

Summary & Analysis of Comments for:  
Draft Advisory on the Effect of Registrar Accreditation Agreement (RAA) Subsection  
3.7.7.3 (“Draft Advisory”)

*Disclaimer: This summary is not a full and complete recitation of the relevant comments received. It is an attempt to capture in broad terms the nature and scope of the comments. This summary has been prepared in an effort to highlight key elements of these submissions in an abbreviated format, not to replace them. Every effort has been made to avoid mischaracterizations and to present fairly the views provided. Any failure to do so is unintentional.*

The comment period ran from 14 May to 09 July 2010. Ten comments were received, and can be viewed in their entirety at <http://www.icann.org/en/public-comment/#raa-3773>.

Summary:

Wendy Seltzer expressed her view that this Draft Advisory “is of concern to non-commercial users who seek anonymity or privacy in domain name registration through the use of third party agents or attorneys.” Seltzer stated that the “attempt to tie registration of a domain name to ‘liab[ility] for harm caused by the wrongful use of the domain name’ is both wrong policy and far outside ICANN’s scope.”

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00000.html>.

George Kirikos raised two issues. First, Kirikos disagreed with the Draft Advisory guidance providing that “any delay over five business days in the Registered Name Holder identifying the licensee would not be ‘prompt’ within the context of the RAA.” Kirikos stated that the “appropriate time period should be left to the discretion and judgment of the courts.” Kirikos stated “5 days is not sufficient time for most attorneys with multiple clients” and suggested a period of “3 weeks measured from the time of actual notice would be a better time period,” giving registrants “ample time to consult with their attorneys.”

Secondly, Kirikos stated his belief that the guidance should go further in placing “liability strictly upon the registrar in the event that the registrant (or licensee...) is a fake identity, or doesn’t exist.”

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00001.html>.

Russell Pangborn, an Associate General Counsel for Trademarks, submitted comments on behalf of Microsoft. Microsoft applauded ICANN “for the helpful clarity provided by the Draft 3.7.7.3 Advisory.” Microsoft agreed with the Draft Advisory’s concept of the term “reasonable evidence of actionable harm,” and supported the Draft Advisory’s “clarification that a party is not required to file a UDRP complaint or court action, or to obtain a subpoena party in order to demonstrate ‘reasonable evidence of actionable harm.’”

Microsoft also made the following suggestions in its comments: 1) the term “prompt” should be considered as “ a delay of no more than three (3) business days;” and 2) the Draft Advisory should be amended “to clarify that a Registered Name Holder must respond to the complaining party.” Microsoft proposed that such a response should take one of three forms: “(i) identification of the licensee and provision of its current contact information; (ii) a statement that the Registered Name Holder accepts the liability and will neither identify the licensee nor provide its contact information; or (iii) a statement that the Registered Name Holder believes that the “reasonable evidence actionable harm” is not complete and, in that event, identify specifically what additional information and/or documentation is required.” Microsoft stated its belief that its proposed “amendment would avoid a situation in which a trademark owner has received no response to a 3.7.7.3 submission or inquiry, assumes (and reasonably so) that the Registered Name Holder has accepted liability for the wrongful use of the name and takes enforcement action against it.”

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00002.html>.

GoDaddy.com in comments submitted by James M. Bladel, recognized the “challenges associated with co-ordinating uniform procedures among privacy and proxy services” and while it believes that the current Draft Advisory “seeks to eliminate confusion, it will have the opposite effect, and introduce additional confusion and inconsistent outcomes.”

GoDaddy.com stated the Draft Advisory “contains many terms that are poorly defined and therefore open to inconsistent interpretation.” GoDaddy.com referred to “reasonable evidence,” “prompt” identification, and “wrongful use” as examples. In addition, GoDaddy.com expressed its concern that these terms were “unilaterally” defined by ICANN staff without community involvement, and suggested that such terms and concepts “require an in-depth review by the ICANN community as a whole.”

GoDaddy.com also stated that the Draft Advisory “could be interpreted as ICANN offering legal advice or interpretation on a Registrar-Registrant contract” to which ICANN is not a party. GoDaddy.com stated that it believes it is not “appropriate for ICANN to do so, nor is this within the scope of its remit.” GoDaddy.com concluded by recommending that “ICANN refrain from issuing an Advisory on this subject” until the issues it raised were resolved.

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00003.html>

Eric Brunner-Williams expressed the need for claims of harm to “distinguish between those which have only legal effect from those which have operational effect”. He stated that it “is imprudent to collapse the notice-to-effect time for what harms that take significant multiples of the notice period to manifest noticeable harm, and ignore the necessity to act on the harms with a temporal horizon comparable to, and significantly less than, the notice period contemplated in this draft.” Brunner-Williams further submitted that “the reduced time is unimportant. Reducing time for the wrong harm is important, and an error.”

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00004.html>.

ALAC submitted the following statement: "...the ALAC strongly supports the proposed Advisory Notice [Draft 3.7.7.3 Advisory] which will increase the compliance with and enforceability of the section 3.7.7.3 provisions."

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00005.html>.

Clarke D. Walton submitted a position paper on behalf of the Registrar Stakeholder Group ("RrSG") which "captur[ed] the overall sentiment expressed by the Executive Committee members who provided feedback."

The RrSG stated that it was "seriously troubled" by the Draft Advisory and raised specific concerns. The RrSG' stated its concerns "over ICANN's interpretations of what constitutes "reasonable evidence of harm" or "prompt" identification of a domain name licensee." The RrSG further stated its position that ICANN should "not undertake the impossible task of rendering advisory opinions regarding their definitions," because in its view, 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" and the "the myriad of diverse legal systems worldwide." The RrSG commented that "individual circumstance should dictate whether identification is 'prompt.'"

The RrSG submitted its view that it would be inappropriate for ICANN to publish a formal advisory regarding definition of terms and "urges ICANN to refrain from rendering an advisory opinion regarding their definitions. 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."

The RrSG also expressed its concern that the Draft Advisory "addresses issues beyond the scope of ICANN's mission" and "the Advisory is not an interpretation of the Registrar Accreditation Agreement...not adhering to the Advisory would not raise an ICANN Compliance issue." The RrSG noted that "ICANN is only responsible for ensuring that these provisions [obligations required to be placed in a registrar's registrant agreement under Section 3.7.7.3] are contained in a registrar's registration agreement." The RrSG states that defining terms and "interpreting provisions contained in the service agreements that registrars have with their customers...is outside the scope of ICANN's responsibilities and is not an appropriate ICANN function." In addition, the RrSG expressed its concern that the Draft Advisory "may increase the liability for a registrar's customers."

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00006.html>.

Comments received from the International Anti-Counterfeiting Coalition ("IACC") focused on the "RAA Improvements Report," and did not specifically address or comment on the draft Section 3.7.7.3 advisory that is the subject of this public comment period.

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00007.html>.

Claudio Digangi, Vice President of the Intellectual Property Constituency ("IPC"), submitted comments on behalf of the IPC. The IPC stated its belief that an advisory for Section 3.7.7.3

was needed and “commended” ICANN for preparing the Draft Advisory, because the IPC believes that the Draft Advisory “will result in more cooperation between and among Registrars, Registered Name Holders, proxy services and intellectual property owners,” and “provides guidance and clarity with regard to the interpretation of the terms of Section 3.7.7.3 and ICANN’s expectations with respect to the same.”

Specifically, the IPC stated its position that the Draft Advisory provides useful guidance for the terms “promptly” and “reasonable evidence of actionable harm” which by their “range of meanings...when used by themselves...has resulted in different interpretations and therefore, is a source of dispute among Registrars, Registered Name Holders, proxy services and intellectual property owners.” With regard to “reasonable evidence of actionable harm,” the IPC states that the Draft Advisory helps to clarify that this term “is not synonymous with a UDRP or lawsuit being filed.” The IPC views this clarification as important in noting its claim that “several proxy services operate, or have operated, under the misconception that the Section 3.7.7.3 obligation to disclose a licensee only applies when a UDRP action or a lawsuit has been filed, or when a subpoena has been issued.”

The IPC also suggests that the Draft Advisory could be improved if “it encouraged a Registered Name Holder that, under RAA 3.7.7.3, licenses the use of a domain name to a third party, but does not reveal the licensee within five (5) business days of the receipt of “reasonable evidence of actionable harm,” to respond to the complaining party, explaining why the identity of the licensee will not be revealed.” The IPC provided an example (which it notes would be “simply” a suggestion included in the advisory) of an explanation that would be “a statement and supporting explanation that the ‘reasonable evidence of actionable harm’ is not sufficient or a clarification that the Registered Name Holder is choosing to accept liability for the harm.” The IPC stated that such a suggestion in the Draft Advisory would help the relevant parties involved to “understand the basis of the Registered Holder’s failure to reveal a licensee.”

The IPC further stated that with regard to any “potential due process concerns that some might raise as a result of revealing the identity of a licensee subject to this Advisory, these concerns are simply unfounded.”

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00008.html>.

Comments from Domain by Proxy (“DBP”) were submitted by Nima Kelly, Vice President of (“DBP”). DBP stated its view that the Draft Advisory’s “proposed tinkering does not address the current situation of holding privacy services absolutely liable for wrongful use of a domain name over which they exercised no control.” DPB recommends that ICANN “suspend further action on the Advisory and instead, proceed with a Policy Development Process so as to permit affected entities the opportunity to collectively draft a comprehensive Issues Report that expressly addresses those unique situations when the Registered Name Holder is a privacy service.”

Alternatively, if ICANN moves forward with an advisory, DBP requests that ICANN “eliminate all statements allowing courts and arbitrators to: 1) rule on issues of “prompt

identification” and “reasonable evidence of actionable harm,” and 2) assess and apportion liability in light of the Registered Name Holders’ “promptness” in identifying a licensee.”

DBP also proposes some alternative language for Section 3.7.3.3 and defining certain terms. Specifically, DBP proposes that: 1) the term “prompt identification” should be defined as “when the Registered Name Holder discloses the licensee’s identity within 10 calendar days upon receipt of reasonable evidence of actionable harm from a party;” 2) “Registered Name Holders shall be held liable in the event they fail to disclose the licensee’s identity when presented with notification of a formal legal process.” DBP submits that the Draft Advisory adopt the institution of a formal legal process as its “reasonable evidence” standard, where reasonable evidence would exist “if the privacy service receives notice that a domain name utilizing its service is named as a Respondent in: (i) a UDRP proceeding, or (ii) a lawsuit in a court of competent jurisdiction;” or, that a privacy service is subject to an investigation by a law enforcement organization; and 3) the Draft Advisory should define “wrongful use” as including six specific types of conduct which DBP listed in its comments.

In conjunction with its proposals to revise Section 3.7.7.3, DBP submitted its proposed revised language for Section 3.7.7.3.

DBP also stated its recommendation to concurrently amend the UDRP “so that upon disclosure of the licensee’s identity, the arbitration proceeding can only proceed against the disclosed licensee and the privacy practice.”

See <http://forum.icann.org/lists/raa-subsection-3773-advisory/msg00009.html>.

#### Analysis:

From the ten comments received, 4 comments were expressly in favor of the Draft Advisory, 3 comments were expressly opposed to the Draft Advisory, and the remaining 3 comments did not expressly support or reject the Draft Advisory but provided other specific comments or recommendations.

The primary purpose of the Draft Advisory was to clarify the definition of a Registered Name Holder and the acceptance of liability under RAA Subsection 3.7.7.3. Two comments raised concerns related to these issues, but in the context of the language and obligations established under the current RAA Subsection 3.7.7.3 itself rather than the Draft Advisory, which only clarifies the language of RAA Subsection 3.7.7.3. DBP, a proxy service provider, expressed its concern that the current RAA imposes liability on a privacy or proxy service that is a Registered Name Holder even if it has no control over the licensee’s use of a domain name. Wendy Seltzer expressed a broader concern that the current language in the RAA puts a chilling effect on the ability of non-commercial users who seek anonymity in domain name registration to use third party agents.

The bulk of the comments received on the Draft Advisory focused on ICANN’s guidance on defining certain terms used in Subsection 3.7.7.3 of the RAA. Among those specific comments, the two issues most often raised were: 1) whether the Draft Advisory is within the

scope of ICANN's mission with regard to providing interpretations for the terms; and 2) the actual interpretation and definition of the terms "prompt," "reasonable evidence of actionable harm," and "wrongful use" in the Draft Advisory.

The comments that opposed the Draft Advisory in its current form stated that the advisory on Section 3.7.7.3 was outside the scope of ICANN's mission. Two commenters (DBP and GoDaddy.com) further recommended that work on the current Draft Advisory be suspended and a process initiated to ensure that the entire ICANN community has an opportunity to provide input on the issues addressed in the current Draft Advisory.

GoDaddy.com expressed its overall concern that it was inappropriate for ICANN staff to "unilaterally" interpret any of these terms without community involvement, while the RrSG stated its position that ICANN should not be providing interpretations of these terms because they are "legal" terms subject to interpretation by a court of law within the proper jurisdiction on a case-by-case basis, and because the interpretation of these terms will vary in country by country.

There was no consensus among the comments received with regard to the Draft Advisory's definitions or interpretation of terms such as "prompt," "reasonable evidence of actionable harm" and "wrongful use." Several comments offered alternative suggested interpretations for these terms.

In response to the Draft Advisory's interpretation that "any delay over five business days... would not be 'prompt,'" various alternative interpretations were proposed which ranged from three business days (Microsoft); ten calendar days (DBP); 3 weeks (Kirikos); to "individual circumstances should dictate" (RrSG). Eric Brunner-Williams expressed concern over the actual effectiveness of the advisory's notice period.

Both Microsoft and the IPC supported the Draft Advisory's interpretation of the term "reasonable evidence of actionable harm." However, DBP proposed that the Draft Advisory adopt the institution of a formal legal process or a law enforcement investigation against a privacy service as its "reasonable evidence" standard.

With regard to "wrongful use" DBP proposed that this term be defined by including six specific types of conduct that it listed in its comments.

#### Next Steps:

In view of the comments received, ICANN will explore what revisions to the draft advisory might be appropriate and will re-evaluate the value in providing any definitions or guidance for the specific phrases used in Subsection 3.7.7.3. Such issues can continue to be discussed within the ICANN community through appropriate fora and processes to determine if consensus exists to pursue further guidance concerning these terms.

Commentators (listed in chronological order):

Name:

Wendy Seltzer  
George Kirikos  
Russell Pangborn  
James M. Bladel  
Eric Brunner-Williams  
ALAC  
Clarke Walton  
Andy Coombs  
Claudio Digangi  
Nima Kelly

On Behalf of:

Individual  
Leap of Faith Financial, Inc.  
Microsoft, Corporation  
GoDaddy.com, Inc.  
Individual  
Registrar Stakeholder Group  
International Anti-Counterfeiting Coalition  
IPC  
Domain By Proxy, Inc.