

IPC Comments on Proposed RAA Revisions

The GNSO Intellectual Property Constituency (IPC) submits the following comments on the draft proposed changes to the Registrar Accreditation Agreement (RAA). See <http://www.icann.org/en/public-comment/#dpc-raa-2008>.

I. Background

IPC has followed very closely the protracted process of revising the RAA. This process, which has been consistently portrayed by ICANN in its annual draft operating plans as a negotiation between itself and the Registrar Constituency, actually impacts a much broader array of interests, including those of IPC members (and the member companies of national and global associations that belong to IPC), both in their capacity as registrants of many thousands of domain names, and in their capacity as holders of intellectual property rights. Unfortunately, ICANN has chosen not to open up the revision process, except through limited public comment periods, of which this is the second.

IPC's work on this topic has been led by a task force on RAA revision. On September 10, 2007, IPC submitted a detailed redline version of the current RAA with numerous suggestions for changes. As we noted then, "IPC views this submission as a first step – and, we hope, a constructive contribution – in what we understand will be an iterative process of revising and improving the RAA." See <http://forum.icann.org/lists/raa-consultation/msg00037.html>. While we had hoped for a dialogue with the drafters of the RAA revision about our specific, concrete suggestions, this never occurred. Instead, our suggestions were responded to only in a summary of the public comments received, which classified some of our suggestions as "taken into consideration," others as "feasible ... and will be included in discussions between the registrars and ICANN," and others as "currently being addressed in other ICANN fora" and thus apparently excluded from the RAA revision process. See <http://forum.icann.org/lists/raa-consultation/msg00039.html>.

While IPC found this response disappointing, we continued to express to ICANN staff our keen interest in the topic and our readiness to engage in dialogue. Since these overtures were all politely rebuffed, our only option was to await the release of draft proposed revisions. This occurred more than 9 months later, on the eve of the Paris ICANN meeting. At IPC's request, we received a useful briefing from ICANN staff on the proposed revisions at our meeting on June 24. Since that time the IPC RAA revision working group has studied the proposed revisions, compared them to our suggestions from last year, and drafted this comment. It was circulated to the full IPC membership in draft on July 31, 2008. This filing includes minor changes from the draft suggested during this review process.

II. Summary of Comments

Although there certainly are some positive features in the proposed revisions to the RAA, overall IPC considers them a disappointment and a missed opportunity. In particular:

- Although IPC is pleased that the drafters took up our suggestion to include provisions on ICANN's right to audit accredited registrars, the specific audit authority proposed is anemic and will do little to detect violations or shortcomings, or to protect ICANN's own interests in its trademark and its reputation.
- As has long been recognized, the lack of graduated sanctions for non-compliance is a fundamental flaw in the existing RAA. IPC commends the inclusion of graduated sanctions in the proposed revisions. However, we question whether they will achieve their objective of facilitating enforcement, since ICANN apparently can only impose them under extremely restrictive circumstances.
- The group liability provisions are also unjustifiably limited, and unresponsive to the wide range of abuses that have been observed in recent years.
- IPC proposed RAA revisions on proxy and private registration services that would have clarified existing RAA obligations and applied them to services that did not follow the licensing model contemplated in RAA section 3.7.7.3. These suggestions were entirely ignored, apparently on the specious grounds that they were "under consideration in the present Whois policy discussions." We urge that they be considered now.
- Meanwhile, the proposed revisions instead appear to legitimize the most irresponsible business models for an undefined category of private and proxy registration services, specifically authorizing them to discard all contact information on their customers, or never to collect it in the first place. The result, misleadingly labeled as an "escrow" provision, will do nothing to protect registrants and will create far more problems than it solves.
- IPC commends the drafters for proposing to establish contractual obligations on resellers for the first time, but the specific proposal raises many questions which need to be resolved.

IPC believes that the closed negotiations between ICANN and registrars have resulted in a significantly flawed product that would benefit from more dialogue and input from the business sector, from representatives of registrants, and from law enforcement, consumer groups and other representatives of the public interest.

III. Detailed Comments

For convenience, our major concerns are presented following the order in which the topics are presented in the "RAA Provisions Comparison" document (see <http://www.icann.org/en/topics/raa/raa-provisions-comparison-18jun08.pdf>), and using that document's numbering.

At the outset, and as an overarching concern, we note that the proposed revisions introduce a number of critical terms into the RAA without defining them. Although in many instances we also have substantive concerns about the provisions in which these undefined terms appear, in any event the draft should be reviewed to ensure that all critical terms are clearly

defined. These include, among others, the following (the redline submitted by IPC proposed definitions for these terms or their equivalents):

- “Affiliate companies” (see proposed 3.4.1)
- “Reseller of Registrar Services” (see proposed 3.12)
- “Privacy service” and “proxy registration service” (see proposed 3.4.1, also 3.12.4)

Item 1a: Registrar Audit Provision

New section 3.14 allows for audits and site visits only upon 15 days’ notice and only as part of a compliance audit that is specifically identified. These limitations are not calculated to discover violations or shortcomings; quite the opposite appears to be true. IPC proposed much more robust audit provisions. Their rejection by ICANN has not been explained. IPC’s proposal included:

- Right to inspect the registrar to ensure that its standards warrant continuation of the license granted the registrar to use the ICANN name and website. Authorizing the use of “ICANN accredited” by registrars insinuates that the registrar has fulfilled the basic requirements set by ICANN. By allowing registrars to use the ICANN trademark, ICANN risks damage to its own intellectual property rights and its reputation if it fails to effectively police the behavior of its licensees for compliance with those standards. (IPC 2.2)
- A general right to audit “at its discretion and for reasonable cause at any time ... to determine compliance with this Agreement or with representations made in the Registrar Accreditation Agreement.” (IPC 5.5)
- A specific right to conduct such audits after a change of control (a/k/a “accreditation by purchase”) to determine whether the new Registrar remains in compliance. (IPC 5.11) The proposed provision (see proposed section 5.9.2) that merely allows ICANN to “request additional information” following such “accreditation by purchase” transactions is especially anemic considering that the triggering event for this revision exercise (the Registerfly affair) involved just such a transaction. See <http://www.icann.org/en/announcements/factsheet-registerfly-registrars-26mar07.pdf>, at page 2. IPC believes that ICANN must have the right to conduct a full audit of the purchaser of an accredited registrar to ensure continued compliance with the RAA, and with any material representations made in connection with applying for accreditation.

ICANN’s audit authority as proposed is particularly toothless given ICANN’s frequent statements that the RAA must be revised in order to safeguard the interests of registrants. In other words, ICANN would audit not simply to protect its own rights, but the interests of registrants in general. This broader public interest responsibility would certainly justify a more robust auditing authority than might appear in an ordinary commercial agreement.

1b. Sanctions and Suspension

IPC supports the proposal that graduated sanctions be introduced, since their lack has clearly been one reason why ICANN's contract compliance efforts have fallen short up to now. We also agree that suspension of the ability to accept new registrations, and fines that cover and, for deterrent purposes, exceed ICANN's enforcement costs, appear on their face to be appropriate intermediate steps on the way to the ultimate penalty of revoking accreditation. We question, however, whether the standard of "repeated, willful, material breaches of the agreement" before fines of more than ICANN's actual enforcement costs can be imposed is both too uncertain (none of these adjectives is defined) and probably too restrictive to be meaningful. Graduated sanctions will not achieve the desired effect of stimulating prompt compliance unless the threat to impose them is credible, and the threshold that must be met under this draft may be too steep. The ability to impose fines, perhaps at a lower level than contemplated in proposed section 5.7, but under a somewhat broader range of circumstances, should be considered. This could also provide an additional step in a system of progressive sanctions, which may be an effective tool to encourage compliance (e.g., costs of enforcement for the first violation; double costs for the second violation; triple costs for the third violation, etc.).

1c. Group Liability

IPC supports the concept that a registrar may be penalized for serious breaches by another registrar which is under common control. The proposal made on this score is far too limited, however, since it applies only when registrar A has been discredited for "misconduct that materially harmed consumers or the public interest," and registrar B (under common control) then engages in "the same course of conduct." Of course an expedited discreditation of B would be proper here, but equally in other circumstances not covered by the proposal. For example, if B controls A and directs it to engage in conduct that "endangers the stability or operational integrity of the Internet" (grounds for termination under 5.3.6), why should B be allowed to continue operating with ICANN's imprimatur, even if it does not itself engage in the same conduct? Furthermore, how would this provision be applied if the reason for A's termination was insolvency (5.3.7) or criminal conviction of an officer or director (5.3.3), neither of which is necessarily "misconduct" on the part of the registrar itself? Given the wide range of abuses and gaming through the establishment of "dummy" registrars that has been observed in recent years, a broader group liability provision is clearly required here.

1e. Registrations by Registrars

IPC agrees that registrants who are registrars should be directly responsible to ICANN for fulfillment of the duties of registrants under the RAA. But this provision, if we read it correctly, misses the larger point, in three ways. First, it applies only to "domains registered by the Registrar for the purpose of conducting its Registrar Services" (emphasis added). This category is ill-defined. The example of registration of the trade name of the registrar has been given, but clearly the category is not limited to this example. Second, a much more serious problem involves registrars registering names for the purpose of warehousing, speculation, or other activities, but without disclosing its true identity as the registrant. These registrations

probably (though we cannot be sure) fall outside the rubric of registrations “for the purpose of conducting Registrar Services,” but ICANN ought equally to be able to enforce registrant obligations directly against registrars in these cases. Third, the provision entirely fails to address the registration of names through dummy entities controlled by registrars. This abuse appears to be quite widespread now, and direct enforcement by ICANN could be a valuable tool for reining it in.

2a. Private Registrations and Registrar Data Escrow Requirements

The myriad problems with this provision begin with its label. Amendments to section 3.4.1 have nothing directly to do with escrow, which is dealt with in section 3.6; the latter section is not proposed to be amended at all. 3.4.1 deals with the Registrar’s “own electronic database ... of each active Registered Name sponsored by it...” (emphasis added). The proposed provision gives registrars permission to discard the entire contents of this database, or never to establish one in the first place, whenever (1) the registration is channeled through “any privacy service or ... any proxy registration service offered or made available by Registrar or its affiliate companies,” and (2) a conspicuous notice is provided to registrants “that their data is not being escrowed [sic]”. We underline the words in the preceding sentence, not merely for emphasis, but to indicate key terms that are left entirely undefined. How such a provision could possibly protect registrants in the case of registrar failure is not explained.

Furthermore, assuming (in the absence of any definition) that a “proxy registration service” refers here to a licensing arrangement governed by section 3.7.7.3, this provision gives any registrar a clear roadmap for frustrating the requirement of that provision that registrars disclose the identity of the licensee to a party presenting it with reasonable evidence of actionable harm associated with the registration. Under the proposed revision, the registrar need not retain any record of the identity of the licensee, or even collect it in the first place, so long as it notifies the actual registrant of that policy. In short, this provision creates far more problems than it solves, and should be dropped in favor of a more realistic and comprehensive approach. Such an approach would include clear definitions of proxy and private registration services associated with registrars; strong safeguards regarding the operations of such services, along the lines IPC has proposed; and an explicit requirement that such services collect, maintain and escrow full contact data on their customers.

IPC also notes with concern that several proposals it made for revision of the RAA with respect to services that hide the contact data of registrants have apparently been rejected by ICANN, evidently because the Director of Public Participation concluded (as stated in his synthesis of comments received during the first public comment period, see <http://forum.icann.org/lists/raa-consultation/msg00039.html>) that they were already “under consideration in the present Whois policy discussions” within the GNSO. This statement was inaccurate when made, and is wholly unsupported today (the Whois discussions within the GNSO are restricted to designing possible studies to shed light on disputed factual issues). We urge that the following proposals be reviewed and incorporated in the revised RAA:

- Licensing of Domain Name Use (Proxy Registration): Section 3.7.7.3 of the RAA spells out the terms under which use of a domain name may be licensed to a third party and the

retained obligations of the licensor, including obligation to divulge the identity of the licensee when presented with “reasonable evidence of actionable harm” flowing from the registration. This provision is apparently the contractual basis for the proliferation of so-called proxy registration services, in which the service operator is the registrant and licensor while the “true registrant” or “beneficial owner” is the licensee. IPC proposed to amend section 3.7.7.3 to (1) make it clear that the provision applies to registrant/licensors that are affiliated with registrars, as well as to unaffiliated parties; (2) specify that current contact information of the licensee is to be provided to the party presenting reasonable evidence of actionable harm; and (3) require the proxy service provider to provide on its website a contact point, authorized to release the contact data sought, to receive presentations of such evidence. These proposed amendments were rejected without substantive explanation. IPC continues to believe that clarifying amendments such as these would be beneficial to registrars, registrants, and proxy service providers alike, and asks that they be considered at this stage.

- Private Registration Services: Another category of service for hiding the contact information of domain name registrants does not involve licensing of a registered name, but simply an anonymization service in which the actual contact information of the registrant is replaced with contact points operated by the service, which then represents that it will forward to the registrant any communication received. While legally distinct, these “private registration services” are functionally similar to the “proxy registration services” described above, and IPC believes that a provision in the RAA explicitly authorizing their operation by or on behalf of Registrars, and subjecting them to the same obligation as proxy services to reveal real contact data of the registrant when presented with reasonable evidence of actionable harm, would be beneficial. IPC proposed such a provision almost eleven months ago (see IPC 3.3.9), but nothing resembling it was included in the proposed revisions posted by ICANN. IPC asks that its proposal be considered at this point.

2c. Contractual Relationships with Resellers

IPC commends ICANN for establishing contractual obligations for the first time for resellers, though as noted above the term remains undefined. However, the proposed section 3.12 is problematic in several ways:

(a) Under proposed 3.12.2, “any registration agreement used by reseller shall include all registration agreement provisions and notices required by [the RAA]”. This is quite ambiguous. Is “reseller” simply to be substituted wherever “registrar” appears in the RAA? For instance, under section 3.7.8, a registrar who learns of inaccurate contact information associated with a registration must take reasonable steps to correct the inaccuracy. Is this obligation to be imposed on resellers as well? If so, how will it be enforced by ICANN? If not, what will be the basis on which the registrar would act in such a case, since the registrant will have agreed only with the reseller, not with the registrar, to provide accurate data and keep it current (sec. 3.7.7.1)?

(b) Why does the provision go to such lengths to allow the reseller to hide the identity of the registrar from the registrant, requiring it to divulge this information only on customer request

or through use of Whois? How does this reticence protect registrants? (Cf. IPC 3.7.13, under which this information would have to be posted on the reseller's website.)

(c) Proposed section 3.12.4 mirrors the proposed revisions to 3.4.1, authorizing resellers to allow completely anonymous registrations for which the identity of the actual registrant is unknown to it, to the sponsoring registrar, to the registry, or to anyone else. How practical is it that ICANN will enforce the "conspicuous notice" requirement (or any other provisions of this paragraph), when the obligation is not imposed on any party with which it has contractual privity (the registrar), nor on a reseller, nor on any entity legally affiliated with a reseller, but simply on an undefined fifth party whose "privacy or proxy registration services" (undefined) the reseller "make[s] available .. in connection with" a registration? Proposed section 3.12.4, like 3.4.1, is a good candidate for elimination, as part of a comprehensive approach in the RAA to the responsibilities of proxy or private registration services, as outlined above.

IV. Conclusion

IPC understands that the proposed revisions to the RAA have been the subject of protracted negotiation between the ICANN staff and the Registrar Constituency. Although the result contains some positive features, it also falls short in several critical areas. Perhaps it is now time to open up the process to the input of those who are not contractual parties to the RAA, but whose interests as registrants, as intellectual property owners, and as members of the public can be profoundly affected by what standards ICANN imposes on accredited registrars, and what steps ICANN takes to enforce those standards. IPC appreciates this opportunity to comment, and hopes that its views will be seriously considered.

Respectfully submitted,

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on behalf of GNSO Intellectual Property Constituency