

Comments of Coalition for Online Accountability

March 28, 2010

The Coalition for Online Accountability (COA) offers the following comments on a few aspects of the Registration Abuse Policies Working Group Initial Report.¹ See <http://www.icann.org/en/public-comment/#rap-initial-report>. See the end of this submission for further information about COA.

1. Whois: COA applauds the cross-constituency commitment to publicly accessible and accurate Whois data, as reflected in the Working Group's apparently unanimous acknowledgement that "Published WHOIS data for domain names involved in malicious conduct is an irreplaceable part of the investigation and mitigation processes used by registrars, registry operators, registrants, security companies, brand owners, victims and law enforcement." (page 68) We read that list as non-exhaustive, and note that copyright owners also depend on WHOIS data as an "irreplaceable part" of their efforts to deal with instances of copyright infringement online.

We also appreciate the emphasis on efforts of the ICANN contract compliance team, and welcome the information provided in the Initial Report on these efforts. We strongly support the recommendation for "an annual compliance audit of compliance with all contractual WHOIS obligations." Recommendation 2, section 7.3, page 76.

There also should be greater transparency about how ICANN compliance staff reacts to third-party reports of registrar or registry non-compliance with these obligations. For example, did ICANN compliance staff take any action on the "WHOIS accessibility situations" identified by a sub-team of the RAP Working Group with regard to 19 accredited registrars – at least some of which appear to amount to clear contractual violations? (See pages 70-73) What other conclusions did ICANN compliance staff draw from the sub-team's evidence that 38% of their sample of 50 registrars were engaged in "WHOIS accessibility situations"?

In addition to those GNSO activities currently underway with regard to Whois data accessibility and reliability, as referenced in the report, it should also be noted that a number of proposed topics for amendment of the Registrar Accreditation Agreement relate to these important issues.

2. Malicious use of domain names: Chapter 6 of the Initial Report also contains useful information. COA participants note that copyright and trademark infringements carried out online may also fall into the category of "malicious behavior," especially to the extent that these

¹ COA regrets it is unable to provide more comprehensive comments on this 107-page report. We note that this is one of thirteen ICANN documents on which public comment periods expire between Sunday, March 28, and Thursday, April 1. Comment periods on at least three other documents close between April 8 and 15. This log-jam in the public comment process casts serious doubt on ICANN's stated commitment, in the Affirmation of Commitments of September 2009, to "responsive consultation procedures." See <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.

infringements are performed on a commercial scale and thus attract criminal liability under the laws of almost every country.

We agree that ICANN can and should do more to encourage accredited registrars and gTLD registries to enforce their terms of service and to develop best practices to address these malicious uses. The discussion of registrar and registry terms of service and indemnification provisions (pages 51-53) seems excessively deferential to the perceived concerns of these contracted parties. We note that this discussion does not point to a single instance in which a registrar or registry has been successfully sued by a registrant whose registration had been cancelled based on violation of terms of service.

3. Best Practices: Without necessarily adopting the views of the Working Group about particular issues on which (according to the majority of Working Group participants) ICANN can do no more than call for the development of voluntary “best practices,” COA supports the general recommendation that ICANN should do more to promote their development and dissemination, including “structured, funded mechanisms for the collection and maintenance of best practices” (section 9.2.3, page 98). Left to their own devices, the contracted parties too often lack either the motivation or the energy to undertake this work. In this regard, it is instructive that, although over the past 9 years the Registrar Accreditation Agreement has always contained a commitment for registrars to abide by any “Code of Conduct” that the accredited registrars themselves might develop by consensus, such a development has never occurred, and it is not clear that it has ever seriously been attempted. RAA section 3.7.1.

Respectfully submitted,

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COA consists of nine leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); the Business Software Alliance (BSA); 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.