

**Comments of the INTA Internet Committee on the
“Proposed Final 2013 Registrar Accreditation Agreement (RAA)”
May 13, 2013**

The Internet Committee of the International Trademark Association (INTA) appreciates the opportunity to provide comments to the Internet Corporation for Assigned Names and Numbers (ICANN) on the most-recent version of the Proposed Final 2013 Registrar Accreditation Agreement (the RAA).

Support for Progress Made by ICANN and Registrar NT

We applaud the substantial progress made by ICANN and the Registrar Negotiating Team (the Registrar NT) in preparing this draft and recognize that coming to agreement on a new RAA is a complex and heavily negotiated process. The negotiations have resulted in meaningful agreements on key provisions that will yield improvements to, and will benefit, the entire Internet community. However, there are still several issues in the current draft that fall short of meeting the concerns long expressed by the public.

ICANN Should Insert Terms to Implement GAC Safeguards 2 and 6 to Mitigate Abusive Activity.

Before commenting on some of the larger issues in the “Proposed Final RAA,” we want to urge ICANN to implement the two “Safeguards” recently proposed by the Governmental Advisory Committee that require terms to be inserted in the RAA (presumably as part of section 3.7.7). Among other issues, the GAC Safeguard recommendation recognizes the urgency and seriousness of the problem of malicious use of domain names in the new gTLDs. We strongly support the recommendations of the GAC to require Registry operators to ensure that terms of use for registrants include prohibitions on malicious activity and violations of law for all domains, not just

the new gTLDs.¹ The RAA seems the most appropriate place to address this requirement and ICANN should endeavor to include the required terms in the 2013 RAA, before it is finalized. Similarly, the RAA is the best mechanism for implementing the GAC’s recommendation to “ensure that there are real and immediate consequences” including domain suspension, for violating the law or providing false Whois information.² Perhaps most crucial from the point of view of whether Safeguards 2 and 6 can be added to the RAA at this stage of the process, the contractual terms would likely be relatively simple, should be non-controversial (as some registrars’ registration agreements already make violations of law, distribution of malware, phishing, etc., bases for termination of the domain registration), and do not appear to require up-front implementation measures by registries or registrars. We urge ICANN to follow the advice of the GAC and to implement these safeguards and recommendations in the RAA now.

Positive Developments in the Proposed 2013 RAA

That said, we again acknowledge that the current draft of the RAA contains some improvements over the existing agreement, such as requiring that registrars enforce their agreements with resellers and adhere to the URS. These are positive developments and steps toward a safer, more secure and more stable Internet community.

¹ “Safeguard 2: Mitigating Abusive Activity -- Registry operators will ensure that terms of use for registrants include prohibitions against the distribution of malware, operation of botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law.” *Annex I, GAC Communiqué – Beijing, People’s Republic of China*, April 11, 2013.

² Safeguard 6: “Consequences – Consistent with applicable law and any related procedures, registry operators shall ensure that there are real and immediate consequences for the demonstrated provision of false WHOIS information and violations of the requirement that the domain name should not be used in breach of applicable law; These consequences should include suspension of the domain name.” *Annex I, GAC Communiqué – Beijing, People’s Republic of China*, April 11, 2013.

Areas for Further Improvement

We take this opportunity to comment on areas of the RAA that were sources of disagreement between the Registrar NT and ICANN and which we believe still require further work: (i) account holder verification as part of Whois verification; (ii) the temporary privacy/proxy service specification (which has at the final hour been robbed of its enforceability); and (iii) minimum Whois data elements. We also address the issue of Special Amendments under Section 6 of the draft RAA. In each case, we generally support the provisions and approach proposed by ICANN and, against that backdrop, we provide the following comments.

Account Holder Verification

We agree with and support ICANN's proposed amendments to Section 1(f) of the Whois Accuracy Program Specification, which is referenced in proposed RAA provision 3.7.8. Specifically, the amendment calls for registrars to verify the email address of the Registered Name Holder (and, if different, the account holder paying for the Registered Name) by sending an email requiring an affirmative response through a tool-based authentication method such as providing a unique code that must be returned in a manner designated by the Registrar; *or*, to verify the telephone number of the Registered Name Holder (and, if different, the account holder paying for the Registered Name) by either (A) calling or sending an SMS to the Registered Name Holder's telephone number providing a unique code that must be returned in a manner designated by the Registrar, or (B) calling the Registered Name Holder's telephone number and requiring the Registered Name Holder to provide a unique code that was sent to the Registered Name Holder via web, email or postal mail.

Improved verification and accuracy of actual account holder contact information are positive measures to deter deceptive practices by bad actors, and ensure that consumers, individuals, and intellectual property owners who have been harmed by the improper registration and/or use of

domain names are able to seek redress from the appropriate parties. Finally, the proposed amendments may prompt registrars to avoid association with registrants who are known to be problematic. While the proposed amendments are a step in the right direction, we support more stringent Whois verification methods than those required by the current draft, such as requiring verification of email *and* phone, to raise the probability of identifying false Whois data.

Temporary Privacy/Proxy Service Specification

We support ICANN's decision to engage actively on the issue of privacy/proxy services in the context of an amended RAA. The Committee has long maintained that the RAA negotiations are an appropriate venue in which to address this serious and widely acknowledged problem of privacy and proxy service abuse. ICANN's addition of interim specifications pending a more robust policy development is an elegant compromise, which seeks to address the concerns of all interested Internet constituencies. Unfortunately, the recent change to the promising March 7, 2013 draft specification falls short of imposing any contractual obligation on privacy and proxy service providers and, instead, merely states unenforceable guidelines. Without any enforcement obligation, or any responsibility imposed upon registrars when privacy and proxy services fail to comply, it is difficult to envision how this specification could have any effect on the existing problem of privacy/proxy service abuse. The provisions set forth in the specification must be drafted as enforceable obligations if they are to be effective, and the specification should ensure that its terms apply to registrars and to third parties in privity with the registrars (resellers, affiliates). The specification should also expressly refer back to the proposed specification on Whois accuracy by ensuring the privacy/proxy services are equally subject to the same verification obligation that applies to registrars. If the privacy/proxy services are not equally subject to the same verification obligations, it is foreseeable that account holders will use privacy/proxy services in order to circumvent the verification requirements set forth in provision 3.7.8 of the RAA.

We strongly urge that ICANN take our comments into consideration and revise the RAA to ensure that the privacy/proxy services are equally subject to the same verification obligation that applies to the registrars. Otherwise, it is without doubt that provision 3.7.8 of the RAA will become ineffective.

Putting this placeholder policy in the RAA advances the recommendation of the WHOIS Review Team, which ICANN has committed to implementing. With these improvements, the proposed interim measures can go a great distance toward minimizing the issues pending development of a permanent and more-comprehensive policy to address privacy/proxy services. We support a final policy that will be more comprehensive than the interim measures.

Minimum Whois Data Elements

The provisions of 3.2.1 set forth the list of data elements that a Registrar is required to submit to the Registry, such as the name, IP addresses and names of primary and secondary name servers, identity of the Registrar, and expiration date of the registration. These minimum elements are required for even so-called thin Whois registries today and, while better verification of those elements needs to be provided for under the RAA, we support the requirement to provide these minimum data elements. We have long supported a transition to providing “thick Whois” service across all registries, and we continue to support that proposal today.

However, 3.2 goes on to state that even its base requirements could be changed by agreement between the Registry and Registrar, if the agreement is approved by ICANN. *“The agreement between the Registry Operator of a gTLD and Registrar may, if approved by ICANN in writing, state alternative required data elements...”* We believe that the elements set forth in 3.2.1 should be a minimum of required elements, and it should be made clear that, while additional data elements may be agreed upon, the data elements must, at least include those set forth in 3.2.

In the March 7, 2013 draft, 3.3.1 provides for continued provision of Port 43 Whois service containing the elements set forth in 3.2 and 3.3. That obligation is now restricted to providers of “thin” registry services. We support the continued provision of Port 43 Whois service for all gTLDs and note that 3.3 includes a mechanism for Registrars to enter into agreement with the gTLD Registry operator and, with the approval of ICANN, specify “alternative” data elements. As highlighted in the comments above, the data elements set forth in 3.3 should be held as a minimum standard that may be supplemented but not reduced.

Amendment and Waiver Process

We oppose the system contained in revised Section 6. This overly-complex process appears designed, not to give the affected parties full voice but, rather, to obfuscate and drag out the Special Amendment process with the net effect being that no Special Amendment may ever be made in this manner. While the new process may have been developed to address concerns of certain stakeholders seeking to prevent amendments that they do not favor, it is important to remember that this process should be policy-neutral since amendments may be proposed which are, in fact, favored by the very same stakeholders.

As such, we would support a more rational, pragmatic and streamlined Special Amendment process in Section 6. We propose that this involve one round of discussions between ICANN and the Registrar Working Group for a limited period of time and, if no agreement is reached, that the matter quickly be referred to expedited arbitration.

The Special Amendment process is recognized as an extraordinary measure; however, it must be one that is workable and that can actually result in an amendment if warranted. While the unilateral amendment power originally sought by ICANN may have been perceived by some as one-sided, the new process of Section 6 swings the pendulum too far in the other direction of allowing endless debate and appeals. If ICANN wishes to have registrars and other stakeholders adhere to the terms

of the RAA, it must foster a sense of trust and a more workable Special Amendment process, and one which may actually result in an amendment would better serve this goal than the proposed byzantine system of revised Section 6.

Comments on the RAA “Negotiation” Process

Despite the progress made, we must express our disappointment over the manner in which the RAA revisions were developed – and revised for public comment again – with an open public comment period still pending.

At the outset, ICANN’s election to proceed with RAA revisions as a bilateral negotiation is not consistent with its role as a public interest coordinator of the Internet DNS ecosystem. Drafting the RAA revisions as a bilateral negotiation with the Registrar NT suggests that ICANN perceives itself as a private company hammering out a ‘deal’ with commercial business partners. In reality, ICANN is a public interest DNS coordinator that was created as a non-profit, despite the challenge inherent in enforcing its ‘laws’ as contract violations, in order to privatize the management of Internet names and addresses in a manner that fosters competition, consumer trust, and global participation - in lieu of intergovernmental bureaucracy.

If ICANN’s contracts are its laws, the RAA is perhaps ICANN’s most fundamental statute, for it sets out not only the rules for registrars, but also (via RAA 3.7.7) sets forth basic rules for registrants as well. In that case, when the RAA negotiations are viewed in the light of regulatory rulemaking, the room for improvement in ICANN’s performance as a public interest coordinator becomes clear. What other analagous legislature drafts its legislation as a bilateral ‘negotiation’ with the stakeholders subject to oversight? What other regulatory body excludes the public from meaningful participation in the rulemaking process on the basis that only industry representatives are proper ‘parties’ to the discussion? For ICANN to earn the global Internet public’s confidence in

its trusteeship of the DNS it must continue to refine and improve upon its performance against these measures of its fundamental governance role and responsibility.

Moreover, the unveiling of a revised “Proposed Final” RAA – before the conclusion of the Public Comment Reply Period on the first draft to see the light of day from eighteen months of bilateral negotiations – with another very short opportunity for public review, analysis and comment is concerning. In a recent online webinar announcement, ICANN indicated that the RAA “negotiations ... have drawn to a close,” suggesting that this call for comments is a formality that must be followed, which casts doubt on how public comments will be adequately considered by the parties.³ These procedural shortcomings reduce institutional confidence in ICANN and its role in administering critical Internet resources on behalf of the public interest.

In closing, we wish to note that providing a mere twenty-one days to review, analyze, and provide meaningful comments on the work product of eighteen months of negotiations is wholly insufficient. Revealing documents of such critical importance to the entire internet community and providing such a brief comment period gives the impression that this is not a genuine effort to seek constructive public feedback, but is merely an exercise in process. The release of a revised version of the RAA, even before the close of the public comment period on the first draft, underscores the lack of meaningful opportunity for the community to contribute to the recently published outcome of nearly two years of closed door bilateral negotiations. We hope that is not the case, and that ICANN will give full weight and consideration to our public comments – and those comments submitted by other interested parties – during the Reply period. Similarly, as ICANN continues to receive feedback, we reserve the right to supplement these comments during the Reply period or thereafter, and we call upon ICANN to provide for a mechanism by which it may assimilate any recommendations of the Expert Panel on Whois into this “Proposed Final” RAA.

³ “This is an opportunity to learn more about the proposed changes to the RAA that are expected to come about now that the negotiations between ICANN and the Registrar Negotiating Team have drawn to a close.” RAA Webinar Announcement, <http://www.icann.org/en/news/announcements/announcement-3-30apr13-en.htm>

Thank you for considering our views on these important issues.

Should you have any questions regarding our submission, please contact INTA External Relations Manager, Claudio DiGangi at: cdigangi@inta.org.

About INTA & The Internet Committee

The International Trademark Association (INTA) is a more than 134-year-old global association of trademark owners and professionals, with members in over 190 countries, dedicated to supporting trademarks and related intellectual property in order to protect consumers and to promote fair and effective commerce.

During the last decade, INTA has served as a leading voice for trademark owners in the development of cyberspace, including as a founding member of ICANN's Intellectual Property Constituency (IPC). INTA's Internet Committee is a group of nearly two hundred trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.