

11 October 2007

Dear Avri,

Re: Domain Name Tasting Discussion on Today's Council Call

In today's council call, Ross asked whether ICANN had a response to his request for information. While it was not specified during the call, I assume that Ross referred to an email he wrote asking whether ICANN used RAA §3.7.4 as a compliance tool to stop domain tasting. (We hadn't responded in writing to Ross - ordinarily staff would expect detailed requests for information like this to be funneled through you, the working group chair, or the full Council.) In an effort to be helpful and to assist Council in its work on domain tasting, staff has prepared the following information regarding the RAA provision mentioned by Ross. We could have responded verbally during the call: I was challenged by mobile reception on some local canyon roads and I think it better in any case to respond in writing. Having said that, this writing is not meant to be a treatise on the subject but it is meant to convey ICANN staff view regarding RAA §3.7.4.

In brief RAA §3.7.4 was not intended as a tool to prohibit domain tasting nor could it be used as an effective tool to stop domain tasting.

To explain further, RAA § 3.7.4 <<http://www.icann.org/registrars/ra-agreement-17may01.htm#3.7.4>> provides as follows:

Registrar shall not activate any Registered Name unless and until it is satisfied that it has received a reasonable assurance of payment of its registration fee. For this purpose, a charge to a credit card, general commercial terms extended to creditworthy customers, or other mechanism providing a similar level of assurance of payment shall be sufficient, provided that the obligation to pay becomes final and non-revocable by the Registered Name Holder upon activation of the registration.

This provision dates back to the original ICANN Statement of Registrar Accreditation Policy (adopted 4 March 1999)

<[http://www.icann.org/registrars/policy\\_statement.html](http://www.icann.org/registrars/policy_statement.html)>. This origin of this particular provision can be traced to paragraphs 65-67 of the Interim Report of the WIPO Internet Domain Name Process (23 December 1998)

<[http://www.wipo.int/amc/en/processes/process1/rfc/3/interim2\\_ch2.html](http://www.wipo.int/amc/en/processes/process1/rfc/3/interim2_ch2.html)>.

65. Payment of Registration. Several vices are perceived as flowing from the lack of rigour in enforcing the requirement of payment of the registration fee for a domain name. Non-enforcement of the requirement can lead to the hoarding of names which, by virtue of the first-come, first-served principle of registration, places the registrant in a position to offer the names for sale to others who might have rights or interests in the names. Most commentators considered that the activation of a domain name registration should

be made conditional upon the receipt by the registration authority of the registration fee. Others suggested that if payment was not received within a specified period of time, the registration authority should have contractual authority to cancel the domain name registration agreement. [References excluded.]

66. It is considered that the requirement of pre-payment before activation of the domain name is correct in principle. However, in practice, in a world of multiple registrars, the requirement may be more difficult to implement.<sup>34</sup> The service of domain name registration may be offered as part of a package of other services by an Internet Service Provider (ISP) in such a way that the amount due for the registration fee may not be separately discernible. This may be particularly so if the cost of domain name registrations falls considerably. It is also likely that the domain name applicant will, in many cases, be separated from the registration authority by one or several ISPs. These practical difficulties seem, however, to be a matter of commercial risk. If the registration authority is required not to activate a domain name until satisfied that the fee has been paid, it is likely that each link in the chain from the registration authority to the applicant will put in place its own arrangements to cover its commercial exposure for advancing the payment on behalf of another further down the chain.

67. It is recommended that a domain name should not be activated by the registration authority unless it is satisfied that payment of the registration fee has been received.

In other words, RAA §3.7.4 dates back almost ten years and was drafted in an attempt to address a different set of circumstances (even though some of the perceived consequences might sound familiar). Chuck or others might correct this or recall more details, but I understand that there was a time before the RAA that Network Solutions (then the sole gTLD registry operator and registrar) would activate a domain registration based on just an email application from anyone in the world. Following registration and activation of the domain, NSI would then send an invoice to the registrant requesting payment.

Some registrants reportedly took advantage of this situation by registering numerous domain names and then exploiting or attempting to sell the rights to the name in between the gap following activation and before the invoice became due. NSI did not require prepayment and did not necessarily have pre-existing business dealings with these registrants that would give them any particular assurance that NSI's registration fee would ever be paid.

The contractual provision that was put in place to address these perceived "vices" simply requires registrars to be reasonably sure they are going to be paid their registration fee before they activate a domain registration.

As an enforcement tool to prevent tasting, the clause would not be effective. The provision does not prescribe any particular minimum registration fee, nor does it prohibit registrars from offering refunds, credits or discounts. RAA §3.7.10 makes it very clear that neither §3.7.4 nor any other provision in the RAA "prescribes or limits the amount Registrar may charge Registered Name Holders for registration of Registered Names." <<http://www.icann.org/registrars/ra-agreement-17may01.htm#3.7.10>>

To illustrate this, once a registrar has received payment of its registration fee it has complied with RAA §3.7.4. Keep in mind that under the RAA a registrar's registration fee (the fee it charges its registered name holders for the registration service) might be US\$35.00 per year or US\$0.00 per year; it might also be US\$0.01 or US\$0.02 per day – again, nothing in the RAA prescribes or limits the fees registrars may charge for their services. As was stated on the Registrar Constituency list: “Any registrar can sell 10,000 names for \$0.07 each (a total of \$700) and be assured of payment of the \$700 (but not only that, actually get paid the \$700), and activate all 10,000 names. Then it can delete 9,900 of them (before or after the AGP). I do not see how this is in any way violation of 3.7.4.”

Some readers might be misled by misreading the second sentence of RAA §3.7.4, which describes what sort "assurance" of payment is acceptable in lieu of actual payment in advance of activation. Saying that a registrar *may* activate a name based on a non-revocable promise to pay from a credit-worthy customer does not create a requirement that a registrar *may not* offer refunds to customers in some instances after they have already paid.

When ICANN moved to enforce this requirement on several occasions, in each case the registrar successfully demonstrated compliance using the reasoning described above.

I hope this information is helpful. Please feel free to distribute it and let me know if you have questions.

Best regards,

Kurt