

Fake Renewal Notices

Item 7: Fake Renewal Notices Action item

<http://gnso.icann.org/en/meetings/minutes-council-20jul12-en.htm>

Mason Cole volunteered to confer with the Registrar Stakeholder Group and find out what solutions the Registrars can offer to deal with bad actors and return to the Council with proposals for options, or solutions, or next steps on this issue.

Response from Mason Cole

Sent: mardi 11 septembre 2012 18:53

To: council@gnso.icann.org List

Subject: [council] Fake renewal notices

Councilors --

You recall we discussed the issue of fake renewal notices in our July meeting and deliberated possible ways to address the problem. I volunteered to discuss this with the RrSG and return to the council with the registrars' thoughts before deciding how to proceed.

Forgive the length of this email, but I want to be sure all the issues are on the table. As is often the case, regrettably, a seemingly simple issue is not so simple as you peel back the layers. Also, registrars must take care in discussions about competitive activity and particular competitors so as not to violate antitrust protections.

The problem

Certain providers send what appear to be renewal notices but are in fact disguised requests to transfer a name from one registrar to another. Unsuspecting customers of ours who don't carefully read the communication wind up moving their names from the original registrar to the one sending the communication. Customers must then deal with a new entity they likely didn't consciously choose.

Working group options

As Mikey O'Connor and his WG informed us in Costa Rica, the WG looked at a number of options for addressing the issue. This included launching a full PDP, attaching the issue to an existing PDP, crafting an amendment to the RAA, and reporting the offending entities to authorities in relevant jurisdictions.

History

There's a link in the DT's report to the council describing activity various authorities have undertaken to address the practice, particularly in the US and Canada. I recommend review of this section to understand what's happened to this point. This includes action from governments and the courts.

Why does the problem yet persist? As one of our members put it, every time there's a legal ruling, some of the craftiest attorneys around carefully write language in the renewal notices that work around new legal requirements. It may also be the case

that regulatory authorities are not aware of the ongoing violations, or that they don't have effective jurisdiction over the perpetrators.

PDP issue

The registrars recognize the attractiveness of addressing the situation via PDP (it's perceived as an "easy" issue that could be acted on quickly to demonstrate council responsiveness and agility). However, we should proceed with care for the following reasons:

1. Drafting policy language that limits certain activity could inadvertently restrain marketing efforts (unattractive and deceptive as they may be in this instance -- and be clear, the RrSG is not defending it). As has been repeatedly pointed out, the registrar marketplace is very competitive and almost all of us work in good faith to attract business in various ways. ICANN cannot make judgment calls on what is good and bad "copy," so prohibiting or proscribing certain language very easily spills into regulation of speech. The council is not a regulator of speech, and this is a very slippery slope.

2. It doesn't in fact appear to be an "easy" issue that could be quickly resolved, unfortunately. The RrSG is mindful of the politics of the situation; however, while politics may be important, more important is making sure efforts are **effective**. If they are not effective, the politics will be worse later, and we'll still have the problem behavior. Effective, in this context, means something compliance could enforce with its limited budget and manpower.

Issues with the RAA

There have been suggestions to just write a line or two into the RAA to prohibit this activity. The RrSG's observation is that if legal language meant to prohibit activity were so easy, the problem would have been cleared up long ago, by contracts, courts and/or consumer protection agencies.

Addressing the behavior through the RAA may eventually be useful. Again, however, language must be effective -- if authorities in Canada and the US, with court rulings behind them, are still unable to find enforceable language to use, that's a signal that ICANN would need to take extreme care in attempting the same so the offender's lawyers don't continue to "write around" the issue.

Next steps

The RrSG is interested in finding the most effective way to handle this issue, which harms consumers and law abiding registrars. While it deplores this type of behavior, the RrSG believes that we should be cautious about putting ICANN in the role of law enforcement via the registry and registrar agreements, particularly when evidence suggests that enforcement is tricky. In particular, creating a contractual obligation that is difficult for ICANN to enforce will only subject ICANN to more criticism about its compliance program without actually changing the behavior. From here, we recommend the following steps:

1. Discuss the issue with ICANN Compliance to make SG and GNSO concerns known, as previous legal actions may impact renewal of offenders' accreditation agreements.

2. Communicate to jurisdictional authorities as a SG to make our concerns known and to assess renewed enforcement – especially authorities like the FTC and the Canadian consumer agency that have already brought cases and may have stronger enforcement tools (e.g., civil penalties for violations of settlement agreements, etc.) that can be used. In particular, it may make sense to schedule a discussion with interested consumer protection authorities in Toronto.
3. Report findings to the GNSO Council.
4. Investigate whether or not enforceable contract language can be crafted, and the extent to which it could be equally or more effective than enforcement actions to date. For example, rather than requiring ICANN to make a determination about the behavior, a contractual provision that says accreditation can be revoked where a registrar has been found to be in violation of a court order or regulatory cease and desist order.

The registrars would welcome the renewal notice WG's ongoing participation in these efforts, of course.

I look forward to the discussion of this matter on our call Thursday.

Mason