
PRAGUE – At-Large Registrants Rights & Responsibilities Working Group

Tuesday, June 26, 2012 – 17:00 to 18:00

ICANN - Prague, Czech Republic

Beau Brendler:

Okay, this is Beau; would it be possible Matt to put the document that was photocopied for this meeting up there? I don't happen to have the hard copy. I know you did, but I don't have them here at the moment, it's my fault.

So this is the At Large Registrant Rights and Responsibilities Working Group meeting. While we are looking around for an agenda, I will remind those of you who have been on the Skype chats for this meeting that the agenda was posted in there, so you can look on there. I also will dig up a copy of it in a moment, and email it to all of you so that you can see it on the Registrants Rights List.

This is actually just fine to have this bit of moment here before we go to the formal agenda, because given the course of some meetings that have happened over the past few days, and some things we have heard in the past few days, I have had two requests from members of the group to give a summary of some issues or to make a response specially Holly Raiche has offered to give us a brief summary of what she heard in the latest update of the RAA negotiations. I guess we're now supposed to call them RAA, what was the word John Jacques suggested, RAA rules – Affirmation of the Contract.

And also Carlton Samuels has mentioned that he would like to say a few words about some issues related to how this dove tails with compliance.

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So while we are trying to get the agenda in front of you I would like to ask Carlton or Holly, which one of you would like...

Male: Beau, it's actually up on the screen already.

Beau Brendler: Oh wonderful, okay. Well, this is the time for us to thank you very much for doing that. I apologize for not bringing this on paper; I will certainly have them on paper for you if you would like them because Gisella printed them out yesterday. Is Carlton down there? He's not down there. Is he? Well, Holly go ahead then please and then after you're done we will go through the formal agenda that you see on the wall.

Holly Raiche: Okay, I'll try and be really brief, but this where we're up to – do I have to speak slowly? Right, this where we're up to from yesterday, and this is the RAA data, I don't know how many of you were also there, but just to review where we're up to so the discussions can actually follow on from that. Now the draft that is on the side is just that, it is a draft for comment. It doesn't actually represent the final position of anybody.

There was some background given which I won't go into because most of us know. Where we go to was there were really three areas where they are seeking comment and therefore issues –

[background conversation]

Holly Raiche:

Right. There is particular areas where they are seeking comment and these are the areas that will obviously have to think through very carefully, there's four and then three. First of all issues about the WHOIS data retention, what data and how long. The method of verification and the timing of verification, i.e. do you contact somebody by email, by phone, by whatever, recognizing there might be some language issues as well and the timing, do you actually put a request up immediately or do you not put something into the root until you've actually verified the person, recognizing there is a set of expectations on the one hand that people will expect to apply and then have the name go straight ahead, as opposed to the requirement for data accuracy.

I think the registrars have raised some issues as well, things like technical burdens on them. There question is about is this going to mean people run away from being involved, they'll all use proxy servers because they don't want to give data and what are the privacy issues involved in terms of verification as well.

Should there be annual re-verification and what kind of burden and this is now the registrant speaking, is this a legitimate burden? Does it have unintended consequences and so forth? In terms of I think the response that was in the comments, the one thing that I was particularly worried about is that the privacy issue raised more or less articulately.

So I was particularly relieved that the ALAC statement today that basically said we want to go ahead. We understand the privacy issues are understood and being dealt with, they should not stop us actually moving forward on issues of I suppose compliance as well as the need for accuracy and verification.

So Beau has excused himself; was anybody else at the RAA update, negotiations update and they want to add anything? Because I was just trying to isolate the main issues. We're going to be – to repeat the two issues that are now apparently the stumbling blocks are the issues of verifications in terms of how do you do it, and when do you do it, and data retention. Those are the things that apparently that just holding the negotiation up. So those are the things that they're going out actively seeking comment from everybody and most particularly us on those issues. Cheryl.

Cheryl Langdon-Orr:

Thanks Holly. Cheryl Langdon-Orr for the transcript record. It might be useful as we discuss this to remember the briefing that we had and that listing. At the time as the record for that meeting will show, I did raise the point on data retention, but I also want to make sure it's the big picture here, it's what the data is and how long it needs to be kept, and how much of it there will be. Because this could end up to be a huge impasse, beyond terabytes of terabytes of terabytes of stuff, some of which it's not even legal to collect in some place and spaces.

So this one really does need the diversity of our community to discuss, think and probably bring back a bit of this and a bit of that rather than a simple clear majority consensus, because it is going to be very, very divergent, I can guarantee we won't get out of our Chinese ALSs the same answer as we get out of the Australian one.

Holly Raiche: Probably not just divergent with Chinese I would say. By way of background, the law enforcement agencies want the data kept at least for two years. There are normally corporate responsibilities in keeping data but you would have to say to what extent does that reflect on requirements on registrants. And I'm not sure it does, and I'm not sure if we're talking about the same data.

So I suspect before we answer it would be nice to go back to what it is that the law enforcement agencies actually want. Also go back to what the registrants are saying about the amount of burden it will be on them. Sala you had your hand up?

Salanieta Tamankaiwaimaro: Yes, just before that Holly, I think we really need to be clear that it's not just that sort of corporate data, it is credit card information, and that in many corporation law sectors is not legal to keep under the merchant banking agreements that the companies will be working under. So it gets really messy.

Beau Brendler: How are you doing? Are you close to wrapping up on your part yet?

Holly Raiche: I'm taking over your...

Beau Brendler: You're tap dancing, okay, all right. So Sala has a question, go ahead.

Salanieta Tamankaiwaimaro: A comment. A comment anyway, as a former legal counsel to a telco and ISP where I was – where we would be served with warrants from cybercrimes and whatnot asking for certain information, I just like to say that every jurisdiction has different laws in relation to how much you're going to release and there are various categories.

One is it could either be a cybercrimes issue in terms of a request for information or two, it could be an intellectual property infringement. And in terms of what data you're going to release again is based on diverse jurisdictions, jurisdictional laws.

For example there are certain countries that have strong data protection laws and there are many countries in our region the Asian, Australia-Asian, Pacific region for instance that have zero data protection laws; having said that, in terms of the accuracy of the data, I used to work closely with ISP engineers when it would come to extraction of information in relation to who owns what IP addresses, issues like time stamping and that sort of thing.

And when you're crossing multiple jurisdictions, the issue of time stamping becomes an issue. And again jurisdictions defer in relation to what standards are in place in certain jurisdictions. For example –

Beau Brendler: Sala, can you hang onto that, till the end, because I'd like to get us back on the agenda here.

Salanieta Tamankaiwaimaro: Okay, sure.

Beau Brendler: Which involves Carlton giving his discussion that he wanted to briefly to have and then we will come to this either at the end of this agenda or during it, thank you.

Carlton Samuels: Thank you, Beau. There are really two issues that kind of conflict here. The 3.78 regarding the 3.78 clause, it seems to me that where the real issue lies is the compliance team determining that that is a distinct difference to be made between the compliance process and the enforcement process, and it went beyond to say well we are in charge of compliance by extension, somebody else is in charge of enforcement. But it's not us. When you listen to the counsel, people from the counsel's position and based on what we heard here from Sam Eisner now, you then get a sense of the tension that exists even inside ICANN between compliance and enforcement.

One of the way I think we can address this issue is know that we have a definitive statement from the legal counsel group. I think we need to separate the clause, the sub clauses in 3.78. I think it is important for us to do that so that we create a sub clause or a new clause that speaks to the enforcement action principally. That's the first thing.

This morning you hear her say that we in terms of the ALAC we saw a policy development process around just one major issue from the WHOIS review team, and that is a privacy proxy conundrum. I still think that is the posture that we should take because if you look at the rest of the report and the recommendations from the report, most of them are

about implementations of things that have already taken decisions have been taken about.

And there are really complaints about lack of enforcement; you look at most of that. I would therefore suggest that in the same breadth, that we're looking at clause 3.78; we also look at the other touch points in that report where there are enforcement responsibilities that are I don't know, not particularly strong or they are not engaged at all. And where there is opportunity to lay those out in our how do you say it, we clearly can't write a contract, but what we can do is make an aspirational proposal about certain clauses, if you understand what I mean.

Where we see those kinds of gaps, I would suggest that we're going to do the same thing. Now this is going to be a joint kind of arrangement between the registrants' rights working group and the WHOIS working group. But there is enough opportunity for a lot of us to get involved and make our voices heard.

With respect to the privacy issue, privacy proxy issue, if you notice the posture that the ALAC has taken is that because both activities tend to the same objective, right, they tend to the same objective. We may want to ensure that whatever the issues report, the issues report that begins the PDP process in the GNSO, we may wish to make sure that they are not obfuscated. Let me tell you why.

There has been already some momentum in looking at the privacy proxy issue with the consultation and the reveal study, okay. Essentially that study went out to say well if you are the folks who are involved in this privacy proxy relationship, if I were to ask you some questions to get a better handle on what you do, would you answer them?

And the questions actually speak more to what do you do now, as a matter of representing privacy interests are becoming a proxy, if you look at the questions that they attempting to ask, the range of questions. Somebody should have told them directly that you weren't likely to get credible responses from that group anyway. They would have known that.

And to me when you start off by doing that kind of thing and spending how many thousand dollars, I don't know, it suggests maybe you're in the wrongs ballpark in the consideration of what might be for the PDP. The PDP that we have, I believe it is important to accept that we have a practice already in play, and what we need to do is develop responsible rules – operational rules for those who might wish to provide those services that does not detract or on the mind, the public interest in having WHOIS credible, WHOIS data for access.

I think that ought to be our proposal. Can I just stop there for the minute and allow others to say something?

Beau Brendler:

Yes, actually Carlton, thank you. I see people have questions, but I would like you to hold your questions to the end so we can just briefly get through the agenda that we've got for the meeting. There are some great ideas here and great thinking about where the group can continue to go, it's an evolving thing, but I think we can just down through this, you'll see that it's dove tailing right into what we're talking about.

The first item on the agenda, which is the lawyer's review of the May 10th, 2002 advisory, which is one of the documents that has helped sort

of clutter up and provide another avenue of fuzziness to 3.7.8. Cintra Sooknanan who is our vice chair is leading that, but that's not ready yet so we will have the report from that at a future meeting.

You can see item number two there, evaluate proposed rewrite of RAA 3.78 and you can see with number three there we've got to collaborate with WHOIS review team and other interested participants. Can you move the document up please or move the clock? Thank you. Back down a little bit.

[background conversation]

Beau Brendler:

That's okay, this is fine. So we have collaborate with WHOIS review team on two different items here and the reason is that we were going to discuss a couple of possible bureaucratic moves; one is as you see in number four collaborate with WHOIS review team and other interested participants on the statement that could possibly be endorsed by ALAC to appoint an investigative panel to review the structure of the compliance department. I think given the nature of what's been discussed over – or what's happened over the last couple of days, there is a smaller group that's been meeting on that so I don't necessarily think we have to discuss that here. If you want to, that's fine, let's do it at the end.

Number five collaborate with the WHOIS review team and other interested participants on a statement that could possibly be endorsed by ALAC to appoint a liaison to the RAA contractual negotiations process

from either this working group or the WHOIS working group. Those of you who were in the board meeting this morning, they have heard me make reference to the need for this to happen now, because it no longer really makes sense for that process to happen without some participation from the public interest.

Review of the current additions to the RAA itself; let's put that aside for the moment and then really what I think we want to do now is as far as number seven goes, assign a subwork team to, I'm going to just suggest changing that wording to work on a new wording of 3.7.8.

So the action item that I want to set now here at 25 minutes to 6 is that I would like to appoint a small team of volunteers here to actually craft the rewrite of 3.78 using some of the research – a lot of the research that Garth Bruen has done, that Carlton has done, so that we use some of the momentum from our discussions to submit that rewrite here in Prague and perhaps call attention to it.

So may I take some volunteers? Holly Raiche, I'm going to guess Evan Leibovich, Carlton Samuels, anyone else? Okay, so during the time that we're here, we will work with Garth's wording and our own wording and will produce the suggested rewrite for 3.7.8.

Yes, in fact the reason I wanted to get through that is now we've actually gotten through the agenda that was set and we can open it up to all the questions that people had previously. There was Holly, and Cheryl and I think Carlton. Go ahead Holly and Sala too.

Holly Raiche:

Just a couple of things. I think there is an immediate task which is around the WHOIS report compliance and that sort of thing. There is a larger task which involves the work of the RAA group and that picks up all of the stuff that was identified by subteam B, so to me that's like step two.

Step one is right now to actually respond immediately and well to the sort of issues that have been raised by the draft and by the responses. And I think 3.7.8 is part of that. What I'm going to suggest in the rewrite and get people's opinions on, the compliance team – I didn't have a change to look at their paper, but they suggested that there were criteria that they actually looked at to determine reasonableness.

Now if those criteria are there, if they're articulated then we have the components of what might be in the sorts of clauses, so that reasonableness does not leave, is not left hanging that there is a test that you go through. Either you take steps and in the end you have done something, you have done enough and we have to determine what that means; or you haven't, and then we can live with reasonableness because it has a meaning.

I think the other thing we have is we now have in the specification form what we mean by accuracy and what we need to be doing is saying this is a terrific approach because you finally said this is what you mean by accuracy, not the vague statements we've seen, and this is what we mean by reasonableness [of the same state]. It will actually make that clause enforceable in a way that it has not been to date. So that's what the team would be but before we actually start drafting something, welcome people's feedback.

Beau Brendler: Let's go to – Sala did you want to reprise what you were talking about now, or did you want to wait for...

Salanieta Tamanikaiwaimaro: Respond to Holly.

Beau Brendler: Oh, respond to Holly okay. All right you can go ahead and do that and then we'll go to Cheryl.

Salanieta Tamankaiwaimaro: Thank you just very quickly on the notion of reasonableness back to the RAA compliance or the contract, I mean the compliance can only enforce a breach of the contract and I think it's critical that we make that clear. And whilst I haven't – my caveat is that I haven't fully read the RAA, but I assume that the RAA how ICANN would have drafted it would be that it would be subject to US laws. If this is the case, then the term reasonableness and this I would like to submit and have it on record, and perhaps the drafting team or whoever could sort of take note, the term reasonableness would be measured according to how the courts in whatever jurisdiction, whatever jurisdiction and law within the United States defines reasonableness. I just thought I'd put that out.

Beau Brendler: Holly?

Holly Raiche: My comment would be not if you tell them what it means. If the document actually includes by the way, reasonableness means this in that context, then that's what the courts actually use as a test.

Beau Brendler: Thank you, Cheryl did you want to ask a question or make a comment now?

Cheryl Langdon-Orr: Thank you, Cheryl Landon-Orr for the transcript record, and this goes to Carlton's report, and I just pinged on one thing and I'm now going to try and channel Alan Greenberg from an earlier meeting, but I'm pretty sure one of the points Alan was making seemed to not necessarily picked up with what you were saying is that there isn't going to be an issues report on this matter, that in fact the issues report says we don't need to do an issues report, we need to do a PDP, and that actually takes away a rather normal opportunity for us to comment on.

And I just want to be really clear on that, because what it means is, we've got – well, not only do we have to be in the PDP, and that won't be a problem. We actually need to get a fairly strong set of comments in and I like to see set of comments, it's very good for the ALAC and I think ALAC should be doing advising, I think as the working group should be suggesting to the ALAC that it takes some drafting and makes its advice, that's aside.

But what we should probably do is not only put commentary into the current call for comments on the draft wording, but we should definitely try and get – this is a numbers game now, right, we get as many ALSs, your Aunt Mary, you know, I’m not suggesting that we have proforma words printed and that sort of thing, but really the more the merrier, because it’s the only way it’s going to sway them out of their comfort zone. I just want to be really clear, we actually have one less opportunity than we normally do.

Thank you and I need to leave, Beau, I’m sorry. Thank you.

Carlton Samuels:

Beau, just to say that Cheryl again is very right about this, this is exactly what the standing is and the suggested role that we have to play is as she lays out, thank you Cheryl.

Beau Brendler:

While we’re sort of on this topic, I mean to go back to the process, specifically for 3.7.8 I mean once we redraft it here what is the – where does it go, I mean can it enter into RAA negotiations now, or is it just going to be tabled for a while or put out for public comment – and Holly do you have an answer for that?

Holly Raiche:

I do have an answer. What they have done and it specifically said in the RAA negotiations update, we are actually looking for feedback on, so we have been invited, please would we comment on, that means they want us to comment, they want us to comment as soon as possible.

The reason they released the draft of the specification, the draft of the RAA and the registrar's comments is they expect us to look at that package and to comment and – I mean the first thing we've got to do is 3.78, but I suggest we have to also look more broadly. Yes, I think we really have to look at what the registrars have said – bye.

Beau Brendler: Okay, Sala has a question, go ahead Sala.

Salanieta Tamankaiwaimaro: I just have a quick comment. I think one of the things that I perceive and correct, Garth, correct me, Beau, if I'm wrong is that At-Large is interested in relation is the stronger enforcement, am I correct in assuming that, Beau?

Beau Brendler: Yes.

Salanieta Tamankaiwaimaro: Okay.

Beau Brendler: Stronger enforcement but also enforceability, in other words the tools for enforcement aren't necessarily there the way they should be.

Salanieta Tamankaiwaimaro: Okay, right, correct. And you know when ICANN compliance said today that they're not regulators, that they can only manage contractual

breaches, legally in my view they're correct. What I would propose that the At Large community can actually do is this, if we drafted or if we brainstormed on standards and I think Carlton had sort of alluded to it, and I've also raised it in the Skype discussions on what should be done, that can also be fed to the GAC in terms of checklists and that sort of thing.

Now, I'm not talking about new regulation. If you heard CZ NIC when they made their opening speech right, at the ICANN opening, this Prague meeting, one of the things they mentioned was that even dot com, you know is regulated here in their jurisdiction. So the point I was trying to make was in terms of highlighting what acceptable standards from a consumer public interest point of view.

And also I'd like to excuse myself, but if you need anything done, I'd like to volunteer my services.

Beau Brendler:

Thank you very much, I really appreciate that. I wanted to let everybody know that within the Skype chat the At Large Prague chat, we have also had offers for participation from Cintra who I have included and also Rudi Vansnick from Europe. So we have a very substantial team to do this, so I think unless people have specific questions, my instinct at this late hour after we've been in meetings all day is to sort of simply say that let's end this here, we've gotten through our agenda, and we know what task is in front of us which is to get our 3.7.8 rewrite completed and give these folks who are interested in participating a chance to review.

Do I have any questions, objections from the floor? Okay, what – go ahead Heidi.

Heidi Ullrich:

Thank you Beau, this is Heidi Ullrich for the record. If you would like to have a meeting, an informal meeting there is free time tomorrow between 13:00 and 14:00 and we can get a small room for you to meet and bring Cintra in on Skype is you'd like.

Beau Brendler:

That would be fantastic. I would love to do that. So action item number two I guess if you call is that we should be able to avail ourselves to a room tomorrow from 1:00 to 2:00 in the afternoon, which should be free. So our point in gathering then will be to draft that wording, and the reason I'm talking very slowly and kind of hesitating here, because I'm watching sort of all the people on the chat who are trying to figure if that time is going to work for them. It looks like it is.

So then thank you very much and will see everyone from 1:00 to 2:00 tomorrow, with location yet to be announced. But I will send that location out on Skype and on the mailing list.

Also I spoke to Olivier. He has had to leave and since this is the last meeting of the day, he gave me the stick if you will to adjourn for the day. So today's meetings are hereby adjourned. Thank you.

[End of Transcript]