

COALITION FOR ONLINE ACCOUNTABILITY

WWW.ONLINEACCOUNTABILITY.NET

C/O MITCHELL SILBERBERG & KNUPP LLP • 1818 N STREET N.W., 8TH FLOOR • WASHINGTON, D.C. 20036-2406
TEL: (202) 355-7900 • FAX: (202) 355-7899 • E-MAIL: INFO@ONLINEACCOUNTABILITY.NET

Comments of the Coalition for Online Accountability October 15, 2015

The Coalition for Online Accountability (COA) welcomes this opportunity to contribute to development of the third Joint Strategic Plan on Intellectual Property Enforcement, called for under the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act). See 80 Fed. Reg. 52800 (September 1, 2015).

Introduction and General Statement

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); Broadcast Music, Inc. (BMI); the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); NBCUniversal; the Recording Industry Association of America (RIAA); the Software and Information Industry Association (SIIA); Time Warner Inc.; and the Walt Disney Company.

The Coalition's main goal is to preserve and enhance online transparency and accountability, by ensuring continued access to the information needed to carry out effective licensing and enforcement of intellectual property rights in the online environment. This includes access to accurate and reliable data on domain name registrants, as a key tool against online infringement of copyrights and trademarks, as well as cybersquatting, phishing, and other criminal or fraudulent behavior online. Since our organization exists to expand digital commerce in legitimate products and services protected by copyright by helping to enable effective enforcement of intellectual property rights, we are especially pleased to contribute to the federal government's strategic plan for enhancing those enforcement efforts.

Those who enforce the copyright and trademark laws must have reliable access to the information and legal tools needed to perform this function. While of course this category includes law enforcement agencies, the vast majority of intellectual property enforcement activities are, and in the United States always have been, carried out by private sector actors, including for example COA participants. Nor can law enforcement agencies anywhere in the world devote the resources and expertise needed to be the sole or even the primary mechanism for dealing with the piracy and counterfeiting that has become so pervasive in the online environment. Private sector access is needed, and this access is often in jeopardy. U.S. enforcement policy, as reflected in the Joint Strategic Plan, should include a focus on ensuring that this access is available for the purpose of enforcement of intellectual property laws by the private sector.

AMERICAN SOCIETY OF COMPOSERS
Authors & Publishers (ASCAP)

Broadcast Music Inc. (BMI)

Entertainment Software Association (ESA)

Motion Picture Association of America (MPAA)

NBCUniversal

Recording Industry Association of America (RIAA)

Software & Information Industry Association (SIIA)

Time Warner Inc.

The Walt Disney Company

Counsel: Steven J. Metalitz (met@msk.com)

In the remainder of this submission, we address some more specific areas that should be identified as priorities under this general rubric in the Joint Strategic Plan.

1. Domain Name Registrars/Registries: ICANN and contractual enforcement

Some important developments since the last Joint Strategic Plan was published in 2013 should be reflected in the new Plan. The Internet Corporation for Assigned Names and Numbers (ICANN), the non-profit corporation which manages the Domain Name System (DNS), has entered into a new standard contract with its accredited domain name registrars, the only entities authorized to sell at retail (directly or through resellers) the registration of domain names in the generic Top Level Domains (gTLDs).¹ The 2013 Registrar Accreditation Agreement (RAA) refers more explicitly than ever before to the obligation of accredited domain name registrars to do their part in ridding gTLDs of blatantly abusive uses of registered domain names. The contract requires registrars to maintain an abuse contact to receive reports of illegal activity involving use of a domain name, and to “investigate and respond appropriately” to abuse reports they receive from any third parties.² Another key provision of the 2013 RAA requires registrars to make “commercially reasonable efforts” to ensure that registrants comply with their promises not to use their domain names “directly or indirectly” to infringe the legal rights of third parties.³

Taken together, these provisions provide an important avenue of redress against those who abuse gTLD domain name registrations to operate sites for pervasive copyright piracy or trademark counterfeiting, among other abuses. Ever since ICANN was created at the behest of the U.S. government in 1998, ICANN accreditation has always been a prerequisite for entry into the lucrative business of making gTLD domain names available to the public, a role that also gives registrars and their affiliates a huge competitive advantage in the marketing of a host of other support services to domain name registrants. Material breaches of the RAA can lead to the imposition of restrictions on the ability of an accredited registrar to sponsor (i.e., to sell) new domain name registrations, and ultimately to the loss of ICANN accreditation, and thus to expulsion from the gTLD domain name registration business altogether. However, the RAA is a contract between ICANN and the particular domain name registrar that is accredited; the obligations it requires registrars to meet can only be enforced by ICANN. In other words, the effectiveness of the RAA as a tool to prevent abuse and enhance cooperation by registrars is meaningless without a clear and robust commitment to contractual compliance by ICANN. Here, in the critical realm of execution, ICANN has thus far fallen dramatically short.

COA participating organizations have brought to the attention of accredited domain name registrars dozens of domain names sponsored by those registrars that are being used to direct Internet traffic to websites dedicated to blatant copyright piracy of copyrighted content, including music, movies, TV programming, software, videogames and books. In almost every case, the registrars fail to investigate or take any other action to deal with the flagrant illegal activity engaged in by their registrants using these domain names. In several instances, right

¹ gTLDs consist of three or more characters “to the right of the dot,” and include both the large legacy gTLDs such as .com, .net, and .org, and nearly 800 new gTLDs, the vast majority of which have been delegated subsequent to publication of the last Joint Strategic Plan.

² See section 3.18.1 of the 2013 RAA, at <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

³ See sections 3.7.7 and 3.7.7.9 of the 2013 RAA.

holder organizations have then filed complaints with ICANN, fully documenting the refusal of accredited registrars to respond appropriately or meaningfully, and asking ICANN to enforce the relevant provisions of the 2013 RAA. ICANN's invariable response has been to summarily dismiss these complaints, telling the complainants only that the registrars have "responded appropriately."

In sum, to date, ICANN's contract compliance record with regard to these critical provisions of the 2013 RAA is a complete failure. Unless and until registrars begin to comply in good faith with the obligations that they voluntarily accepted when they signed the 2013 RAA, and unless and until ICANN undertakes meaningful and substantive action against those who will not comply, these provisions will simply languish as empty words, and their potential to improve transparency, accountability and the rule of law in the DNS will never be realized.

ICANN's contract compliance failure occurs at a critical juncture in the life of the organization and its relationship with the U.S. government. ICANN is currently deeply enmeshed in a process of enhancing its accountability structures, as an integral element of its plan for taking over the last management functions of the DNS (and of associated systems for managing IP addresses and Internet protocols) from U.S. government oversight. This "transition" process was launched by the U.S. Department of Commerce more than a year ago, and will not be completed until the U.S. government approves ICANN's transition plan. The U.S. government should insist that enhanced accountability for ICANN includes an ironclad commitment, backed by concrete action, that it will fully enforce its contractual provisions that require effective action to be taken against those who abuse the DNS to enable or facilitate pervasive copyright piracy and similar blatantly illegal activities. This should be a key aspect of the government-wide Joint Strategic Plan for Intellectual Property Enforcement. Nothing less should be acceptable for an Administration that seeks to bolster the "multi-stakeholder model" for managing key Internet resources like the DNS, because that model, at its core, depends on enforcement of contracts in lieu of governmental regulation.⁴

2. Domain Name Registrars/Registries: Voluntary Initiatives

As part of the current strategic plan, the U.S. Intellectual Property Enforcement Coordinator (IPEC) pledged to "continue to facilitate and encourage dialogue among different private sector entities that make the Internet function, which may include domain name registrars and registries," as part of a "voluntary, non-regulatory approach to combating online infringement."⁵ However, for a variety of reasons, this initiative has not advanced during the

⁴ In that regard, COA is concerned by pending proposals to recast the scope of ICANN's mission and mandate to effectively insulate the organization from such important obligations, in a way that may support the misguided argument that ICANN should be excluded from enforcing its contractual obligations in the context of copyright infringement. See *CCWG-Accountability's 2nd Draft Proposal on Work Stream 1 Recommendations 25-26*, at <https://community.icann.org/pages/viewpage.action?pageId=53783460&preview=/53783460/54887691/CCWG-2ndDraft-FINAL-3August.pdf>, including a proposal to amend ICANN's Bylaws to prohibit ICANN exercising its power to engage in activities regulating services "that use the Internet's unique identifiers *or the content they provide*". Although this ICANN working group has taken the view that such an amendment would not act as a restraint on ICANN's contracting authority, any such language must be further clarified to exclude such an interpretation with respect to copyright infringement.

⁵ 2013 Joint Strategic Plan at 36.

ensuing two years. We urge the IPEC to include such an effort in the next Joint Strategic Plan.⁶ IPEC has a well-established track record in facilitating useful inter-industry dialogues among right holders and entities that provide important enabling services, such as payment processing and advertising placement. These dialogues have led to concrete progress in encouraging major players in these sectors to step up to their responsibility to help and to cooperate in the service of a safer, healthier e-commerce marketplace. IPEC is well situated to play a similar role with respect to domain name registries and registrars, whose services are also critically important to all websites in making it easy and convenient for customers to reach them.

It is crucial that voluntary efforts be viewed as a supplement to, and not as a replacement for, the vigorous contract enforcement that USG must insist that ICANN undertake. But they can offer more flexible and pragmatic solutions than would be available through legislative or regulatory initiatives. Best practices that will help identify registrants that are using these services mainly to advance piracy and similar illegal behavior, and that will facilitate prompt steps to deny these services to those who persist in this activity, are in the best interests of all players. COA participants look forward to working with the Office of the IPEC in such efforts.

3. Other ICANN Contract Issues

The Joint Strategic Plan should also commit the U.S. government to play an active role within ICANN in pressing for strong contract enforcement activities in at least two other areas: gTLD registries and Whois.

In the ongoing expansion of the new gTLD space that is ultimately expected to result in the delegation of more than 1000 new domains,⁷ every new gTLD registry has committed by contract with ICANN to policies aimed at prohibiting new gTLD domain name registrants from using those names to carry out “piracy, trademark or copyright infringement, or counterfeiting,” along with other forms of illegal activity.⁸ Labeled as a “public interest commitment,” this obligation grew directly out of efforts by the ICANN Governmental Advisory Committee, with substantial leadership from the U.S. government, to insist on much stronger efforts than ICANN had proposed to prevent the new gTLDs from becoming havens for massive infringement and other criminal activities. Even though the basic “public interest commitment” fell well short of what the GAC called for, it still provides a contractual basis for requiring a rapid response, both by the new registries and by their authorized registrars, when piracy or counterfeiting issues arise in the new gTLDs. As might be expected due to the anemic takeup of the new gTLDs in general, the first new gTLD domain names for sites dedicated to infringement are just starting to be identified; but as more serious problems are almost sure to crop up within the time frame of the

⁶ COA applauds the request of the Chairman and Ranking Member of the U.S. Senate Judiciary Committee, in a letter dated April 9, 2015, urging the IPEC to “facilitate conversations among rightsholders, registrars, registries, and ICANN to identify mutually agreeable best practices in this important space.” See <http://pub.bna.com/eclr/040915grassleymarti.pdf>.

⁷ As of October 9, 2015, 764 “new gTLDs” had been delegated since October 2013, with 574 applications still in the pipeline. See <http://newgtlds.icann.org/en/program-status/statistics> for current statistics.

⁸ The minimum standard is set out in section 3(a) of Specification 11 of the Registry Agreement each new gTLD registry has signed; some registries have taken on more extensive and detailed commitments. The “Base Registry Agreement” containing the minimum obligation, and a compilation of all the new gTLD registry agreements, can be found at <https://www.icann.org/resources/pages/registries/registries-agreements-en>.

Joint Strategic Plan, it is prudent to identify as a priority a strong U.S. government insistence on vigorous enforcement by ICANN of the “public interest commitments.”

The 2013 RAA contains important commitments for improving the accuracy and accessibility of domain name registrant contact data through the WHOIS system.⁹ Registrars signing on to the 2013 RAA take on somewhat stronger obligations to improve the accuracy of the Whois data on which intellectual property owners, law enforcement, consumers and members of the public rely to learn who is responsible for particular domain names and the websites and other Internet resources associated with them.¹⁰ Though many registrars have complained loudly about these new obligations and are already agitating within ICANN to relax them, ICANN must stay the course and continue to enforce them, as one key ingredient of a broader strategy to improve the accuracy level of Whois. While ICANN’s enforcement record to date regarding the Whois-related provisions of the 2013 RAA certainly surpasses the abysmal record it has compiled with regard to the provisions addressing abusive uses of domain names, it still needs improvement, and the U.S. government should remain vigilant in pressing for it.

The 2013 RAA also set in motion a long-overdue effort toward addressing the huge issue of proxy registrations, where tens of millions of gTLD registrations lurk in the shadows of the ostensibly public Whois. While there is a legitimate role for proxy registrations in limited circumstances, the current standardless system is frequently manipulated to make it impossible to identify or contact those responsible for abusive domain name registrations. A first step toward greater accountability and transparency was taken in the 2013 RAA, which requires some proxy registration services to disclose their terms and conditions and abide by those they have disclosed.¹¹ More importantly, it led to the creation of an ICANN working group to draft accreditation standards for such services, nearly all of which are operated by subsidiaries of accredited registrars. The goal is to require registrars to deal only with services that meet accreditation standards on issues such as accuracy of customer data, prompt relay of messages to proxy registrants, and ground rules for when the contact points of a proxy registrant will be revealed to a complainant in order to help address a copyright or trademark infringement. As part of the Joint Strategic Plan, the U.S. government should become much more engaged on this issue, in support of U.S. right holders and others who seek to bring the bad actors to light (and to justice), as well as in support of U.S. law enforcement interests. If a satisfactory accreditation system cannot be achieved in the near future within the ICANN structure, it would be timely and appropriate to consider whether legislative solutions or other unilateral actions by our government would be helpful in ameliorating the situation.

4. Successor to Whois

As the IPEC is well aware, access to accurate registrant contact data is essential for identifying infringers and for facilitating efforts either to legalize their use of copyright material through licensing, or to end it through enforcement. Several important initiatives are underway

⁹ Although the GAC asked that new Whois accuracy obligations be incorporated into the registry agreements for new gTLDs also, this was not done.

¹⁰ See RAA sections 3.7.7.2 (suspension of domain name for false Whois data) and 3.7.8 (duty to comply with Whois Accuracy Program Specification, at Specification 2), at <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

¹¹ See Specification 5 of the 2013 RAA.

within ICANN and associated Internet standards bodies that will have a significant impact on the continuing ability of right holders and law enforcement to access registrant contact data, and on the accuracy and usefulness of that data. Indeed, within the next several years, possibly even during the lifespan of the next Joint Strategic Plan, the current Whois system may be partly or wholly supplanted by a new system for dealing with domain name registrant data. One part of this transformation is already well advanced, with the adoption by the Internet Engineering Task Force of the RDAP protocol as a successor to the badly outdated technical protocol that has been employed for Whois services for the past two decades. Under most of the agreements ICANN has signed with contracting parties that maintain Whois services, RDAP implementation can be mandated automatically once such implementation is “commercially reasonable.”¹²

While the transition to RDAP should have no immediate impact on the policies surrounding public access to registrant contact data, the increased flexibility it provides will facilitate the implementation of many proposed policy changes, including the establishment of tiered or gated access rules. Such proposals, under which unrestricted public access to what is generally poor quality Whois data would be replaced by much more restricted access to what is hoped to be more accurate data, have been under consideration within ICANN for years, and are expected to be at the heart of a formal policy development process on designing a new registration data service. This process is about to be launched at the request of the ICANN Board of Directors. Given the important role that public access to accurate domain name registrant contact data plays in intellectual property enforcement, as well as the enormous contribution that such access makes to the advancement of transparency and accountability online, a strong U.S. government role in ICANN’s ongoing work in this area should be a central feature of the new Joint Strategic Plan.

5. ccTLDs

ICANN has little influence over the policies or activities of the hundreds of country code Top Level Domains (ccTLDs)¹³, whose registries generally do not have contractual relationships with ICANN.¹⁴ But COA participants note that some of these ccTLDs are attractive destinations for professional copyright pirates seeking a registry that is tolerant of, or even willfully blind to, use of their domain names for illegal activities. While some ccTLD registries have been much more responsive to reports of these abuses than any of their gTLD counterparts, others are completely uncooperative. As recommended by the Office of the U.S. Trade Representative in its 2014 Notorious Markets Out-of-Cycle Review, our bilateral discussions with trading partners should encourage them to “take an active role in preventing the use of their ccTLDs to facilitate

¹² See Specification 4 of the Base Registry Agreement for new gTLDs, at <http://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>.

¹³ These are the 2-letter top level domains allocated to each UN-recognized country or territory, along with a smaller number of equivalent TLDs in non-Latin scripts.

¹⁴ ICANN does implement the ultimate decision about which entities operate ccTLD registries, however, as reflected in Whois data for the DNS root zone. While this responsibility has always been carried out under US government oversight, that will no longer be the case once the transition of the IANA functions to ICANN is complete. As COA has pointed out in publicly filed comments, the lack of any “provision for oversight, appeal or review of IANA function actions involving the country code Top Level Domains ... is a major flaw” in the transition proposal now working its way through the ICANN-devised process for ultimate submission to NTIA. See http://www.onlineaccountability.net/assets/2015_Sept08_Comments_on_IANA_transition.pdf.

the sale and distribution of counterfeit and pirated products and services.”¹⁵ COA urges that this priority be reflected in the Joint Strategic Plan, along with other potential avenues for making progress in this sphere, including the relevant provisions of U.S. Free Trade Agreements¹⁶, and a possible role for the World Intellectual Property Organization, which has issued “ccTLD Best Practices” that might be adaptable to address this issue.¹⁷

Respectfully submitted,

Steven J. Metalitz, Counsel
Coalition for Online Accountability

¹⁵ U.S. Trade Representative, “2014 Out-of-Cycle Review of Notorious Markets,” March 5, 2015, at 12, n. 21.

¹⁶ See, e.g., Australia FTA, Art. 17.3; Chile FTA, Art. 17.3; Peru FTA, Art. 16.4; Singapore FTA, Art. 16.3. All these texts are accessible via <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

¹⁷See <http://www.wipo.int/amc/en/domains/bestpractices/index.html>.