

World Trademark Review Daily

ICANN goes head to head with registrar group over proposed new RAA International - Hogan Lovells International LLP

Domain names

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ICANN's negotiations with the Registrar Stakeholder Group Negotiating Team (Registrar NT) over amendments to its [Registrar Accreditation Agreement](#) (RAA) appear to have turned into something of a battle of wills. The two bodies have been in negotiations over the new RAA since October 2011, but the issue has recently gained momentum in view of the fact that ICANN is seeking to oblige all registrars that want to sell new gTLDs to sign up to the 2013 RAA, even if their previous RAAs are still in force. With the first registry agreements for new gTLD applicants looking likely to be signed as early as the end of the second quarter of 2013, this presents an almost impossibly tight timeline that could even threaten to delay the launch of the new gTLDs.

ICANN published its [Proposed 2013 Registrar Accreditation Agreement](#) on its website on March 7 2013 with the aim of seeking public comment, "particularly on areas where ICANN and the Registrar Negotiating Team have not been able to reach agreement in principle." Within a day of the public comment forum being opened on the ICANN website, the Registrar NT submitted a [statement](#) setting out its gripes.

The group is unhappy that, although agreement on the new RAA had almost been reached in late 2012, when negotiations resumed in February 2013 after a short break, ICANN added 10 new items for inclusion into the agreement. One of these proposed new amendments, Section 6.3, basically gives ICANN's board of directors with a two-thirds majority the right to unilaterally amend the RAA in future. ICANN has also been seeking to include a similar clause in the Registry Agreement (RA) that all new gTLD registries must sign, which has caused a similar uproar. In Registrar NT's view, "the effect of such a clause in the primary agreements between ICANN and its commercial stakeholders would be devastating to the bottom-up, multi-stakeholder model" in that it would undermine the [Generic Names Supporting Organisation](#) (GNSO)'s Policy Development Process. The GNSO is a body constituted under the ICANN umbrella composed of representatives of stakeholder groups such as registrars, registries, commercial users, IP advocates and non-commercial users of the Internet.

However, at a meeting of the [Association of National Advertisers](#) in March, ICANN CEO Fadi Chehadé stated "I cannot live with a perpetual contract", and added "I'm not going to back off this one" in reference to ICANN's proposed unilateral right to amend the registry and registrar contracts. The reference to a "perpetual contract" relates to the fact that both the RAA and the RA run for a period of 10 years with the RA having a presumptive right of renewal. For this reason, ICANN is worried that such a situation could result in registrars and registries having the power to block future proposed changes where it is in their own interests (but not necessarily in the public interest).

In one of the [comments](#) to the amended RAA on the ICANN website, German-based registrar [Cronon AG](#) has raised a seemingly valid point that the proposed Section 6.3 would not be recognised by German courts, stating that:

"German law does not allow to require [sic] registrants to enter into provisions which can be changed by the declaration of one party only. A section stating that provisions are still binding after they have been changed unilaterally would have no legal effect..."

Cronon saves its most scathing remarks about ICANN for the closing statements of its comment submission by saying:

"it seems that after getting registrar agreement through honest negotiations on many items that are nonetheless challenging to many of us... ICANN staff saved their own worst demands for the end and then ran away from the negotiating table."

One proposed change to the RAA no longer under contention, however, is the question of WHOIS verification, now called the "WHOIS Accuracy Program Specification" in the proposed 2013 RAA. Although watered down from ICANN's original proposal, it will still require registrars to verify a registrant's email address or telephone number by asking them to respond providing a code sent to them via email or SMS. ICANN had originally wanted both email and telephone numbers to be checked, but registrars pushed back on this for reasons of cost.

The deadline for comments on the ICANN website was March 28 2013 and ICANN states that, "after review of the comment received, the proposed 2013 RAA will be reviewed to determine if further changes are warranted". With the apparent deadlock at the current moment, it is difficult to envisage how agreement

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could be reached in time to have the amended RAA in place for the launch of the first new gTLDs.

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