

COALITION FOR ONLINE ACCOUNTABILITY

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C/O MITCHELL SILBERBERG & KNUPP LLP • 1818 N STREET N.W., 8TH FLOOR • WASHINGTON, D.C. 20036-2406
TEL: (202) 355-7900 • FAX: (202) 355-7899 • E-MAIL: INFO@ONLINEACCOUNTABILITY.NET

COA Comments on Revised PICDRP

<http://www.icann.org/en/news/public-comment/draft-picdrp-02oct13-en.htm>

October 23, 2013

The Coalition for Online Accountability (COA) appreciates the chance to comment on the revised “Public Interest Commitment Dispute Resolution Procedure” (“revised PICDRP”) that was posted on October 2, 2013.

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners (listed below). COA and its participants have engaged actively in many aspects of ICANN’s work since the inception of the organization, including more than 20 formal submissions regarding the new gTLD program.

COA filed reply comments on April 27, 2013 on the original draft of the PICDRP. See <http://forum.icann.org/lists/comments-draft-picdrp-15mar13/msg00008.html>. While the revised PICDRP appears to be responsive to some of our major concerns, we recommend some additional clarifications or amendments to the revised text.

1. Other Routes to Compliance

In our April 27 comments, COA “strongly urge[d] that the PICDRP must be without prejudice to other means of enforcing PIC Specs, including but not limited to (a) informal consultation and discussion ... and (b) contract enforcement by ICANN.” The revised PICDRP represents an improved draft on these points, but should be made more specific.

Sections B.3.3 and B.3.4 make it clear that ICANN retains the discretion, after reviewing the materials provided both by the complaining party (“Reporter”) and by the Registry, to undertake a compliance investigation and (presumably) to take further steps to enforce the contractual obligations which the investigation shows to have been breached. While ICANN may choose to invoke the Standing Panel procedure, either in lieu of (section B.3.3) or after

American Society of Composers
Authors & Publishers (ASCAP)

Entertainment Software Association (ESA)

Software & Information Industry Association (SIIA)

Broadcast Music Inc. (BMI)

Motion Picture Association of America (MPAA)

Time Warner Inc.

Recording Industry Association of America (RIAA)

The Walt Disney Company

Counsel: Steven J. Metalitz (met@msk.com)

(section B.3.4) carrying out its own compliance investigation, it is never obligated to do so, and can always simply process the matter as a straightforward compliance question.¹

However, these provisions only address the situation in which the issue of non-compliance with a PIC specification is initiated by a complaint from a third party. It should be made clear that this is not the only way that such a case could arise. Indeed, the nature of some of the contractual obligations involved makes it very unlikely that the need to investigate a possible breach would arise solely from a third party complaint.

For instance, the obligations spelled out in section A.4 or A.5 of the PICDRP involve creating and providing documentation to ICANN, or maintaining records and reports and providing them to ICANN. Ordinarily, a third party would never know whether or not a registry was in compliance with these obligations. Similarly, no third party is likely to be the source of information indicating possible non-compliance with a number of the specific obligations that new gTLD registries have already taken on in fully executed versions of Specification 11. See, e.g., the registry agreement with respect to (.游戏) [<http://www.icann.org/en/about/agreements/registries/xn--unup4y/xn--unup4y-agmt-docx-14jul13-en.docx>], Specification 11, paragraphs 3.b (operator to conduct periodic technical analyses, maintain statistical reports, retain them during the term of the agreement, and provide them to ICANN on request); 4.a.i (operator to audit Whois data for accuracy on a statistically significant basis); 4.d.ii (operator to monitor the TLD for abusive behavior and address it as soon as possible if detected). ICANN must not unilaterally incapacitate itself from enforcing contractual obligations that registry operators owe to ICANN, simply because no third party has complained about non-compliance, especially when there is little realistic prospect of such a complaint.

While COA is confident this outcome was not intended, the revised PICDRP should be further revised to rule out any such interpretation. To do so, a provision such as the following should be added at an appropriate place: “Nothing in this Procedure shall be construed to limit the authority of ICANN to enforce any provision of the Registry Agreement, including but not limited to Specification 11, or to audit or investigate compliance with any such provision.”

Similarly, it would still be beneficial to state clearly that a third party can bring apparent PIC Spec violations to the attention of the registry operator informally in an effort to bring the operator into compliance with its contractual obligations under Specification 11, without resort to the formal process of filing a PIC report with ICANN. As COA noted in its April comments, this would avoid undermining the efforts of those registry operators who have agreed to form industry advisory councils to help (inter alia) reduce the risk of use of registrations for abusive

¹ If ICANN acts under B.3.4 “to seek the input of a Standing Panel to inform ICANN’s continued handling of the matter,” then the following statement in B.4.1 should not apply: “The PIC report and response, if any by the Registry Operator will be the basis for the Standing Panel’s compliance evaluation. Absent exceptional circumstances, additional evidence will not be considered...”. Surely the results of ICANN’s compliance investigation must also be considered by the Standing Panel in this scenario. The entirety of section B.4 should be carefully reviewed to make sure that it applies to both scenarios in which a Standing Panel would become involved: both in lieu of, or after, an ICANN compliance investigation.

purposes such as piracy or counterfeiting.² While the revised PICDRP no longer sets up the formal complaint process as a mandatory gateway to compliance efforts, it would be improved by insertion of a savings clause along the following lines: “Nothing in this procedure shall be construed to limit the ability of Registry Operator to voluntarily modify its policies, procedures or practices to cure non-compliance or to improve compliance with Specification 11 or the obligations set out in section A, based on information brought to its attention by any party through any channel.”

2. The Standing Panel – Unresolved Questions

The Standing Panel plays a critical role in the revised PICDRP, including the authority (in cases delegated to it by ICANN) to make an apparently binding determination on whether or not a registry operator is in compliance with its PIC specifications. In light of this extraordinary power, it is disturbing that the revised PICDRP provisions about the Standing Panel contain so many ambiguities. These include:

- Will there be one Standing Panel to handle referrals for a range of registry operators (as the title implies), or will a separate Standing Panel be constituted ad hoc for each complaint against each Registry Operator, as implied by the text of B.4.1.?
- What are the qualifications for service on a Standing Panel? Legal expertise? Technical expertise? Governance experience? Familiarity with the “domain name industry”?
- Who will select Standing Panel members? If not ad hoc, how long will they serve? How will they be compensated by ICANN?
- Will the required disclosures from Panel members be left up to the discretion of Panel members, or will they be required to disclose certain facts, e.g., whether they or any member of their immediate families has ever been employed by or a contractor for either the reporting party; the registry operator; the parents, subsidiaries, or affiliates of either; or ICANN? Can a party seek to replace a Panel member based on information that “might reasonably be viewed as undermining his or her impartiality” even if that information is not contained in the disclosure made by the Panel member?
- Will the Standing Panel’s role be different in cases referred to it under section B.3.3 (prior to any compliance investigation by ICANN) than it will be in cases referred to it under section B.3.4 (ICANN has already completed a compliance

² See, e.g., <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1210?t:ac=1210> (application of Bronze Registry Ltd., item 18(b)(iv), providing for the creation of an industry advisory council for “the recommendation of sector-specific registration policies, the formulation of guidance on intellectual property and other best practices related to the gTLD,” and of an Abuse Prevention and Mitigation Working Group, to “give the Applicant’s team advice on abuse preventions and mitigation and how this may effect registration policies.”)

investigation which has “demonstrate[d] that the Registry Operator is not in compliance”? Surely in the latter case the ICANN conclusion should be given significant weight in the Standing Panel’s review.

- While it seems clear that the revised PICDRP provides no opportunity for review of or appeal from the decision of the Standing Panel at the behest of ICANN or of the Reporter, it is far from clear why this should be so, especially since the Registry Operator, in the case of an adverse ruling from the Standing Panel, retains the ability to invoke the Dispute Resolution mechanism under the Registry Agreement (see section B.4.6).

COA urges that all these questions be clearly resolved before the PICDRP is finalized.

3. Other Corrections/Changes

COA notes some additional changes or corrections needed to the text of the revised PICDRP. In the following items, we suggest adding the text shown in *italics*, while deleting the words that have been [bracketed].

(a) Section A.2: “... The Registry Operator’s Abuse Point of Contact will receive reports from ICANN *and other parties* regarding alleged non-compliance with the Public Interest Commitments described in Specification 11 (PICs).” Certainly an “Abuse Point of Contact” which cannot be contacted by third parties would not be compliant.

(b) Section B.1.2: “... The Reporter must state in detail how it has been harmed *or concretely threatened with harm* by the alleged noncompliance.”³ Reporters should not have to wait until harm has actually been inflicted in some cases. For instance, if a registry operator fails to comply with PIC Spec 3(a) by making insufficient provisions in its Registry-Registrar Agreement for all the forms of abusive behavior listed there, a Reporter should be allowed to raise that complaint even if the particular abuse involved has not yet occurred. More generally, any “harm” standard may need to be flexibly interpreted to avoid screening out valid and substantive complaints. While we recognize the value of some meaningful standing requirement to help screen out vexatious, frivolous, or de minimis complaints, it is important to remember that the PIC Specs have been adopted to serve the public interest and not necessarily just to protect a particular party from a particular harm.

(c) Section B.1.3: “ ICANN also will make a determination as to whether the Reporter [is in good standing and] is not a Repeat Offender as set forth below in Section 5.” Assuming that any Reporter that has not been identified as a Repeat Offender is allowed to file an otherwise valid report, the bracketed words are unnecessary and potentially confusing.

(d) Section B.2.2: “The Reporter’s failure *without demonstrable just cause* to participate in the requested conference shall be grounds for ICANN’s closure of the PIC report. “ The standard set forth in section B.3.1 should be stated here as well (conforming changes would be needed in, e.g., section B.2.5.).

³ Conforming changes will be needed elsewhere in the document, e.g., in paragraph B.1.3(iii).

(e) Section B.2.3: text of second sentence is garbled.

(f) Section B.2.4: “If the parties are able to resolve the issues raised by Reporter in the PIC report during the 30-day conference period, the Registry Operator shall inform ICANN and shall provide ICANN (*with copy to the Reporter*) with appropriate evidence that the matter has been resolved.”

(g) Section B.3.2: “The Registry Operator will then have ten business days to respond to ICANN’s request for explanation, *and to provide a copy of the response to Reporter.*”

(h) Section B.5.3.a: “Based on the last three rolling years, factors that are relevant to the determination of whether a Reporter is a Repeat Offender, include, but are not limited to:

- a. the number of PIC reports filed by the Reporter which were resolved in favor of a Registry Operator *without any substantive change in the policy, practice or behavior that gave rise to the Report;*”

It is quite likely that Reports will lead to changes in Registry practices that make it unnecessary to continue to pursue the matter. Reporters should be encouraged, not penalized, for raising issues that can be resolved at an early stage of the matter, even if that resolution takes the form of “resolv[ing] the report in favor of the Registry Operator” based on the changed practice.

(i) Section B.5.4: Some appeal mechanism needs to be provided for any decision to brand a Reporter as a Repeat Offender and bar it (indefinitely?) from filing any new Reports.

Thank you for considering the views of COA.

Respectfully submitted,

Steve Metalitz, counsel to COA