

# COALITION FOR ONLINE ACCOUNTABILITY

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The Coalition for Online Accountability (COA) appreciates this opportunity to comment on the September 2010 version of the ICANN staff's Plan for Enhancing Internet Security, Stability, and Resiliency. See <http://www.icann.org/en/public-comment/#ssr-plan-fy11>.<sup>1</sup>

We focus our comments on two points addressed in the draft Plan.

## 1. Improvements to the RAA

The discussion of this issue on page 37 does not mention that a drafting team composed of representatives from the GNSO and ALAC has completed work on a report on possible amendments to the Registrar Accreditation Agreement. Many of the high priority amendment items identified overlap with the "further enhancements" and "suggested modifications" mentioned in the draft Plan. A link to the report can be found at <http://gns0.icann.org/>.

## 2. Contractual Compliance

This is an issue of great importance to COA participants, and it is disappointing to see how little attention it receives in the draft Plan. The brief discussion on page 43 includes the following puzzling paragraph:

The Contractual Compliance Department has conducted [sic] to assess Whois data contact information accuracy within the gTLD system and to assess the extent to which registrants are using privacy and proxy services to shield their identity. In an effort to encourage contract compliance and to provide public confidence, the Contractual Compliance Department is developing a system to publically [sic] identify compliant parties. This system is in the early stages of development, and consultation with the registrar and registry communities will be sought before it is implemented.

It is not clear whether the "system" described in the last two sentences is focused on the Whois data accuracy and privacy/proxy system issues mentioned in the first sentence. This should be clarified. (The rest of this comment assumes that it would have such a focus.)

COA (and other members of the Intellectual Property Constituency) were surprised to learn that "a system to publically [sic] identify compliant parties" with regard to Whois data accuracy and

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<sup>1</sup>COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); the Recording Industry Association of America (RIAA); the Software and Information Industry Association (SIIA); Time Warner Inc.; and the Walt Disney Company. COA is an active participant in the GNSO Intellectual Property Constituency and has engaged fully in a wide range of debates on ICANN governance and policy issues.

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American Society of Composers  
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The Walt Disney Company

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use of privacy and proxy services was under development. We work closely with ICANN contract compliance staff and were unaware of this proposal, which was not mentioned in the current ICANN operational plan (see <http://www.icann.org/en/financials/adopted-opplan-budget-fy11-10jul10-en.pdf>) or in recent contract compliance newsletters (see <http://www.icann.org/en/compliance/newsletter/>).

We also question how ICANN could possibly identify which registrars are “compliant” with Whois data accuracy requirements, or with the operation of proxy and privacy registration services.

- On the first issue, does ICANN plan to comprehensively audit the Whois data of each registrar in order to determine how accurate it is? Or is some other measure of “compliance” intended to be used?
- On the second issue, what would constitute “compliance” with regard to the offering of privacy or proxy registration services? Would one measure of such compliance be the track record of operators of such services in disclosing the identity and contact points for registrants whose registrations are associated with activity that is inflicting “actionable harm” on third parties? For example, if an operator made such disclosures after receiving “reasonable evidence” of widespread copyright piracy or trademark counterfeiting at a website to which the domain name resolves, would that be evidence of “compliance”?

Has ICANN ever even collected any data in the contractual compliance arena on this topic? Would part of the development of the system include the issuance of the long-delayed draft registrar advisory that sought to provide some minimal guidance regarding the relevant RAA provisions? (See <http://www.icann.org/en/compliance/reports/draft-advisory-raa-3773-14may10-en.pdf>.) Or will this draft advisory remain in limbo due to the opposition of the largest accredited registrar and its alter ego proxy registration service?

Finally, we note with dismay, but not with surprise, that ICANN staff continues to take the position that the development of a program with the ostensible goal “to encourage contract compliance and to provide public confidence” is a matter of concern only to “the registrar and registry communities,” and that only these contracted parties are to be consulted in its development. This seems to be ICANN’s invariable default position, subject to correction only after other affected parties – including, in this case, COA and other members of the Intellectual Property Constituency – point out yet again that it is contrary to ICANN’s purported objective to serve the public interest above the narrow business interests of the registrars and registries. ICANN’s addiction to this approach speaks volumes.

Clearly, the concept of a “system to publically identify compliant parties” needs much more discussion. That discussion must include the affected non-contracted parties. Indeed, unless they play a leading role in designing such a system, it will – deservedly – lack any credibility and thus do nothing to “provide public confidence.”

Thank you for considering the comments of COA.

Steven J. Metalitz, counsel to COA