

Registrar Negotiating Team Analysis of ICANN Posted RAA Dated 4 June 2012

After an exchange of drafts in January and February, the Registrar Negotiating Team produced a revised proposal for an RAA dated March 14, which was designed to meet the negotiation objectives. ICANN produced a responsive draft, which was posted by ICANN as a non-negotiated draft, on 4 June 2012.

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ICANN Draft RAA 3 June 2012 v Registrar NT Draft of 14 March 2012

1. DEFINITIONS.

Registrar Negotiating Team Comments on ICANN Changes

Definitions: Except as noted in the Consensus Policies and Temporary Policies Specification, and in connection with Registrar Services as discussed in the Data Retention Specification, the Registrar Stakeholder Group Negotiating Team (the “Registrar NT”) does not have substantive objections to the language in the draft RAA posted by ICANN on 4 June 2012 (the “ICANN Draft”). The NT has proposed additional definitions to be included such as “privacy proxy service” and “cybersquatting”.

2. ICANN OBLIGATIONS.

ICANN Obligations: The Registrar NT does not have substantive objections to the language in the ICANN Draft.

3. REGISTRAR OBLIGATIONS.

Registrar Obligations: Except as noted below, the Registrar NT) does not have substantive objections to the language in the ICANN Draft.

3.3 Public Access to Data on Registered Names. During the Term of this Agreement, ~~with respect to any gTLD operating a “thin” registry:~~

The Registrar NT has requested that the requirement to operate registrar-provided WHOIS servers be limited to “thin” registries (i.e., .com and .net). Thick registries already provide centralized public access to WHOIS data, and all new gTLDs are required to be “thick.” The

3.3.1 At its expense, Registrar shall provide an interactive web page and a port 43 Whois service (each accessible via both IPv4 and IPv6)

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providing free public query-based access to up-to-date (i.e., updated at least daily) data concerning all active Registered Names sponsored by Registrar in any gTLD. The data accessible shall consist of elements that are adopted ~~designated~~ from time to time ~~as Consensus Policy and/or a Binding Amendment~~ according to an ICANN adopted specification or policy. Until ICANN otherwise ~~specified~~ specifies by means of an ICANN adopted ~~Consensus Policy or a Binding Amendment~~ specification or policy, this data shall consist of the following elements as contained in Registrar's database:

3.3.6 ~~In the event that ICANN determines, based on a professional analysis of economic data made available to Registrar, that an individual or entity is able to exercise market power with respect to registrations or with respect to registration data used for development of value added products and services by third parties~~ addition, Registrar shall provide third-party bulk access to the data subject to public access under Subsection 3.3.1 under the following terms and conditions: [no changes from terms and conditions in ICANN Draft]

~~3.3.6.6~~ 3.3.7 Registrar's obligations under Subsection ~~3.3.6.1—3.3.6.5 may be modified by Consensus Policy~~ 3.3.6 shall remain in effect until the earlier of (a) replacement of this policy with a different ICANN policy, established according to Section 4, governing bulk access to the data subject to public access under Subsection 3.3.1, or (b) demonstration, to the satisfaction of ICANN, that no individual or entity is able to exercise market power with respect to registrations or with respect to registration data used for

obligation to maintain and publish partial data sets on a registrar-by-registrar basis, particularly in light of the possible addition of hundreds if not thousands of new top level domains conserves registrar resources without providing a corresponding benefit to the Internet community. We understand that ICANN's position on this request is based on appearance and not substance.

The competitive circumstance underlying the bulk access mandate (the existence of a single registrar serving non-gTLD registrants) no longer exist. The NT has asked that the obligation be eliminated, subject to ICANN's ability to re-impose the requirement in response to changes in the competitive landscape.

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development of value-added products and services by third parties.

3.4 Retention of Registered Name Holder and Registration Data.

3.4.1. For each Registered Named ... Registrar shall collect and securely maintain ...: the data specified in the Data Retention Specification attached hereto for the period specified therein;

3.4.2 During the Term of this Agreement and for ~~threetwo~~ (32) years thereafter, Registrar (itself or by its agent(s)) shall maintain:

3.4.2.3 In electronic form, records of the accounts of all Registered Name Holders with Registrar, including dates, amounts, form of payment, credit card numbers (if available) and unique transaction identification numbers, associated with all payments and refunds.

3.4.3 During the Term of this Agreement and for ~~threetwo~~ (32) years thereafter, Registrar shall make these records available for inspection and copying by ICANN upon reasonable notice. ICANN shall not disclose the content of such records except as expressly required by applicable law; ~~or a Consensus Policy, Binding Amendment~~ Policy or as otherwise permitted by ~~this~~

Please see RAA Critical Issues Analysis: DATA RETENTION AND WHOIS, attached.

*ICANN proposes to obligate registrars to retain and – in combination with section 3.4.3 – disclose to ICANN for inspection **and copying** sensitive payment and private data for the life of any registration plus two years. The NT believes that this requirement is inconsistent with information security standards, Payment Card Industry requirements, and several applicable laws on data privacy. Please note that this request is **in addition to** the Law Enforcement data retention requests that are addressed in the Data Retention Appendix. The data transmission requirement - especially of payment data - would be inconsistent with several applicable laws regarding the international transfer of data.*

The existing RAA references generic ICANN “specifications” or “policies” throughout. The Registrar NT has sought to eliminate this reference, which is undefined, un-bounded, and ambiguous, and to replace it with two clear and easily understood concepts: (i) Consensus Policies (which includes Temporary Policies) as in the New gTLD Registry Agreement; (ii) a “Binding Amendment” process that would enable

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~~Agreement~~ [an ICANN specification or policy.](#)

amendments to the RAA to come into force across the entire registrar community with the support of some portion of ICANN accredited Registrars; or (iii) other prospective policies specifically contemplated by the RAA (e.g., a code of conduct adopted with the consensus of the registrars). This concept, which is embodied in the New gTLD Registry Agreement, is partially implemented in the changes to Section 6 in the ICANN draft RAA dated 4 June 2012. Nonetheless, ICANN is to date unwilling to eliminate the confusing reference to some unspecified “third mechanism” for unilaterally altering the terms and conditions under which registrars operate.

3.7 Business Dealings, Including with Registered Name Holders.

Please see RAA Critical Issues Analysis: DATA RETENTION AND WHOIS, attached.

3.7.8 Registrar shall comply with the Whois [accuracy program as specified in the Whois Accuracy Program Specification to this Agreement](#). In addition, Registrar shall abide by any ~~new~~ Consensus Policy ~~or Binding Amendment~~ requiring reasonable and commercially practicable (a) verification, at the time of registration, of contact information associated with a Registered Name sponsored by Registrar or (b) periodic re-verification of such information.

3.7.9 Registrar shall abide by any Consensus Policy or other ICANN adopted ~~Consensus Policies, Binding Amendments, or ICANN adopted~~

It is clear that a Consensus Policy may not be changed by an amendment to the RAA. It is not clear, however, why the amendment mechanism should not be available to permit

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~~specifications and policies otherwise permitted by this Agreement~~specification or policy prohibiting or restricting warehousing of or speculation in domain names by registrars.

3.8 Domain-Name Dispute Resolution. During the Term of this Agreement, Registrar shall have in place a policy and procedures for resolution of disputes concerning Registered Names. Until ICANN adopts ~~a different~~an alternative Consensus Policy or ~~revises the existing policy~~other policy or specification with respect to the resolution of disputes concerning Registered Names, Registrar shall comply with the Uniform Domain Name Dispute Resolution Policy (“UDRP”) identified on ICANN’s website (www.icann.org/general/consensus-policies.htm).

3.12 Obligations Related to Provision of Registrar Services by Third Parties. Registrar shall ensure that provision of Registrar Services for all Registered Names that Registrar sponsors will be performed in compliance with all

changes in areas where a Consensus Policy is not in force.

The existing RAA references generic ICANN “specifications” or “policies” throughout. The Registrar NT has sought to eliminate this reference, which is undefined, un-bounded, and ambiguous, and to replace it with two clear and easily understood concepts: (i) Consensus Policies (which includes Temporary Policies) as in the New gTLD Registry Agreement; (ii) a “Binding Amendment” process that would enable amendments to the RAA to come into force across the entire registrar community with the support of some portion of ICANN accredited Registrars; or (iii) other prospective policies specifically contemplated by the RAA (e.g., a code of conduct adopted with the consensus of the registrars). This concept, which is embodied in the New gTLD Registry Agreement, is partially implemented in the changes to Section 6 in the ICANN draft RAA dated 4 June 2012. Nonetheless, ICANN is to date unwilling to eliminate the confusing reference to some unspecified “third mechanism” for unilaterally altering the terms and conditions under which registrars operate.

The Registrar NT proposed to address the “reseller” issue by affirmatively embracing the notion that an ICANN accredited registrar is responsible for taking steps to ensure that all

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obligations under this Agreement, regardless of whether the Registrar Services are provided by Registrar or a third party, including a Reseller. Registrar must enter into ~~a written agreement with any such Reseller that effectively enables Registrar~~ agreements with all of its Resellers. Such written agreements must not contain terms that prevent or interfere with Registrar's ability to comply with all of its obligations under this Agreement ~~including, without limitation, obligations arising under Specifications [— through —] hereto. Registrar shall be in breach of this Agreement if (a) Registrar fails to enter into a written agreement with a Reseller, (b) Registrar Services with respect to a Registered Name that is sponsored by Registrar are provided in a manner that violates the obligations of this Agreement, or (c) upon becoming aware that such a Reseller is causing Registrar to be in breach of any of the provisions of this Agreement, fails to take reasonable steps to enforce its agreement with such Reseller so as to cure and prevent further instances of non-compliance.~~ In addition, Registrar must ensure that:

3.12.1 Its Resellers do not display the ICANN or ICANN-Accredited Registrar logo, or otherwise represent themselves as ~~accredited~~ Accredited by ICANN, unless they have written permission from ICANN to do so.

3.12.2 Its Resellers facilitate Registrar's entry into a registration agreement between the Registrar and the Registered Name Holder in accordance with Section 3.7.7, and upon the request of the Registrant, identify Registrar as the sponsoring registrar or provide a means for identifying Registrar as the sponsoring registrar, such as a link to the

sponsored registrations are undertaken in compliance with the requirements of the RAA. References to reseller-specific obligations that could undermine the basic principle or provide support for some kind of compliance "carve-out" for resellers.

This appears to duplicate the NT language in 3.12.1 above and 3.12.3 below.

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[InterNIC Whois lookup service.](#)

~~3.12.23.12.3~~ ~~its~~ [Its](#) Resellers identify the sponsoring registrar upon inquiry from the customer.

[3.12.4 The identity and contact information provided by the customer of any privacy or proxy registration service offered or made available by its Resellers in connection with each registration will be deposited with Registrar.](#)

The Registrar NT believes that the obligation to escrow proxy/privacy service registrant data would be best accomplished through an accreditation program for such services. Absent that, if registrars are obligated to escrow such data, under the responsibility principles articulated above, registrars would be required to obligate resellers to maintain an escrow of such data. Registrars would be obliged to flow through and have mechanisms to enforce reseller compliance with any obligations with respect to access/delivery of escrowed data. A solution that requires, in the first instance, resellers to escrow data with registrars, however, is likely to meet significant resistance and would be difficult to implement as proxy/privacy services not affiliated with a registrar may not be readily identifiable as such without manual review.

~~3.12.33.12.5~~ [Its](#) Reseller's customers are provided with a link to an ICANN webpage detailing Registrant Rights and Responsibilities, as detailed in subsection 3.15 below.

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3.12.6 In the event Registrar learns that a Reseller is causing Registrar to be in breach of any of the provisions of this Agreement, Registrar shall take reasonable steps to enforce its agreement with such Reseller so as to cure and prevent further instances of non-compliance.

This issue is embodied in the language proposed by the Registrar NT, as described above.

4. PROCEDURES FOR ESTABLISHMENT OR REVISION OF SPECIFICATIONS AND POLICIES.

Please see the discussion of Section 4 in the NT's RAA Critical Issues Analysis: Consensus Policy, attached.

5. TERM, TERMINATION AND DISPUTE RESOLUTION.

Except as noted below, the Registrar NT does not have substantive objections to the termination language in the ICANN Draft.

5.2 Renewal. If Registrar seeks to continue its ~~accreditation~~ Accreditation, Registrar ~~shall notify ICANN that it seeks~~ must apply for renewed ~~accreditation,~~ which renewal Accreditation during the period that is no more than ninety (90) days and no less than sixty (60) days prior to the Expiration Date, and Registrar shall be granted renewal by ICANN ~~within [specify period of time],~~ provided that Registrar:

Given the ability of ICANN to suspend or terminate the agreement for breach at any time, the Registrar NT believes that ICANN should commit, absent extraordinary circumstances, to make a final determination on renewal eligibility by a date certain, rather than retain the ability to push out such decisions past the expiration date. The Registrar NT proposes to adopt a mechanism of automatic renewal that mirrors the process laid out in section 4.2 of the draft new gTLD agreements as included in the applicant

5.2.1 meets the ICANN ~~adopted specification or policy on accreditation~~ registrar Accreditation criteria then in effect;

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5.2.2 is in compliance with its obligations under this Agreement, ~~as it may be amended~~ at the time of such application, and remains in compliance throughout the period during which ICANN is reviewing such application as well as at the Expiration Date; *guidebook..*

5.2.3 executes and agrees to be bound by ~~commercially reasonable~~ the terms and conditions of the then-current Registrar accreditation agreement (the “Updated RAA”) (which may differ from ~~those~~ the terms and conditions of this Agreement) that ICANN adopts by action of the ICANN ~~board~~ Board of ~~directors~~ Directors following consultation with the Registrar Stakeholder Group (or its successors) and other interested Internet stakeholders concerning the proposed new terms and conditions contained therein and the associated costs and benefits related thereto;

The Registrar NT feels that the word “consultation” should be replaced by “negotiation” as well as a reference to the amendment process as the currently proposed language implies a one-sided notification would be sufficient.

Any renewal granted by ICANN shall be effective as of the Expiration Date, and shall be conditioned upon Registrar’s continued satisfaction of Subsections 5.2.1 through 5.2.5 through the Expiration Date. ICANN shall use commercially reasonable efforts to inform Registrar prior to the Expiration Date of ICANN’s decision whether to renew such Accreditation.

5.5 Termination of Agreement by ICANN. This Agreement may be terminated before its expiration by ICANN [if Registrar]

5.5.2.1 is ~~finally~~ convicted by a court of competent jurisdiction of a felony or other serious offense related to financial activities, or is

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~~finally~~ judged, ~~in each case~~ by a court of competent jurisdiction to have:

5.5.2.1.3 with actual knowledge (or through gross negligence) permitted Illegal Activity ~~of a criminal nature~~ in the registration or use of domain names or in the provision to Registrar by any Registered Name Holder of inaccurate Whois information; or

5.5.2.1.4 failed to comply with the terms of an order issued by a court of competent jurisdiction relating to the use of domain names sponsored by the Registrar;

or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing; or

5.5.2.3 ~~has been finally~~ is found by a court or arbitral tribunal, in each case of competent jurisdiction, to have, directly or through an Affiliate, ~~knowingly engaged in the trafficking in or use of a domain name with the bad faith intent to profit from the goodwill of a trademark belonging to someone else; or~~ committed a specific violation(s) of applicable national

The Registrar NT believes that ICANN should respect due process and appeal rights provided by applicable jurisdictions. Therefore the Registrar NT proposed to retain the requirement of the finality of any conviction.

The Registrar NT believes that new the addition of “or use” would extend the liability of registrars for services they may not technically or legally involved in the provision of such as web hosting, email, SSL certificate, and more, i.e. services beyond the scope of the RAA, transferring liabilities of all other providers to registrars. Each complaint on potentially illegal content would necessitate a full legal review well beyond the authority and abilities of most registrars. Accordingly, courts have constantly and since the early years of the domain name industry held that registrars cannot be held liable for content pointed to by a domain name (Lockheed Martin Corporation vs. Network Solutions Inc (9th Cir. 10/25/99) and others).

ICANN has not explained its objection to defining the concept of cybersquatting. Neither has ICANN explained its refusal to only rely on final decisions. The Registrar NT believes that ICANN should respect due process and appeal rights provided by applicable jurisdictions.

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law or governmental regulation relating to cybersquatting or its equivalent; or

Due to inconsistencies in the decisions of different arbitration panels, the Registrar NT believes that a single such decision should not trigger termination.

5.5.2.4 ~~has been~~ found by ICANN, based on its review of the findings of arbitral tribunals, to have been ~~knowingly~~-engaged, either directly or through its Affiliate, in a pattern and practice of trafficking in or use of domain names ~~with the bad faith intent to profit from the goodwill of a trademark belonging to someone else.~~ identical or confusingly similar to a trademark or service mark of a third party in which the Registered Name Holder has no rights or legitimate interest, which have been registered and are being used in bad faith.

The Registrars NT believes that the term “knowingly” is required to make a valid determination of active engagement in such practice.

6. AMENDMENT AND WAIVER.

See NT comments on Section 7.3 below

7. MISCELLANEOUS PROVISIONS.

7.3 Revocation. In the event that ICANN determines in a commercially reasonable manner that the continued maintenance of ICANN’s Registrar Accreditation model becomes impractical, ICANN may revoke this Agreement. The determination may only be made after a period of public comment on the topic, and a subsequent affirmative supermajority vote of the ICANN Board of Directors. The revocation will be in effect upon the earliest of: (i) 18 months

ICANN has asserted that it needs the right to “revoke” all registrar accreditations if it determines, following public comment, that the model is “broken.” Note that this right is in addition to its rights to make changes (i) through the Consensus Policy process; (ii) through the new amendment mechanism; and (iii) through an “Updated RAA” as described in 5.2.3. As noted above, some registrars are more

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after the ICANN Board of Director vote for revocation; or (ii) the date a new policy is developed by the relevant ICANN Sponsoring Organization and approved by the ICANN Board of Directors (the "Sunset Period"). If this Agreement expires during Sunset Period, and the Registrar meets the requirements of Section 5.2 (Renewal), such renewal term shall not extend beyond the end of the Sunset Period. Nothing in this section precludes Registrar from seeking to qualify under a replacement program, if any is created.

comfortable with this revocation right than with the Updated RAA approach. Neither mechanism appears in the New gTLD Agreement, and that the combination of Consensus Policy and the ability to amend the RAA across the entire registrar-body based on reasonable support from registrars should be adequate and goes well beyond the powers included in normal contracting arrangements.