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TORONTO – Registrant Rights and Responsibilities Working Group  
Tuesday, October 16, 2012 – 16:00 to 17:00  
ICANN - Toronto, Canada

GISELLA GRUBER: Ladies and gentlemen, we are about to start the next session, which is the Registrant Rights and Responsibilities Working Group Meeting on Tuesday the 16th of October, local time 4:30 PM in Toronto. Chair Holly Raiche.

Yet again, a reminder please to say your names when speaking for transcript purposes, but also for our lovely interpreters who have already had a long day. Thank you. Holly, over to you.

HOLLY RAICHE: ...and for the record. Next, my slides are coming up; we have a couple of issues to deal with. First of all, do we disband because in fact the reason for the formation of the GNSO Working Group was actually completed in that it resulted in negotiations? We could draw a line under that and say, "Finished. End story."

On the other hand, we've got Carlton saying no, and I'm not going to let you have the microphone, because in fact there were plenty of issues that were raised by that working group. It's in the final report for anybody who really can't sleep tonight; you're welcome to read the 128 pages. We'll send you the link. I put on my slides, which Matt is about to put up, the two teams...the result of the two teams. One was an aspirational charter. It was hard-fought, we lost, all we got was an

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aspirational charter. But there are issues there at some point in the future we could pick up and that may be reason enough alone to keep that working group going.

The other is there were lots of issues that we identified, not all of which are the subject of RAA negotiations. So there is plenty of future work to do and it has to do with the RAA and its adequacy and what's there and what can be improved. That would be a long-term goal. The short-term goal, which we can either deal with under this or Carlton's group, WHOIS, because he's going to follow me, but he's going to agree that his group and my group get together. That that's fine, thank you very much, Carlton.

Is what we discovered yesterday, in conversation with the Compliance Working Group and it became very clear that the bottom-line for the RAA does not allow the kind of penalty that says, "By the way, registrars, if you keep putting in name after name after name, registrant name after registrant name, and they keep getting knocked back..." There doesn't seem to be a penalty. Now Garth, you can add to the sort of disquiet we had yesterday.

What it wound up with was several of us raising our eyebrows and saying it's time to write to the board to say, "We know that you're working through many improvements to the RAA, but at the end of the day if there isn't a way to say, 'You, registrars, are just letting criminals in and you don't care.', we're going to do away with you." Termination is my term. Then we could do something along those lines. It would obviously be far more eloquent and far more evidence, and so forth.



And maybe...the feeling of the group, do we actually want to discuss that really high-level problem we identified yesterday or just create some of us that can go away, read through the negotiation documents such as they are, pointing out that all we've had...we've had a public briefing, we know what they've said. Carlton and I sat there yesterday, I took notes, I sent around a report to everybody.

So that's the extent of what we know. There are some hints about what's happening, but we didn't actually hear the kind of hint that said there should be a drop-dead line after which some registrars just ought to be drawn, hung and quartered, is the term. Now, Garth have I got that right?

GARTH BRUEN: You do. But I might just want to add a few points when you are out of breath.

HOLLY RAICHE: How long do you want to wait? Go ahead.

GARTH BRUEN: Thank you. Garth Bruen, Chair of NARALO, for the record. What Holly is referring to, and just so everybody is clear and on the same page...I, in particular, for several years have been researching the issue of false WHOIS and compliance. And I can say that I somewhat fell down the rabbit hole and, to a certain extent, I hit the bottom.

Because what we found is that a very, very important portion of the contract does not appear to be enforceable. And this is actually



confirmed within the WHOIS Working Group report that ICANN is supposed to respond to. Now the issue is that any deletions or suspensions of domain names, in relation to reports of WHOIS inaccuracy, are completely at the discretion of the registrar. And that's actually the term that I believe Compliance used in their own presentation, is that it is at the discretion of the registrar. Which means that it is not a breachable offense if they do not do it.

So there actually is no way to enforce this part of the contract. And I bring this up because this problem, as it is, is not part of the negotiations. And it's not just us who have said this. This is in the WHOIS Review Team report. And I don't think that this is just...sorry Holly. You can keep eating your banana. This is not just about criminality and abuse; this is actually also about registrants' rights and the consumers of domain names. Because there is no policy at the top level, in terms of the contract, it means that the policy is pushed down to the whim of the registrar.

And the domain customer themselves don't know what that policy is going to be, and don't know where the line is until they cross that line as far as the registrar is concerned. So we've been talking about very extreme cases of persistent abuse and criminality, but this may also be a problem of just the domain consumer not knowing where they stand. Thank you.

HOLLY RAICHE:

Okay. That having been said, I think I would like now to ask sort of two questions, or maybe one. Number one: Are people happy to continue with this particular working group and it picking up where the GNSO



Working Group left off, and that is continuing to identify issues in the RAA that we feel need improvement over time that are not being picked up in the current negotiations that are still issues? And let me give you an example. The RAA actually refers to a code of practice that people should comply with.

Well in fact there is no code of practice at all. And it may be that either you get a code of practice or something that says, "This is what we believe good registries and registrars should do." And whether it's voluntary or mandatory or whatever. That is a piece of work in and of itself. There are also other issues...I mean I haven't gone through the 20 pages of issues. I'm sure there's stuff...so do people want to continue this group with those terms of reference? Cintra?

CINTRA SOOKNANAN:

Hi Holly. Thank you. First of all I'd like to really welcome you as chair of this group. And I do think that this working group remains relevant and I also think that in actually defining our scope of what our next steps are. As I told you just now, I would be happy to do a mind map, just since there is so much text to read through and so many ongoing issues that may have been sorted by the negotiations. I would be happy to produce that for you so that the working group can really assess the next steps.

HOLLY RAICHE:

Cintra, that would be fantastic. And I must learn to turn my mic off. I would suggest you work with one other person, if somebody else wants to put their hand because it's two things. It's first of all going through



the suggestions from the final RAA report that we did, and I'll be happy to send out a link. And put that against...and there's lots of documentation in terms of the negotiation.

There's the actual updates on the negotiation, but then there are other documents, there's specification, there's...if you go on the website there are probably five or six relevant documents. It is a lot of work and my suggestion is, I'm happy to read through a couple, but that could a task that will lead us to future work for this group. So are people happy with that? And we've got an action item on Cintra and probably mine and Evan?

EVAN LEIBOVITCH:

Hi, this is Evan. What you're talking about, Holly, absolutely needs to keep going. If for no other reason than ALAC has a bylaw mandate from the ICANN board that is different from that of the GNSO. We have the right and we have the obligation to extend what we're doing beyond the confines of the GNSO.

And where that becomes relevant here is in, for instance, the issue of enforcement which is outside policy but is in the realm of implementation of the policy, execution of it, and something that is very much within the realm of ALAC and we have been very active in it. But my own concern right now is...just as a show of hands, how many people here are also involved in the WHOIS Working Group?

[background conversation]



EVAN LEIBOVITCH:

No, no. The reason I'm asking is because I have a concern about cross-purposes and cross-pollination. WHOIS, to me, is a core component of registrant rights and responsibility. As in it's a responsibility to have accurate contact information, to me, is a part and parcel of all of this.

So going back to the earlier conversation that happened about cross-purposes and communications between working groups, I'm a little concerned of having two semi-parallel groups essentially butting up against each other so often as to wonder if it's necessary to keep them separate. And I'll leave it at that. So the short-term answer is yes this has to be done. My concern is simply a matter of duplication and stuff that is really common purpose but maybe unnecessarily going in parallel. That's all I'll say.

HOLLY RAICHE:

Thank you Evan. I think then maybe the terms of reference for the RAA is if it's about WHOIS, and that includes what data is included. It includes our push for thick WHOIS, those sorts of things. If those are identified as issues that are outstanding, they get flicked past. So I don't think...because there were other things that we talked about in that sort of long list of issues, we identify those and then we will have to prioritize those. If it's WHOIS, you get it.

Now I think my other question is there is an immediate something that we need to do, and maybe it's part of the WHOIS group, I'm not sure. But the immediate thing was to put our heads together about compliance with WHOIS requirements, that when we found out that



there simply is nothing to say to anybody, "By the way, if you do wrong you get shot." And it's the first thing that Garth said as well.

So I don't know if we want to make that an immediate thing that this group does now, quite apart from the groups, from the working groups. Or if that belongs to WHOIS because really we were concerned about the lack of penalty in the context of the discussion of WHOIS. So maybe that is what you guys do; only I'm one of you guys.

EVAN LEIBOVITCH: Okay so to that extent, WHOIS is a part of the whole package. But a significant enough subpart that it deserves its own attention, I guess.

HOLLY RAICHE: Just one point though. In the website it talks about us including 3.7.8. I actually think that's your baby.

[background conversation]

HOLLY RAICHE: It's your baby.

CARLTON SAMUELS: This is Carlton, for the record. Actually, as I see it now, 3.7.8 is probably the single most important thing for registrant rights because what we are talking about is compliance. That's the piece that we are concerned





about because it does not give enforcement power. And we have two issues with that.

First of all, it is a deliberate disavow, it's a deliberate...they stay away from it deliberately because they don't want to be seen as a regulator. That is a bad word. And so I don't believe that you're going to get any change in 3.7.8 to talk about enforcement unless you get over this hurdle that they place in the way of saying, "We are not a regulator." Okay, so we're not going to talk about regulation. But what we can talk about is what it is that protects the consumer from harm.

So let us change the language a little bit and see how we do that. Now if we tie it in to protecting the consumer from harm, we can weave that in to registrants' rights and responsibilities fairly seamlessly. That's my thinking for the minute about it. But that's the heart of what we want to get at really.

HOLLY RAICHE:

Okay. The map we've got, 3.7.8 is back with RAA. But if you look at the terms of reference, the most immediate term of reference for us is 3.7.8 and the compliance issues around that. That's number one, our task. Number two, our task longer-term...and by the way we're changing this from a GNSO Working Group to an ALAC Working Group.

Which means, Matt, I want to have a look at who gets the emails and everybody who's not on the ALAC I don't want to get emails, and indeed I want to go around with everybody and say, "Do you want to be part of the RAA?" And if you don't, you go off the mailing list. And I can imagine there are a lot of people who want to go off the list. Cintra has



got...and I will work on the longer-term, which is once we've got our heads around 3.7.8 and the documentation, because there are some things being developed that say this is what accuracy means, this is what reasonableness...

So some of those issues are being dealt with, not all of them. Not all of them. But our first task in this group is 3.7.8. Label it "Compliance" and it will result in correspondence to the board saying, "We are concerned that..." That's the first term of reference. The second term of reference is longer-term, which is to go through the final report and to identify issues that have not been addressed as part of the RAA from the original GNSO list and WHOIS now can clarify your terms of reference. And Evan, you'd like to speak.

EVAN LEIBOVITCH:

Okay. And I want to speak to something you said about the fact that this is no longer associated with the GNSO, this is associated with ALAC. It's significant for the reasons I'm about to talk about, and this is where we are going beyond policy. One of the things that has come up time and time again is the opacity with which the entire negotiation process has gone on.

Alan has made clear to us that yes, there are reports that come out and there's comment periods that are made on those things, but we still have a situation where there are no observers from the ICANN community that are seeing what's going on. When this issue has come up earlier in the week we received a response that this is a standard commercial negotiation between a client and a supplier, and I do not

buy that explanation at all. ICANN is meant to be acting in the public service.

We are representing a global public interest constituency and I believe that we have a rationale to understand what is going on. And when they make a decision, for instance, that 3.7.8 is not part of the negotiations we need to know why it wasn't made that way and who made the decision of what goes on the table and is off the table and so on. Thank you.

HOLLY RAICHE:

Ladies first.

[background conversation]

HOLLY RAICHE:

That is a bad word. Okay. There are four people I can think of to do the hard yards on that immediate issue, which is Garth, you Evan, you Carlton, and myself. Happy to start drafting something so that very soon we can go to the board and say, "Thank you for the briefing that you gave us. We still are concerned, X Y Z." And it's going to be about enforcement. It's going to be about the opacity of the process. And because Olivier is silly enough not to follow the conversation, we'll make him sign it.



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OLIVIER CRÉPIN-LEBLOND: Holly...it's Olivier for the transcript record. I'm actually listening. I'm using my fingers to do something else in the meantime, but my ears are currently listening to you.

HOLLY RAICHE: Thank you very much. I just wanted to warn you you're signing something. And what Cintra will be doing, and really it would be helpful if other people aside from myself could help her, which is to go through the report, the long one, and to weed out the issues that are not part of the WHOIS issue, that are not part of this 3.7.8. It is not an easy job.

I've got to tell you, we spent a year and a half on some interesting long conversations, but to go through and pick out what in the RAA negotiations...and there were lots of recommendations, what still is an issue for this group. Matt has an action item on him, to get rid of everybody that's not an ALAC member so it becomes an ALAC Working Group, not a GNSO Working Group. That is not to say we can't talk to them, but...

EVAN LEIBOVITCH: Actually I'm going to make a suggestion Holly. Oh, sorry. Heidi's got her hand up.

HEIDI ULLRICH: Sorry, Holly. This is Heidi for the record. I don't believe you mean ALAC, I think you mean At-Large. Otherwise you're just restricting it to the 15 ALAC members on the At-Large Advisory Committee.



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EVAN LEIBOVITCH: Okay, but sorry Holly. Actually, on reflection, I would go a step further and not automatically boot people just because they're not identified with At-Large. Our processes are still all open. At-Large is running the show, we are defining the agenda, but if somebody from GNSO who is not otherwise associated with At-Large wants to be a part of our effort I would absolutely not keep them out by default.

HOLLY RAICHE: I think, maybe though, what we do is say, "This group has come to an end. This is the task we're now going to do. Do you want to join?" Assume they are off the list and invite them if they still want to participate. You know? I agree with you. People like Michele, in spite of yesterday's performance...but we will eventually need to...people like Steve Metalitz, who was very interested. Go back to the people who were interested, who are on the list, and say, "This is what we're doing."

EVAN LEIBOVITCH: Okay, we're arguing over the mechanics as opposed to the intent. I'm just saying the intent is to say the agenda is going to At-Large. This is now becoming an end-user focused effort. We will accept and appreciate the input of anyone that comes forward or wants to stick around, but having said that, appreciate that this is no longer a GNSO-driven agenda. This is an At-Large-driven effort.

HOLLY RAICHE: And for the staff, you don't have to take notes, I'll take notes and write them up.



[background conversation]

HOLLY RAICHE:

No. I think...they're shutting me off. I think we've actually finished the business of what we were going to do. Seriously. We are going to continue. We've got Cintra identifying, and please other people help her, identifying the longer-term issues. We have a small team that's going to work on the immediate issue of 3.7.8, the opacity and the compliance. And now the WHOIS group, and Carlton who is the chair, is going to shut me up. Thank you very much.

CARLTON SAMUELS:

I am not really going to shut you up. This is Carlton, for the record.

MATT ASHTIANI:

Hi this is Matt Ashtiani, for the transcript record. We have five questions from Graham. I'm going to read them in reverse order. His first question says: 3.7.7.9 Code of Practice Voluntary, those are rules to be followed and not discretionary. Sorry, that was a comment. His other question says: how can a domain name holder be a ccTLD when they're not legal by virtue of ccNSO listing in IANA?

[background conversation]



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MATT ASHTIANI: I'll read it one more time? He says: how can a domain name holder be a ccTLD when they're not legal by virtue of ccNSO listing in IANA?

CARLTON SAMUELS: This is Carlton, for the record. I am not sure what that means. And I don't even want to hazard a translation, I might get it wrong. So I would respectfully ask for clarification on that one.

[background conversation]

CARLTON SAMUELS: This is Carlton, for the record. I wanted to address the issue of the RAA and the consensus policy-making. For three years we've been hearing every time you mention the RAA, and that's from the time we had registrants' rights, the pushback is, "Well the RAA itself is not totally subject to consensus policy-making." And if you try to explore a little bit further and say, "Well tell me which parts of it are subject to consensus policy-making."...there are clauses there, so we asked for the clauses to be identified, the clauses that are subject to consensus policy-making.

The best I have come across is...the clauses that are definitional, people say they are the ones that are subject to consensus policy-making. I actually think that's a feint. I think it's a sleight-of-hand. I believe it is important to have a declarative statement from whomever to identify specifically which clauses in the RAA are subject to consensus policy-making.



I think it's very important to do that because up until yesterday the rationale that was given for not including members of the community in the negotiations, even just sitting on your hands inside the room, was that it is a contractual obligation between two parties and there is no need for the community to be there.

The weakness of the argument is that the RAA is probably the single most important instrument that actually actuates ICANN. If ICANN didn't exist and didn't have contracts with people called registrars to potentiate the Domain Name System, then it would not need to exist. That is my opinion. And so I think it is a massive sleight-of-hand to say that the RAA should not be subject to consensus policy-making.

So my suggestion to the group is one of the first things we must do, as a matter of reconstituting this Registrant Rights Working Group, is to find out definitively what clauses in the RAA are subject to consensus policy-making. Thank you.

GARTH BRUEN: Our chair is trying to escape to the door.

CARLTON SAMUELS: We're recognizing J.J.

JEAN-JACQUES SUBRENAT: Thank you. You're all seated are you?

[background conversation]





JEAN-JACQUES SUBRENAT: No, I was born before John Jeffries, so J.J. is mine. Look, Chair of the ALAC, I'd like to make a statement here and have it recorded. When I was on the board of ICANN a small number of us, two, perhaps three board members, had a long fight throughout the ALAC review process.

And one of the points I made and which led to the decision of the board of finally accepting that the ALAC should appoint a member of the board with voting rights, I remember I had used the term "an act of faith." In the lay sense, of course. That is that we must give movement and impetus, because we found that there had already been improvements on the ALAC side but that it required further encouragement from the board and from the rest of the community, and we could not remain with the judgment, which I then heard, that the ALAC was not as efficient nor as meaningful as some other parts of the community.

It is upon that basis that small number of us argued, and finally won the day. Unfortunately not to have two members seated, but one. But after all, with voting rights, it was better than nothing. I'm making this point, Chair, because I feel it unfortunate...and as a former ambassador the world "unfortunate" is just before a nuclear attack. I find it unfortunate that we give a public image of things which need to be sorted out before an official session of any part of the ALAC.

So that I think that it is not wise to proceed in this way, nor is it wise to give an image of oneself, of our group of which I am part, of dysfunctionalities and perhaps a lack of prior consultation and understanding on who occupies which role. So this may be a rather



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rough statement, but as someone who is less involved in this particular item than in others of our agenda today, I wanted to make this clear. Thank you.

CARLTON SAMUELS:

Thank you J.J. We are at the stage...this is since we have agreed on a way forward with respect to registrant rights, and we have agreed to harmonize certain aspects of the work that is coming up between the WHOIS Working Group and the Registrant Rights Working Group. I think it is just for us to put the various pieces in play and move on. So at this stage I really would call this session to a close. Thank you very much.

[End of Transcript]

