

Comments of Intellectual Property Constituency
Preliminary Issue Report on
Registrar Accreditation Agreement (RAA) Amendments

<http://www.icann.org/en/announcements/announcement-2-12dec11-en.htm>

January 13, 2012

The GNSO Intellectual Property Constituency (IPC) offers the following comments on the Preliminary GNSO Issue Report on the Registrar Accreditation Agreement Amendments, dated December 12, 2012 (Preliminary Report), and posted at <http://gns0.icann.org/issues/raa/prelim-issue-report-raa-amendments-12dec11-en.pdf>.

Summary of Comments

IPC welcomes the Preliminary Report, and looks forward to participating in any Policy Development Process (PDP) that results from it. Just as importantly, we commend the ICANN Board for initiating immediate negotiations with the accredited registrars on significant amendments to the Registrar Accreditation Agreement (RAA), and for the “sense of urgency” the Board communicated in its resolutions and rationale adopted at the Dakar ICANN meeting.

If these negotiations are undertaken by the ICANN staff and the registrars with the same sense of urgency that has been expressed by the Board, the Governmental Advisory Committee, and many others within the ICANN community, including the IPC, then they may, within the next several weeks, achieve effective resolutions on many of the issues discussed in the Preliminary Report. If not, however, an expedited PDP should be planned for, along with other mechanisms, in order to make the needed RAA improvements. Because the current negotiations are being conducted in an opaque environment, the outcome cannot be anticipated at this point.

Whether through negotiations, PDPs, or both, we must maintain a focus on the goal. The objective is to make the RAA a clear, enforceable statement of how those entities empowered by ICANN to participate in the gTLD registration marketplace must conduct business in order to protect consumers; to enable effective enforcement of laws, including intellectual property laws; to strengthen accountability and transparency in the domain name system; and to preserve stability and security. This is not what the RAA has ever been, but it is what the RAA must become. There are multiple paths toward that goal, and all of them should be pursued as appropriate in order to advance the objective as rapidly as possible.

In these comments, IPC will address three main issues:

(1) The relationship of the Preliminary Report to the RAA contract negotiations now underway;

(2) The staff’s proposals for how to structure any PDP on the issues addressed in the Preliminary Report, and for how to achieve “binding” outcomes;

(3) The relationship of the PDP(s) to the ongoing Whois studies and other GNSO work.

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(1) Relationship with RAA negotiations

The Preliminary Report is in the very unusual posture of discussing a possible PDP on an undefined set of issues – or, more precisely, on an undefined subset of the issues listed in Annex 2. IPC agrees that every one of these topics is “within the scope of the ICANN policy process and the GNSO,” Preliminary Report at 3, and thus could potentially be addressed in the policy development process. But at the same time, the same set of topics are also appropriate subjects for contract negotiation between the registrars and the ICANN staff, and most if not all of them may be on the table in the negotiations now underway. In other words, while “each of the Proposed Amendment Topics is a potential candidate for a PDP,” *id.* at 20, it is equally true that each could be negotiated by ICANN with the registrars, and after appropriate review, approved by the Board, without the need for a protracted PDP.

The negotiations are mandated by the Board to reach a conclusion in time for “proposed amendments to be provided for consideration at ICANN’s meeting in Costa Rica in March 2012.” See Board Resolution 2011.10.28.31. Presumably, in order to that to occur, the negotiation results, in the form of proposed amendments to the RAA, must be published at least 15 working days before the official opening of the meeting, *i.e.*, on or about February 19. See <http://www.icann.org/en/committees/participation/document-publication-operational-policy-30oct09-en.pdf> (Document Publication Operational Policy for ICANN International Public Meetings). Thus, the Preliminary Report is correct in its observation that “it is impossible to predict at present which amendment topics will ultimately be resolved through the agreement of terms in the ICANN/gTLD registrar negotiations.” Preliminary Report, at 6. However, the picture could become somewhat clearer by February 19. That date is within five weeks after the close of the public comment period on the Preliminary Report, and well before any PDP could realistically be launched.

As the Preliminary Report correctly notes, “some [recommendations] may be resolved prior to the PDP” through the negotiation process (Preliminary Report, at 6). However, other statements in the Preliminary Report seem to reflect some confusion about the relationship between the contract negotiations and any PDP. For example, it is stated that “one or more PDPs that may result from the Board’s Dakar RAA Resolution may run in parallel to the RAA negotiations” (Preliminary Report, at 10, *emphasis added*). This could not occur if, as mandated by the Board, the negotiations are concluded by February 19. (Of course, it is possible that the Board would order that the negotiations be extended for a limited additional period.)

The Preliminary Report also suggests “that once a determination has been made that a specific amendment topic will be addressed in the negotiations, that issue should be “removed” from further consideration under the PDP.” (*Id.*, at 10-11) IPC agrees with this suggestion in principle; but the use of the passive voice in this statement may mask the difficult question of

who will determine, and based on what evidence, that a particular amendment topic “will be addressed” in the negotiations. Furthermore, the objective must be, not simply to “address” a given topic, but to do so effectively, within the terms of the Board resolution. That resolution asks whether the new contract provision on a particular issue that has been reached in the negotiations is sufficiently “meaningful,” whether it is “in the global public interest,” and whether it advances “the twin goals of registrant protection and stability.” See text preceding Board Resolution 2011.10.28.31. .

One reason why the relationship between contract negotiations and any PDP process is so murky at this point is that there has been virtually no transparency into the negotiations. The wiki set up to provide information about the negotiations contains very little actionable information about the status of discussions, and absolutely nothing about possible contractual language under consideration.

For instance, when visited on January 10, 2012, the most recent entry on the page for reporting on negotiation sessions concerned the December 8, 2011 meeting; and that entry was not posted until January 3, 2012.

<https://community.icann.org/display/RAA/RAA+Negotiation+Meeting+Reports> (visited 1/10/12). Meanwhile, it appears that further negotiation sessions were held December 20, 2011, and January 5, 2012, for which no report at all had been posted. Furthermore, the meeting reports themselves contain very little information beyond a list of topics discussed, identified only by their title (evidently corresponding to the “summary of proposed amendment topics” appearing on pages 40-41 of the Preliminary Report).

The other wiki page, on amendment topics, is similarly unenlightening. See <https://community.icann.org/display/RAA/RAA+Negotiation+Topics>. There are no topic pages for nearly a dozen of the topics on which the board ordered negotiations to commence, leading to the conclusion that these have not even been brought up in the negotiations.¹ Furthermore, those topic pages that do exist provide no details on proposals or counter-proposals; they contain very little information concerning specific topics discussed; and they contradict the meeting reports. For example, while the December 8 meeting report indicates that topic C.1 (require PCI compliance in registration process) was discussed at that meeting, the topic page for this topic states that the issue was discussed only on November 18, at the first meeting session. See <https://community.icann.org/display/RAA/PCI+Compliance+in+Registration+Process> (visited Jan. 10, 2012).

The Board resolution was adopted on October 28, 2011 and appears to require negotiations to reach a conclusion by February 19, 2012, a 114-day period. Although more than two-thirds of that period has already elapsed, the ICANN community remains almost entirely in the dark about the negotiations. While we are gratified that the Board ordered the registrars and

¹ These include important topics such as defining and disclosing “resellers” (topic B.3, B.5); making registrars responsible for compliance by their alter ego privacy/proxy services (topic B.4); spelling out what registrars are required to do to verify new contact information supplied to them after a report of false Whois data (topic C.4); defining when registrars must cancel registration based on false Whois data (topic C.3); and streamlining the process by which non-compliant registrars lose their accreditation (topic D.3). There is no explanation why these topics have been omitted from the negotiations, in apparent contravention of the Board’s directive.

staff to negotiate, we are disappointed that this negotiation seems to be taking place in near complete opacity.² Of course, we hope that the outcome on substance will be more palatable.

(2) Structure of PDP process, and reaching “binding” outcomes

The Preliminary Report recommends that, because so many issues are likely to be involved in a PDP on RAA amendments, the process be split “into approximately 4 separate PDPs, to be run in parallel.” Preliminary Report at 36. IPC is unable to comment definitively on this proposal, because of the uncertainty (explained above) about the precise range of topics that would be addressed in the process. As noted, this might become somewhat clearer in the next several weeks. However, we do not object in principle to the concept of parallel processing of the amendment topics in the PDP context. We note that if the Board chooses to extend negotiations on certain topics in order to try to reach an agreement upon them, this might provide a 5th – or N+1th – parallel track, which could be the most expeditious one.

We believe the process should be structured so as to enable the fastest possible progress on the greatest number of high priority issues, in keeping with the “sense of urgency” expressed by the Board and by so many others within the ICANN community. If the determination is that this is best achieved through a limited number of PDPs operated in parallel, and that all the parallel tracks can be adequately staffed and supported by ICANN, IPC would endeavor to organize its volunteer resources in order to participate constructively in all of them.

We also offer comments on some of the options listed in the Preliminary Report on pages 20-22 regarding “alternatives for producing ‘binding’ changes through ICANN’s Policy Processes.” Of course, beyond adopting consensus policies that would be binding on all accredited registrars, any other RAA change becomes “binding” upon all registrars that sign up to it, whether through substitution of a new form of agreement upon renewal of accreditation, or through the use of incentives to encourage registrars to sign up to new provisions without waiting for expiration of their current agreements.

IPC believes that ICANN should not only provide strong financial incentives for registrars to take on additional obligations even prior to expiration of their current agreements; it should also strive to be much more proactive and creative in designing such incentives. For example, ICANN should consider making acceptance of enhanced obligations with respect to all gTLD registrations sponsored by a given registrar a prerequisite for entering into any appendix agreement with that registrar covering a new gTLD. Under this approach, for instance, any registrar who agrees to phase in, for all its registrations, a reliable system for authenticating Whois data at the time of initial registration, renewal, or in response to a complaint of false Whois data, could be allowed to serve the new gTLD marketplace under the same terms; those registrars who decline this invitation could continue to sponsor registrations in the existing gTLDs, but not in any new ones.

² The Board resolution recites that the GNSO council “extensively debated” the process for moving forward on amendments, but does not spell out the main stumbling block to agreement: the insistence of the contracted parties that all but the registrars and staff be excluded from the negotiations, and their resistance even to accept meaningful requirements for reporting to the community on their closed negotiations. IPC finds it regrettable that, in this instance, recalcitrance seems to have carried the day.

The last alternative stated in this section of the Preliminary Report is that ICANN “take the steps necessary to see that a Code of Conduct is adopted by the registrars under the existing Section 3.7.1” of the RAA. This option has been on the table for over a decade, ever since the initiation of competition in the gTLD registration space, and there has never been any visible evidence of registrar willingness to do so. One of the topics identified in Annex 2 (A.9) calls for ICANN to draft the Code of Conduct and to require registrars to comply with it, either as a condition to renewal of accreditation or (through appropriate incentives) during the term of an existing accreditation. IPC does not know of any other path to follow that will move registrars toward adoption of an effective Code of Conduct after more than a decade of resistance to doing so, but is certainly open to other approaches that might hold promise.

(3) Relationship to other GNSO council work

The recommendation for a series of parallel PDPs on a range of RAA-related issues is an ambitious one, and will make considerable demands on the resources of ICANN staff, GNSO volunteers, and the Internet community as a whole. However, IPC agrees with the ICANN board that this project should take a high priority and should be pursued with a “sense of urgency” commensurate with the compelling need to develop more effective rules in the public interest for domain name registration practices. Accordingly, we strongly support the recommendation that “GNSO council consider whether any ... pending projects or future projects should be revised or suspended pending the outcome of the RAA negotiations and the RAA related PDPs.” Preliminary Report, at 23. This consideration should apply across the board, and not only to the specific projects discussed in section IX of the Preliminary Report.

With particular regard to the WHOIS studies discussed on pages 24-28 of the Preliminary Report, IPC urges that every effort be undertaken to avoid any delay in action on reform of the RAA because of the pendency of, or planning for, Whois studies. We believe that this section of the Preliminary Report overstates the extent to which the results of any of these studies is likely to be so indispensable to the policy development process (or to the contract negotiations) over RAA reform as to justify delay in achieving progress on the critical issues referenced in the Board resolution or spelled out in the Preliminary Report. While it is true that the studies could provide some additional factual data upon which RAA changes could be based, there is a real risk that these studies will be deployed as a delaying tactic by those who resist the needed changes.

For example, while IPC strongly supports the concept of the Whois Privacy and Proxy Service Abuse study, and has long argued that it should be given much higher priority than it has, we do not believe that its findings (which would not be available until sometime in 2013 at the earliest) are indispensable to action on Whois improvements, such as clearer requirements on when a registrar must cancel a registration based on false Whois data, or requirements for registrars to verify some or all such data. We do not view this study as in any way a “pilot for verification processes” (Preliminary Report, at 27); and we think it would add very little to the NORC Whois study, which was completed two years ago, on the issue of data verification. We are far more concerned that some who oppose these needed reforms will seize upon the staff’s suggestion to argue that any PDPs on these issues must be delayed for more than a year, until after this study, which has not even been launched yet, is completed and fully reviewed. Similarly, the need for better definition on when a registrar must cancel a registration based on

false or unusable Whois data does not turn on whether a domain name used to carry out abuses or crimes is associated with such data “10% or 80% of the time,” a question which the proxy abuse study would not even answer anyway (id., at 26).

Finally, we agree with the staff that any PDP relating to Whois should address the recommendations of the Whois Review Team, to the extent that such recommendations have not already been effectively addressed in the re-negotiated text of the RAA issues, or through some other channel. We note that the Board is obligated, under section 9.3.1. of the Affirmation of Commitments, to act upon this Review Team’s recommendations no later than 6 months after they have been made. <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

IPC appreciates this opportunity to comment.

Respectfully submitted,

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