
March 26, 2013

Ms. Samantha Eisner

Internet Corporation for Assigned Names and Numbers (ICANN)
12025 Waterfront Drive, Suite 300
Los Angeles, California 90094-2536

Dear Ms. Eisner:

The purpose of this letter is to submit comments and suggestions regarding the Proposed 2013 Registrar Accreditation Agreement (RAA).

Background

LegitScript is an anti-abuse organization with a focus on websites engaged in the illegal or fraudulent marketing or sale of healthcare products, particularly prescription medicines. We work closely with many ICANN-accredited Domain Name Registrars, as well as major search engines, financial payment service provider companies, drug safety regulators across the globe, and non-profits engaged in consumer education relating to online healthcare safety. LegitScript is the only Internet pharmacy verification and compliance service endorsed by the National Association of Boards of Pharmacy, which represents the government regulators that license and regulate pharmacies and pharmacists in the US, Canada, and jurisdictions in Australia and New Zealand. We monitor online healthcare product websites in over a dozen languages throughout North America, the European Union, Asia, Oceania and the Middle East.

LegitScript maintains collaborative relationships with many Registrars, and we recognize and respect the central role that Registrars play in ensuring the safety and stability of the Internet. With specific respect to unsafe or fraudulent websites engaged in the illegal, unsafe or fraudulent sale of healthcare products, ICANN-accredited Registrars and LegitScript have, by working together, suspended over 35,000 “rogue” Internet pharmacy domain names¹ since 2009.

Although LegitScript’s experience with “rogue” Internet pharmacies and other fraudulent or unsafe healthcare websites forms the context in which our comments were developed (simply

¹ “Rogue” Internet pharmacy websites are generally defined as either those websites that illegally facilitate the sale of prescription medicines or, to take the literal definition of the word rogue, those that are “operating outside normal or desirable controls,” e.g., by arguing that they exist in a jurisdictionless space and are subject to no laws and regulations whatsoever. See, e.g., thefreedictionary.com/rogue.

because that happens to be LegitScript’s focus), we note that there are many other types of illegal and unsafe activity that occur online; we believe that our comments and suggested language apply equally to these other types of illegal or dangerous conduct. Even so, we note that numerous law enforcement agencies around the world and industry leaders have expressed concern about the problem of rogue Internet pharmacies, with industry leaders such as Google, Microsoft, Yahoo, Visa, MasterCard, AmericanExpress, DiscoverCard, PayPal, Neustar, GoDaddy, eNom and Facebook joining forces to create the Center for Safe Internet Pharmacies (CSIP), with which LegitScript is also affiliated.²

LegitScript appreciates the opportunity to submit these comments relating to the Proposed 2013 RAA language.

I. Definition of “Applicable Law(s)” (Sections 1.11, 3.43, 3.72, 3.7.10, 3.94, 3.12.7, 3.15, 3.18.2, 3.18.3, 5.5.2.3, 6.4.2, 7.10)

The phrase “applicable law” or “applicable laws” is used several (approximately twelve) times throughout the Proposed 2013 RAA; although it also appears in the 2009 RAA, the incidence of this phrase’s use increases greatly in the 2013 RAA. However, the term is nowhere defined in the proposed RAA language. In some cases, the phrase is used in relation to actions or responsibilities taken by a Registrar; in some cases, it is used in relation to actions taken by a registrant or the use of a Registered Name.

Based on our experience, when the phrase is used in reference to commercial use of a Registered Name, LegitScript believes that it is critical to clarify that “applicable laws” includes the laws and regulations of any jurisdiction where the registrant is using the website to engage in commercial activity and/or target customers.

The reason that this definition is necessary is that it is common for a registrant to attempt to illegally market drugs for sale in “Country A” contrary to Country A’s laws, but utilize a registrar in “Country B.” In cases where the Registrar, to whose country the drugs are not marketed at all, receives a complaint, the rogue Internet pharmacy registrant points out that the conduct cannot be said to be illegal under the Registrar’s country’s laws, because the website is not being used to sell drugs to the Registrar’s country; therefore, the Registrant’s country’s laws are simply not implicated at all. In this way, the registrant uses the Registrar’s location in Country B to create a “safe haven” for criminal activity and thereby argues that “applicable law” only refers to the Registrar’s country’s laws and regulations, not the laws and regulations where the drugs are being illegally shipped to.

² Of course, the comments in this letter are submitted solely by LegitScript and only reflect LegitScript’s input.

This is not merely an academic concern, rather, it describes the common practice of most major rogue Internet pharmacy criminal networks, assisting these networks' efforts to sell counterfeit, falsified, unapproved or otherwise dangerous drugs over the Internet with impunity.

To provide a concrete example, LegitScript estimates that at any one time, there are between 30,000 and 50,000 rogue Internet pharmacy websites targeting the US, Europe, and Japan (locales with high disposable income) with unapproved drug sales, including known counterfeits and prescription drugs sold without a prescription; for substantial number of these, the domain name is registered with a registrar in China, Russia, Turkey or another country outside of the United States, European Union or Japan. The drugs are not marketed to China, Russia, Turkey or such other country and thus the website cannot be said to be violating those countries' laws. Therefore, although the websites exist solely for the purpose of selling counterfeit drugs into the United States, European Union, and Japan, the Registrar concludes that Chinese, Russian or Turkish laws are the only "applicable laws," and evidence of violating US, EU, or Japanese laws is ignored by the Registrar, thus enabling the rogue Internet pharmacy to remain online indefinitely.

For this reason, LegitScript suggests adding the following clarifying language in the 2013 RAA:

1.1.12 "Applicable law," when used to describe the commercial use of a Registered Name, refers to both the laws and regulations of a jurisdiction where the Registrar is located or registered as a business, as well as the laws and regulations of the jurisdiction where the Registered Name is used or intended to be used to market or distribute goods or services, or to otherwise engage in economic activity.

The addition of this definition should not be read to imply that a Registrar becomes responsible to know, either preemptively or prospectively, the laws in all of the countries where a registrant may potentially seek to engage in commercial activity. Indeed, documents such as the Uniform Dispute Resolution Policy (UDRP) clearly state that it is primarily the registrant's responsibility to understand whether the use or registration of a domain name violates a third party's rights. However, this proposed language would serve to reduce the incidence of criminal networks utilizing Registrars in one country as a "safe haven" for registering domain names used to conduct criminal activity in another country.

II. Bulk WHOIS provision (3.3.6)

The language in section 3.3.6 of the Proposed 2013 RAA significantly modifies the existing requirement that Registrars make available in bulk the WHOIS information in 3.3.1, which includes the full “thick” WHOIS information (unless substitute or alternative information is required by the top-level domain registry and approved by ICANN).

The existing requirement for a Registrar to provide bulk WHOIS access, and proposed 2013 RAA language essentially eliminating that requirement, is complicated by various other proposed changes in registry responsibilities and WHOIS data availability that may eventually potentially reduce or eliminate the utility of a bulk WHOIS requirement. However, these other proposed changes — such as the proposed requirement that .COM and .NET registries adopt a “thick” WHOIS requirement — remain inchoate. Another complicating factor is the apparent lack of significant use of the bulk WHOIS provision to date, perhaps suggesting that there is no demand for access to bulk WHOIS and thus no reason not to modify section 3.3.6 as proposed.

LegitScript believes that there are important reasons to retain some type of bulk WHOIS access requirement, and urges the retention of a general requirement that Registrars be required to provide bulk WHOIS access with weekly updates in limited circumstances. We believe that new language, as proposed below, can be tailored to address Registrars’ concerns without fully eliminating the bulk WHOIS requirement.

As background, there are several policy reasons that retaining a bulk WHOIS provision — or, at least, some assurance that WHOIS is fully available in bulk, and not merely via Port 43 — is important. These reasons include:

1. From an anti-abuse perspective, Port 43 is insufficient as a means for anti-abuse organizations to obtain the information required to monitor for abuse. By way of specific example, LegitScript has documented cases in which a Registrar serves as a “Registrar of choice” for rogue Internet pharmacy networks and blocks or severely restricts Port 43 access by anti-abuse organizations. The ability to obtain a full roster of domain names registered with a problematic Registrar, and associated thick WHOIS records, can be extremely valuable when analyzing abuse patterns, including for intentionally falsified WHOIS records.
2. From a value-added perspective, it is important to recognize that there may be value-added services to be derived from bulk WHOIS access that do not currently exist, may currently be in development, and/or have not yet been contemplated. Adopting a provision that, in essence, makes it all-but-impossible to ensure that a third-party will

ever be able to obtain bulk WHOIS records directly from a Registrar stymies a potential area of development that may benefit future Internet users.

On the other hand, if the bulk WHOIS records are available directly or indirectly (utilizing the zone file, for example) in “thick” format from all registries, this obviates the need for Registrars to provide bulk WHOIS access. This argument in favor of removing access to bulk WHOIS records, however, is premature: although all new gTLDs will be required to have thick WHOIS records and most gTLDs currently do already, it is the two TLDs that constitute the majority of domain names — .COM and .NET — that currently only provide “thin” WHOIS records. Unless it can be assured that full thick WHOIS records will be available from the .COM and .NET registry, the proposed modification to 3.3.6 removes the only assurance currently in the RAA of accessing a Registrar’s complete list of .COM and .NET domain names, especially given the propensity for a small but important number of Registrars to block or unreasonably throttle Port 43.

Accordingly, LegitScript recommends the following language (with bold representing new language to the 2009 RAA):

3.3.6 For any data subject to public access under Subsection 3.3.1 that is not otherwise available to third parties in bulk at the same pricing and frequency as described in this section, 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:

3.3.6.1 Registrar shall make a complete electronic copy of the data available at least one (1) time per week for download by third parties who have entered into a bulk access agreement with Registrar **and who are approved to access such data under 3.3.6.6 by ICANN.**

3.3.6.2 Registrar may charge an annual fee, not to exceed US \$10,000, for such bulk access to the data.

3.3.6.3 Registrar's access agreement shall require the third party to agree not to use the data to allow, enable, or otherwise support any marketing activities, regardless of the medium used. Such media include but are not limited to e-mail, telephone, facsimile, postal mail, SMS, and wireless alerts.

3.3.6.4 Registrar's access agreement shall require the third party to agree not to use the data to enable high-volume, automated, electronic processes that send queries or data to the systems of any Registry Operator or ICANN-Accredited registrar,

except as reasonably necessary to register domain names or modify existing registrations.

3.3.6.5 Registrar's access agreement must require the third party to agree not to sell or redistribute the data except insofar as it has been incorporated by the third party into a value-added product or service that does not permit the extraction of a substantial portion of the bulk data from the value-added product or service for use by other parties.

3.3.6.6 ICANN shall adopt a Consensus Policy describing standards for ICANN to review and, as appropriate, approve or deny third parties who wish to access such data under this section. Such standards shall permit public and private entities to access the data for legitimate research, value-added commercial (but not marketing), anti-abuse and other legitimate purposes.

In the event that the language above is problematic, LegitScript alternatively urges the adoption of clarifying language clarifying, at least, that Registrars may offer bulk WHOIS to legitimate third parties. LegitScript believes that this is important because the current language proposed in the 2013 RAA draft could be read by Registrars to mean that without the market power study referenced in the draft language, nothing in the RAA permits a registrar to offer their bulk WHOIS (and thus, a Registrar may reason that offering it is prohibited).

As an alternative, therefore, LegitScript suggests that the following language be added to the proposed language in 3.3.6:

3.3.6.6 Nothing in this section prohibits a Registrar from voluntarily providing third-party bulk access to the data subject to public access under Subsection 3.3.1, subject to the terms and conditions described in sections 3.3.6.1 through 3.3.6.5.

Again, this merely clarifies that the newly proposed language for 3.3.6 does not serve as a bar to a Registrar who is willing to provide a third party with bulk access to the data.

There are other sections in the RAA that we understand will continue to be the subject of discussion and negotiation. In particular, we applaud the move toward greater transparency and accountability by better identifying resellers and holding them accountable to the RAA and other ICANN requirements; preventing the use of “rogue” proxy WHOIS services, which LegitScript has observed being utilized by rogue Internet pharmacy networks; and steps intended to improve WHOIS accuracy. LegitScript also shares concerns that have been raised, in several cases by

Registrars, relating to privacy and ensuring that registrants' personal information is protected appropriately. LegitScript also supports the move to ensure that proxy WHOIS registration programs have greater accountability, in part to ensure that privacy protections are not used as an impenetrable shield for criminal activity.

LegitScript believes that the two sets of language suggested in this letter will strengthen the RAA and, we hope, will be non-objectionable to Registrars, members of the GAC, ICANN, and other stakeholders in the multi-stakeholder governance process.

We appreciate the opportunity to submit these comments and welcome any questions or requests for clarification that ICANN or other stakeholders may have.

Yours Truly,



John C. Horton
President, LegitScript