

**July 9, 2010**

**Registrar Stakeholder Group Position Regarding  
Registrar Accreditation Agreement Subsection 3.7.7.3**

**BACKGROUND**

The Registrar Stakeholder Group (“RrSG”) has been asked to provide feedback regarding the draft advisory concerning subsection 3.7.7.3 of the Registrar Accreditation Agreement (“Advisory”). This position paper captures the overall sentiment expressed by the RrSG Executive Committee members who provided feedback about this matter. Due to time constraints, however, no formal vote regarding this position paper was taken.

**RrSG POSITION**

The RrSG is seriously troubled by the §3.7.7.3 Advisory. In particular, the RrSG is very concerned about ICANN's interpretations of what constitutes "reasonable evidence of actionable harm" or "prompt" identification of a domain name licensee. These are legal terms that are subject to interpretation by a court of law, within a proper jurisdiction, and on a case-by-case basis. There is no universal definition of these terms that is applicable to all circumstances and court systems. As such, ICANN should not undertake the impossible task of rendering advisory opinions regarding their definitions.

Furthermore, the Advisory addresses issues beyond the scope of ICANN’s mission. The Advisory is not an interpretation of the Registrar Accreditation Agreement (“RAA”), and not adhering to the Advisory would not raise an ICANN compliance issue. §3.7.7.3 of the RAA only requires that registrars place in their registration agreements an obligation that Registered Name Holders provide accurate WHOIS data, and that if a domain name is licensed to a third party then the Registered Name Holder accepts liability if it does not reveal the name of the third party in certain circumstances. ICANN is only responsible for ensuring that these provisions are contained in a registrar’s service agreements. As long as a registrar has these provisions in its service agreements, there is no breach of the RAA.

The Advisory inappropriately stretches beyond the RAA and attempts to define terms contained in the service agreements that registrars have with their customers. Interpreting provisions of registrar service agreements is outside the scope of ICANN’s responsibilities and is not an appropriate ICANN function. This particular divergence from ICANN’s charged responsibilities is especially alarming to the RrSG because the Advisory may increase liability for a registrar’s customers. The Advisory is another example of ICANN mission creep that harms innocent registrants.

As a practical matter, the Advisory does not help registrars or Registered Name Holders appropriately define the terms "reasonable evidence of actionable harm" or “prompt”

identification. This is due, in part, to the global nature of the Internet and the myriad of diverse legal systems worldwide.

For example, RrSG members note that while publishing critical commentary about a particular country's politicians on a domain name such as *[politician]sucks.com* may be permissible in some countries, it may be illegal in others. Clearly, in cases such as these, the evidence required to demonstrate actionable harm will vary depending on the jurisdiction where the dispute arises. Similar problems also extend to intellectual property related domain name disputes, where the law varies from country to country.

With respect to the definition of "prompt" identification, a bright-line definition of what constitutes "prompt" identification is inappropriate. Individual circumstances should dictate whether identification is "prompt." In some cases, it may take more than five business days to make a good faith determination about whether reasonable evidence of actionable harm exists.

ICANN's publication of a formal advisory regarding the definitions of these terms is inappropriate. Attempting to define these terms is simply not a responsibility that ICANN should assume and the RrSG urges ICANN to refrain from rendering an advisory opinion regarding their definition. If ICANN insists on formally publishing the Advisory then ICANN should include a disclaimer that it is not legal advice and that a court of law may make a completely different determination or interpretation.

## **CONCLUSION**

The opinions expressed by the RrSG in this position paper should not be interpreted to reflect the individual opinion of any particular RrSG member.