



## Comments of Intellectual Property Constituency

### Proposed Final 2013 RAA

May 13, 2013

The Intellectual Property Constituency (IPC) of the GNSO appreciates the opportunity to provide the following comments on the Proposed Final 2013 Registrar Accreditation Agreement (Proposed 2013 RAA). See <http://www.icann.org/en/news/public-comment/proposed-raa-22apr13-en.htm>. Since the public comment notice indicates that “[i]nput on the areas that have changed since the 7 March 2013 posting will be of particular help,” IPC confines its comments largely to two of those areas.<sup>1</sup>

1. Specification on Privacy and Proxy Registrations (see <http://www.icann.org/en/resources/registrars/raa/proposed-privacy-proxy-24apr13-en.pdf> )

This Specification fails to address any of the serious concerns IPC raised regarding the Interim Specification on this topic that was included in the March 7 materials posted for public comment. See IPC comments filed March 28, <http://forum.icann.org/lists/comments-proposed-raa-07mar13/pdfnrQoqrMJ0g.pdf> , at 10-11. It also creates an additional problem, by deleting the requirement in the Interim Specification that proxy service providers affiliated with registrars not only disclose their policies, but also that they abide by them.

In particular, the Specification imposes no obligation upon any covered proxy service provider to verify or validate the customer information that it collects, nor any consequences if that information is inaccurate or insufficient to enable contacting the customer. Thus, even if the customer uses the registration in a manner that violates the rights of third parties or involves other serious misconduct such that the customer contact information is revealed upon complaint to an injured party (or to law enforcement), that information may be entirely useless. In other words, the Specification provides a clear roadmap for bad actors seeking to evade accountability for their use of registered domain names: register through a proxy service and provide customer information that hides your identity and makes it impossible to contact you. Neither the registrar, nor its affiliated proxy service provider, has any responsibility to verify or validate this

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<sup>1</sup> For this reason, we omit any discussion of the numerous positive and constructive features of the Proposed 2013 RAA, and confine ourselves to thanking ICANN staff and registrar representatives for the substantial progress that the document exemplifies.

data, nor to cancel or suspend the registration if the data cannot be confirmed, because this customer contact data may never become Whois data that is subject to such obligations.<sup>2</sup>

IPC urgently renews the request made in its March 28 comments that, if the proxy service customer cannot be contacted using the contact data “revealed” in the case of abuse, these contact data must be treated as changed Whois data for the registration (and the customer treated as a Registered Name Holder), thus subjecting the registration to suspension or cancellation on the same basis as if the data had been submitted to the registrar as Whois data. We appreciate that the Specification (para. 2.4.5) now references the possibility that “the P/P provider will ... publish in the Registration Data Service (Whois) or equivalent service the P/P Customer’s identity and/or contact data.” But even under this formulation, the service provider retains the option to simply reveal the data to the complaining third party without publishing it in Whois. Thus, the Specification fails to plug the loophole through which unscrupulous registrants can circumvent the accountability and transparency functions of Whois by submitting false contact data to the proxy service provider.

Second, while the revision of the Interim Specification has taken a step to clarify its applicability to proxy service providers operated or controlled by resellers, it is a step in exactly the wrong direction: it excludes such services from the scope of the Specification. The entire Specification applies only to services “offered through the Registrar or its Affiliates.” Specification, paragraph 2. “Affiliate” remains narrowly defined in section 1.2 of the Proposed 2013 RAA in terms of common control.<sup>3</sup> Where the Interim Specification apparently required the Registrar to “prohibit Resellers” from using proxy services that did not comply with the Interim Specification, see Interim Specification at paragraph 2, the revised Specification omits this requirement, and in fact explicitly exempts registrars from any obligations with respect to “the services of a P/P Provider that is not provided by Registrar or any of its Affiliates,” Specification at paragraph 3.1. This describes such a service provided by an unaffiliated reseller. While the chapeau of the Specification states that registrars must “require its Affiliates and Resellers to comply with the terms of this Specification,” that phrase does not in itself extend the scope of the obligation: “the terms of the Specification” itself exclude any obligation for reseller-affiliated proxy services to comply.

Third, the entire thrust of the Specification has shifted from obligating deeds to merely requiring words. The Interim Specification governed what the proxy services it covered had to do; the revised Specification only governs what they must say about their policies and procedure. As part of this retrograde shift of the entire Specification to a disclosure-only obligation, the requirement that the proxy service providers “abide by .... the terms and conditions of its

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<sup>2</sup> In the typical proxy registration situation, it is the proxy service, not its customer, that is the Registered Name Holder. So long as the contact information for the proxy service is accurate and complete, the Whois accuracy requirements of the Proposed 2013 RAA are apparently inapplicable to contact information for the proxy service’s customer – the true registrant, in common parlance.

<sup>3</sup> “‘Affiliate’ means a person or entity that, directly or indirectly, through one or more intermediaries, Controls, is controlled by, or is under common control with, the person or entity specified.”  
<http://www.icann.org/en/resources/registrars/raa/proposed-agreement-22apr13-en.pdf> , at section 1.2.

service” has been deleted (Interim Specification at paragraph 3.1; compare Revised Specification at paragraph 2.1). The failure of a proxy provider controlled by the registrar to do what it says in its disclosures had consequences for the registrar under the Interim Specification; it has none under the revised Specification, so long as the provider mouths the words that purport to set forth its policies and procedures.

This giant step backward contrasts starkly with the improvements exhibited in section 3.7.7 of the Proposed 2013 RAA. Where today a registrar is in compliance with Section 3.7.7 of the RAA so long as its agreement with registrants contains the requisite terms, under the Proposed 2013 RAA it must also take commercially reasonable measures to enforce those terms. Unfortunately, under the revised Specification, this is not the case with proxy service providers, even those wholly controlled and operated by registrars; once they disclose their policies, they are under no obligation to follow them, and ICANN apparently has no power to levy any consequences for non-compliance.

In order to remedy these serious and fundamental flaws in the revised Specification, COA urges ICANN to amend it so that it:

- Requires registrars to ensure that proxy services they control verify customer contact data, or at least to treat “revealed” contact data of proxy registrants as Whois data subject to the same verification requirements as conventional Whois data;
- Applies to proxy services provided by resellers as well as by accredited registrars;
- Holds registrars accountable when their associated proxy services systematically fail to abide by their own policies for receiving and responding to complaints of abuse, by requiring registrars to take steps to ensure compliance.

A redline version of the Specification showing one way to make the minimum required changes to achieve these objectives is attached.

## 2. RAA Amendment Procedure (RAA Sections 6 and 7)

In its March 28 comments, IPC acknowledged concerns expressed by registrars about proposed amendment procedures, and urged “all interested parties to continue to work on modifications to this provision .... that can help address these concerns while preserving the vital ability of ICANN to change accreditation standards even if without the formal support of a majority of registrars that sponsor a supermajority of registrations.” March 28 comments, at 6. The Proposed 2013 RAA includes substantial changes to Sections 6 and 7 that raise serious concerns about whether this “vital ability” has been preserved. Our review of the convoluted process set forth in these extensive revisions suggests that, while it might indeed be theoretically possible for accreditation standards to be modified to reflect substantially changed conditions even without approval of a registrar majority, the path toward such a modification is exceedingly

narrow and tortuous. The issue is whether, with these latest modifications, ICANN would still be in a position to carry out its public interest mandate.

A hypothetical but realistic example illustrates the concern. Currently, the Expert Working Group on gTLD Directory Services is meeting to devise a new model to supersede the current Whois framework. See <http://www.icann.org/en/groups/other/gtld-directory-services> . The ICANN Board has directed that an “expedited” Policy Development Process be initiated based on the output of the Experts Group. <http://www.icann.org/en/groups/board/documents/briefing-materials-1-08nov12-en.pdf>, at 1, 2, and Appendix at 1, incorporated in Board Resolution 2012.11.08.01. It is clearly within the realm of the possible that such a PDP would founder based on the opposition of the contracted parties (including registrars) to the changes it would require. Under the March 7 version of the Whois Accuracy Program Specification to the RAA, paragraph 8, the Experts Working Group work product could form the basis of an RAA amendment, and registrars would be foreclosed from arguing that there was not a “substantial and compelling need” for it. In the Proposed 2013 RAA materials, that paragraph has been deleted altogether. See <http://www.icann.org/en/resources/registrars/raa/proposed-whois-accuracy-07mar13-redline-22apr13-en.pdf> , at 3 (deleting paragraph 8).

Thus, the question arises whether the amendment procedure in the Proposed 2013 RAA would realistically be available in order to implement the new registration data directory model if it is opposed by the registrars. The Vice Chair of the ICANN Board, speaking at an ICANN-sponsored webinar, recently gave his personal opinion that it would be available. See <https://www.icann.org/en/about/learning/webinars/transcript-whois-recommendations-implementation-24apr13-en.pdf>, at 16-17 (“there are mechanisms in the new registrar agreement, at least, and presumably in the new registry agreement, for the Board to actually undergo a process to make changes to those agreements, and so we’d use another mechanism” in case a PDP was unsuccessful). It would be quite reassuring if ICANN staff and registrars were to confirm their understanding that the amendment mechanisms set out in sections 6 and 7 would in fact be available in this scenario, and to describe in detail how such an amendment would qualify and what path it would have to take in order to become binding on registrars over their objections.

The process for amending the RAA must be “fit for purpose” in the sense of accommodating ICANN’s public interest obligations. The impending new post-Whois model for registration data directory information is a leading and timely example of a purpose for which the amendment process devised by ICANN staff and the registrars, without participation by the rest of the community, must clearly be fit, if the RAA as a whole is to be acceptable. IPC urges ICANN and the registrars to spell out more clearly and specifically that the amendment process they have devised is “fit for purpose” in this sense.

Thank you for considering the comments of IPC.<sup>4</sup>

Respectfully submitted,

INTELLECTUAL PROPERTY CONSTITUENCY

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<sup>4</sup> IPC takes this opportunity to express its disappointment with how ICANN staff handled the last round of public comments on the RAA, especially with regard to Whois issues. Although it gave no indication of it in the March 7 public comment announcement, ICANN staff concluded, in the last sentence of the staff's summary of the public comments received that "[f]urther revisions to the WHOIS related obligations in the draft 2013 RAA were viewed as inappropriate in light of ... pending work." <http://www.icann.org/en/news/public-comment/report-comments-proposed-raa-22apr13-en.pdf>, at 19. Since all this "pending work," consisting of unspecified "work towards a Proxy/Privacy Accreditation Program," and "the upcoming PDP on Data Directory Services," was well known to staff at the time the draft RAA version was posted March 7, staff should have stated in that public comment announcement its conclusion that "further revisions to the WHOIS related obligations" would be considered "inappropriate." IPC members could then have saved the time and resources expended in analyzing such provisions in the March 7 draft. Since the most detailed of IPC's comments and suggested changes submitted March 28 were directed toward such obligations, see March 28 comments at 3, 7-9, we were disappointed to learn only afterwards that ICANN staff considered them "inappropriate." This behavior undermines the credibility of ICANN's stated commitment to meaningful public comment procedures. Furthermore, on the merits the staff's conclusion is unfounded. It seems exceedingly unlikely that either the future Proxy/Privacy accreditation program or the upcoming PDP on data directory services will consider, for example, the time period within which registrars must validate or verify Whois data, or whether that validation should include the numerical street address, to cite just two examples of the changes IPC sought in the Whois Accuracy Program Specification. See March 28 comments at 7.

ANNEX to IPC comments: Redline showing changes

## **SPECIFICATION ON PRIVACY AND PROXY REGISTRATIONS**

Until the earlier to occur of (i) January 1, 2017, and (ii) the date ICANN establishes and implements a Privacy and Proxy Accreditation Program as referenced in Section 3.14 of the Registrar Accreditation Agreement, Registrar agrees to comply, and to require its Affiliates and Resellers to comply, with the terms of this Specification, provided that ICANN and the Working Group may mutually agree to extend the term of this Specification. This Specification may not be modified by ICANN or Registrar.

1. Definitions. For the purposes of this Specification, the following definitions shall apply.
  - 1.1 "P/P Customer" means, regardless of the terminology used by the P/P Provider, the licensee, customer, beneficial user, beneficiary, or other recipient of Privacy Services and Proxy Services.
  - 1.2 "Privacy Service" is a service by which a Registered Name is registered to its beneficial user as the Registered Name Holder, but for which alternative, reliable contact information is provided by the P/P Provider for display of the Registered Name Holder's contact information in the Registration Data Service (Whois) or equivalent services.
  - 1.3 "Proxy Service" is a service through which a Registered Name Holder licenses use of a Registered Name to the P/P Customer in order to provide the P/P Customer use of the domain name, and the Registered Name Holder's contact information is displayed in the Registration Data Service (Whois) or equivalent services rather than the P/P Customer's contact information.
  - 1.4 "P/P Provider" or "Service Provider" is the provider of Privacy/Proxy Services, including Registrar and its Affiliates, as applicable.
2. Obligations of Registrar. For any Proxy Service or Privacy Service offered through the Registrar or its Affiliates, or through a Reseller or its Affiliates, and used in connection with Registered Names Sponsored by the Registrar, the Registrar must require all P/P Providers to follow the requirements described in this Specification and to abide by the terms and procedures published pursuant to this Specification.
  - 2.1 Disclosure of Service Terms. P/P Provider shall publish the terms and conditions of its service (including pricing), on its website and/or Registrar's website.
  - 2.2 Abuse/Infringement Point of Contact. P/P Provider shall publish a point of contact for third parties wishing to report abuse or infringement of trademarks (or other rights).
  - 2.3 Disclosure of Identity of P/P Provider. P/P Provider shall publish its business contact information on its website and/or Registrar's website.

- 2.4 Terms of service and description of procedures. The P/P Provider shall publish on its website and/or Registrar's website a copy of the P/P Provider service agreement and description of P/P Provider's procedures for handling the following:
  - 2.4.1 The process or facilities to report abuse of a domain name registration managed by the P/P Provider;
  - 2.4.2 The process or facilities to report infringement of trademarks or other rights of third parties;
  - 2.4.3 The circumstances under which the P/P Provider will relay communications from third parties to the P/P Customer;
  - 2.4.4 The circumstances under which the P/P Provider will terminate service to the P/P Customer;
  - 2.4.5 The circumstances under which the P/P Provider will reveal and/or publish in the Registration Data Service (Whois) or equivalent service the P/P Customer's identity and/or contact data, and under which the P/P Customer will be deemed the Registered Name Holder, and the P/P Customer's identify and contact data will be deemed Whois information subject to the Whois Accuracy Program Specification; and
  - 2.4.6 A description of the support services offered by P/P Providers to P/P Customers, and how to access these services.
- 2.5 Escrow of P/P Customer Information. Registrar shall include P/P Customer contact information in its Registration Data Escrow deposits required by Section 3.6 of the Agreement. P/P Customer Information escrowed pursuant to this Section 2.5 of this Specification may only be accessed by ICANN in the event of the termination of the Agreement or in the event Registrar ceases business operations.
3. Exemptions. Registrar is under no obligation to comply with the requirements of this specification if it can be shown that:
  - 3.1 Registered Name Holder employed the services of a P/P Provider that is not provided by Registrar, or any of its Affiliates;
  - 3.2 Registered Name Holder licensed a Registered Name to another party (i.e., is acting as a Proxy Service) without Registrar's knowledge; or
  - 3.3 Registered Name Holder has used P/P Provider contact data without subscribing to the service or accepting the P/P Provider terms and conditions.