not be directly affected by the outcome of a vote (for example, when the Director is a consultant representing a party that would be affected by the decision, but

the Director's compensation from the party does not directly turn on the outcome of the vote).

- Requiring that Board members who are employed by, represent, or have other affiliations with ICANN contracted parties (gTLD registries or accredited registrars) must recuse themselves from the Board's consideration of contract amendments and other decisions that directly affect ICANN contracted parties; and clarifying the circumstances under which such directors must withdraw from consideration of other matters before the Board.
- Spelling out that whenever COI considerations require that a director abstain from voting on a particular matter, the same considerations also require that the director withdraw from Board deliberations or discussions on that matter, except to the extent that such discussions take place in public fora, or are recorded, transcribed, and promptly made public.
- Divesting the peers of the interested Director, sitting as the Board Governance Committee, from the responsibility to make final decisions regarding COI questions involving fellow directors, and using the ICANN Ombudsman or some other independent third party as the decider in some or all of these cases.
- Imposing reasonable restrictions on post-service employment of ICANN directors by, or contracting of such directors with, parties under contract to ICANN, or whose businesses are materially affected by decisions taken by the Board during the directors' tenure.

These are not radical propositions, but rather provisions that are commonplace in the governance of many organizations around the world. Accordingly, AIPLA, COA and INTA recommend that no action should be taken on the COI policy changes (and accompanying by-laws provisions) proposed by the board, until the additional changes listed above have been incorporated in the draft.

Finally, with regard to the changes proposed to the COI policy and to the by-laws, we offer the following suggestions:

- It is not clear whether, under the framework the Board is proposing, compensation decisions would be made about directors as a whole, or on an individual, director-by-director basis. The process outlined in proposed Section 22(3) of the by-laws seems to contemplate the latter, since it calls for consideration of "all relevant factors" in a way that turns upon the individual circumstances of a director, the offices and committee assignments s/he holds, his/her attendance record, and similar specific criteria. In any case, this should be clarified, since it could affect the needed scope of amendments to the COI policy.¹

¹ For instance, by its terms, the COI policy proposed amendments seem to apply only to the vote of a director on a compensation proposal for that director. Does this reflect a determination that Director X's vote on the compensation to be paid to Director Y would not constitute even a potential conflict of interest? If so, would the

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- The Board should consider requiring that any increase in director compensation take effect only after the expiration of the term of the director voting upon it. Such safeguards are often employed in public administration contexts, such as when legislators vote on their own salaries. See, e.g., U.S. Const. Amendment 27; see also *id.*, Article I, Section 6, cl. 2 (legislator may not be appointed to an office whose compensation was increased during the legislator’s term). Such a safeguard might ameliorate (although not eliminate) COI issues with regard to director compensation issues.

Respectfully submitted on behalf of AIPLA, COA and INTA by Steven J. Metalitz, counsel to COA:

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About the commenting organizations:

Founded in 1897, AIPLA is a national bar association whose more than 16,000 members are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property.

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners. COA and its participants have engaged actively in many aspects of ICANN’s work since the inception of the organization.

The International Trademark Association (INTA) is a 133-year-old global organization with 5,900 members in over 190 countries. One of INTA’s key goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last decade, INTA has served as a leading voice for trademark owners in the development of cyberspace, including as a founding member of ICANN’s Intellectual Property Constituency (IPC).

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need for any amendment on this topic be obviated so long as compensation arrangements were proposed and approved on an individual, director-by-director basis, with each director precluded from voting only on his/her own compensation?