NO. 09-17625

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL L. BALSAM,
Plaintiff – Appellant

vs.

TUCOWS INC., a Pennsylvania corporation, TUCOWS CORP., a Mississippi corporation, ELLIOT NOSS, an individual, PAUL KARKAS, an individual, and DOES 1-100,
Defendants – Respondents

On Appeal from the United States District Court for the
Northern District of California, No. 3:09-CV-03585 CRB
Honorable Charles R. Breyer

PLAINTIFF – APPELLANT'S REPLY BRIEF

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I. **INTRODUCTION**

The Registrar Accreditation Agreement ("RAA") between the Internet Corporation for Assigned Names and Numbers ("ICANN") and Respondent Tucows Inc. ("Tucows") creates third-party beneficiary rights in persons harmed by the wrongful use of Internet domain names, such as Appellant Daniel Balsam ("Balsam"). Paragraph 3.7.7.3 of the RAA expressly requires that Registered Name Holders ("RNHs") who license use of their domain names to third parties (e.g., Tucows) accept liability for harm caused by wrongful use of their domain names, unless they promptly identify their licensees.[1] Nothing in ¶ 5.10 immunizes RNHs from liability to harmed parties.

Respondents offer "Proxy Registration Services" (also known as "Private Registration Services"), the sole purpose of which is to hide the identity of the true operator of a domain name. By doing so in the instant case, Tucows became the RNH – the legal owner – of *AdultActionCam.com*, a pornographic website promoting random sexual encounters that advertises through unlawful spam.[2]

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[1] Just last week, ICANN published a statement of its intent that persons harmed by wrongful use of licensed domain names – and not just Registrars and ICANN – can enforce ¶ 3.7.7.3. *See* Attachments A and B.

[2] "Spam" is the commonly accepted term to describe "unsolicited commercial email." *See, e.g., U.S.A v. Kilbride*, 584 F.3d 1240, 1244 (9th Cir. 2009).

Tucows then licensed use of the domain name back to its spammer-customer.

Tucows is essentially wearing two distinct hats[3] – one as the Registrar, and the

other as the Proxy Registration Service/RNH, which is *not* a Registrar function.

Respondents could have easily avoided liability, pursuant to ¶¶ 3.7.7 and

3.7.7.3 of the RAA, simply by providing Balsam with the identity of the licensee

when Balsam provided Respondents with reasonable evidence of actual harm. It

would have cost Respondents nothing to do so, but they nevertheless willfully

refused to identity the customer who sent 1,125 unlawful spams to Balsam.

Respondents refusal to identify their licensee demonstrates an intent to

become a "spammer-friendly" Proxy Registration Service and profit by protecting

customers who use domain names for unlawful purposes.

Respondents defend their actions by denying the plain language of the RAA

(and ICANN's stated intent of enforceability); ignoring California law, industry

standards, and public policy; manufacturing a subpoena requirement (which

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[3] The district court below opined that it is a coincidence that Tucows is wearing
both hats. (ER 32.) However, it is no coincidence. Tucows signed the RAA as a
Registrar, and attempts to use the immunity given to Registrars to shield itself even
when it chooses to act as a Proxy Registration Service/RNH, which are not
functions of a Registrar. The district court showed a distinct misunderstanding
about why Tucows was wearing two hats. (ER 25.) The district court also seemed
to believe there were two different parties involved, as was the case in *Solid Host
v. NameCheap, infra*. *Id.* Here, Tucows intended to wear both hats.

ICANN has expressly rejected); citing to a case from another circuit based on different facts; and boldly rejecting fundamental maxims of jurisprudence.

Respondents' Answering Brief ("Answer") attempts to complicate the issues and distract this Court from the relevant facts and law. This Court should:

- Find that Balsam is a member of a class defined by and benefitted by ¶¶ 3.7.7 and 3.7.7.3 of the RAA.

- Hold that Tucows must accept liability for wrongful use of its domain name because it refused to identify its licensee.

- Hold Respondents liable for Balsam's damages.

In the alternative, this Court could remand to allow Balsam to amend his Complaint. The World Intellectual Property Organization ("WIPO") held that Tucows (wearing its Proxy Registration Service hat as the legal owner of a domain name) was a proper respondent as to claims of wrongful use of the domain name. *Siemens AG v. Joseph Wunsch/Contactprivacy.com*, WIPO Case No. D2006-1248 at ¶ 6 (Dec. 6, 2006), *available at* http://www.wipo.int/amc/en/domains/decisions/ html/2006/d2006-1248.html. Therefore, the district court below erred when it dismissed Balsam's complaint with prejudice; the WIPO holding demonstrates that Respondents should have liability, and Balsam could amend the Complaint to add more factual allegations and legal theories.

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II. DISCUSSION

A.   Spamming from Proxy-Registered Domain Names is Unlawful

Respondents attempt to distance the instant dispute from the Ninth Circuit's

holding in *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009). Answer at 24-

26. Respondents are correct that the spammer-defendants in that *particular* case

registered their domain names with false information, as opposed to proxy-

registrations. But the Ninth Circuit – presciently foreseeing the instant dispute –

made a broader holding, stating that proxy-registering domain names used for

spamming also violates the law.

> Based on the plain meaning of the relevant terms discussed above,
> private registration for the purpose of concealing the actual
> registrant's identity would constitute "material falsification."

Id. at 1259.

Respondents are correct that *Kilbride* did not hold that *all* proxy registration

is unlawful. Balsam acknowledges that proxy-registered domain names may have

legitimate uses; e.g., for websites promoting political speech. But proxy-registered

domains *used for spamming* constitute material falsity, and are thus actionable

under state and federal law.

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B.   **Respondents Continue to Misinterpret ¶¶ 5.10 and 3.7.7.3 of the Registration Accreditation Agreement**

    *1. **Paragraph 5.10 Only Immunizes ICANN and Registrars from Liability, Not Registered Name Holders***

The RAA between ICANN and Domain Registrars includes a generic, catch-all "no third party beneficiary" provision. (Excerpts of Record ("ER") 131.)

> 5.10 <u>No Third-Party Beneficiaries</u>. This Agreement shall not be construed to create any obligation *by either ICANN or Registrar* to any non-party to this Agreement, including any Registered Name Holder.

Respondents fail to address Balsam's argument that the section heading of ¶ 5.10 – "No Third-Party Beneficiaries" – must yield to the actual language of the paragraph, which indicates that *only* ICANN and Registrars have no liability to third parties; nothing in the RAA immunizes RNHs. (ER 17, 27.) Here, Respondent Tucows wears two hats – it is both a Registrar and a RNH. It may not have obligations wearing the first hat, but it does when it wears the second hat.

Nevertheless, Respondents continue to willfully misread ¶ 5.10 as if it stated that *no one* has an obligation to third parties under the RAA, and claim that ¶ 5.10 is dispositive of this entire dispute. Answer at 14. Respondents' citations to no-third-party-beneficiary cases in their Answer at 15-16 prove Balsam's point. In all the citations*,* the contractual language may not confer any rights or remedies upon anyone else, but nothing limits *who* has no liability to third parties.

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In contrast, ¶ 5.10 expressly states that *only* ICANN and Registrars have no liability to third parties. Respondents would have this Court ignore the fact that ICANN did not *have* to include "by either ICANN or Registrar" in ¶ 5.10, but it did so anyway. Here, Respondents are not merely a Registrar; they also operate a Proxy Registration Service, meaning that they are the RNH – the legal owner – for purposes of liability. This Court should conclude that the limiting language in ¶ 5.10 as to *who* has no liability leaves the door open to liability by someone *other* than ICANN and a Registrar, particularly in light of ¶¶ 3.7.7 and 3.7.7.3, which expressly constitute voluntary acceptance of liability by RNHs for wrongful use of their licensed domain names.

Respondents seek to have it both ways: they seek immunity for unlawful actions because Tucows is a signatory to the RAA, and they seek to profit by expanding their business to non-Registrar functions such as providing Proxy Registration Services, which are outside the scope of the no-third-party-beneficiary language of ¶ 5.10. The twin public policies of openness and responsibility should not be subverted to allow a Registrar to provide a haven for unlawful activity.

Respondents' Ninth Circuit authority, *U.S.A. v. FMC Corp.*, is distinguishable, because even the text quoted in the Answer at 15 states: "The Consent Decree does contain *a paragraph* that discusses rights of non-parties to the Decree, but *that paragraph* disclaims an intent to grant rights to third parties."

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531 F.3d 813, 821 (9th Cir. 2008) (emphasis added). Here, it is *not* the case that

the *same* paragraph that gives rights to non-parties simultaneously disclaims an

intent to grant rights to those third parties. Unlike *FMC*, there are *different*

paragraphs at issue in the instant dispute. And the specific paragraph ¶ 3.7.7.3

controls over the general "no third party beneficiaries" ¶ 5.10. Moreover, *FMC*

also "factor[ed] in the presumption against third-party enforcement for government

consent decrees." 531 F.3d at 822. The instant Action does not involve a

government consent decree.

Rather, the instant Action involves a party wearing two hats… seeking the

economic benefits of both and the liabilities of neither.

2. *Paragraphs 3.7.7. and 3.7.7.3 Expressly Create Liability for RNHs*

Respondents do not dispute the general rule of law (Cal. Code of Civil

Procedure § 1859 and Cal. Civil Code § 3534) that specific contractual terms

control over general terms. (ER 48.) *See also* Opening Brief at 27-30 for

discussion and substantial case authority. By failing to address this in their

Answering Brief, Respondents have waived disagreement. *Independent Towers of*

Washington v. Washington, 350 F.3d 925, 929 (9th Cir. 2003).

Respondents fail to adequately address Balsam's argument that the specific

language of ¶¶ 3.7.7 and 3.7.7.3, constituting acceptance of liability by RNHs in

particular circumstances, controls over the general language of ¶ 5.10. Instead,

Respondents blithely claim that reconciling specific versus general terms is not even necessary. Answer at 22. Respondents come to this erroneous conclusion because, they claim, "Paragraph 5.10 disclaims any intention to benefit third parties." Answer at 22. But it does not. Paragraph 5.10 only states that *ICANN* and *Registrars* have no obligations to third parties. Nothing in ¶ 5.10 immunizes *RNHs* from liability.

Respondents also claim that "Paragraph 3.7.7.3 is not a provision that binds Tucows and ICANN." Answer at 22. But it does. Paragraph 3.7.7.3 binds Tucows because:

- Tucows is the RNH of *AdultActionCam.com*.

- ¶ 3.7.7.3 (and its acceptance of liability) is incorporated into the RAA by ¶ 3.7.7.

- Tucows is a signatory to the RAA.

Respondents' argument would render ¶ 3.7.7.3 null, which is what they really want.

In other words, Tucows seeks to profit by wearing a second hat – that of a Proxy Registration Service – while still claiming immunity because it was first a Registrar.

3. *The RAA Creates Liability for Respondents Because Respondents Signed the RAA*

Respondents admit that "Paragraph 5.10 may not immunize Registered Name Holders from liability." Answer at 16. They continue, "but neither does [¶ 5.10] create liability for them because Registered Name Holders are not signatories to the Agreement." *Id*. Respondents' logic might work if the RNH and the Registrar were different entities (e.g., Enom and NameCheap as discussed in *Solid Host*, *infra*). But here, the RAA *does* create liability for Respondents because Tucows *is* a signatory to the RAA. The fact that Tucows may have signed the RAA wearing its Registrar hat proves that Tucows had actual knowledge that ¶ 3.7.7 imposed upon Tucows (the Registrar) the requirement to in turn require Tucows (the RNH) to accept liability for harm caused by the wrongful use of its domain names, pursuant to ¶ 3.7.7.3.

Tucows should not have the ability to avoid its obligations as an RNH merely because it is also a Registrar. If this were the case, every Registrar could offer Proxy Registration Services *and* refuse to identify a licensee engaged in wrongful use of domain names, with no risk of any liability or repercussions whatsoever. This result cannot be reconciled with the plain language of ¶ 3.7.7.3, which expressly imposes liability on RNHs for wrongful use of their domain names. Respondents' interpretation would render ¶ 3.7.7.3 superfluous and

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unenforceable, violating both public policy and ICANN's intent in drafting the
contractual language.

**C.   Paragraphs 3.7.7 and 3.7.7.3 Show Intent to Benefit a Class of Which
Balsam is a Member; Respondents' Interpretation of "To a Party" is
Illogical and Would Make ¶ 3.7.7.3 Superfluous**

Courts will look through general, catch-all "no third party beneficiary"
provisions to determine whether a specific contractual provision is *really* intended
to benefit third parties. This specific language at issue says:

> A Registered Name Holder licensing use of a Registered Name
> according to this provision shall accept liability for *harm* caused by
> wrongful use of the Registered Name, unless it promptly discloses the
> identity of the licensee *to a party* providing the Registered Name
> Holder reasonable evidence of *actionable harm*.

RAA at ¶ 3.7.7.3 (emphasis added).

It is undisputed that:

- Tucows is the RNH of *AdultActionCam.com*.

- Tucows licensed the use of the domain name to a third party.

- Unlawful spam causes harm. *See* Cal. Business & Professions Code
  § 17529(d), (e), (g), (h).

- A district court entered judgment in Balsam's favor, demonstrating
  that there was wrongful use of the domain name *AdultActionCam.com*
  and that the harm was actionable.

- Balsam provided Respondents with reasonable evidence of the harm.

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- Respondents refused to identify their licensee.

1. *Respondents' Interpretation Would Make ¶ 3.7.7.3 Unenforceable*

Respondents argue that "to a party" at the end of ¶ 3.7.7.3 means that only

signatory parties to the RAA – Registrars and ICANN – can enforce ¶ 3.7.7.3.

Answer at 22-23. However, Respondents' interpretation means that:

- Balsam suffered harm by the wrongful use of the *AdultActionCam. com* domain name but cannot enforce ¶ 3.7.7.3.

- ICANN could theoretically enforce ¶ 3.7.7.3 except that ICANN suffered no harm by unlawful spam received by Balsam, and thus ICANN has no standing.

- Tucows the Registrar could enforce ¶ 3.7.7.3 but since Tucows is *also* the RNH, Tucows does not need to enforce ¶ 3.7.7.3 because Tucows already knows the identity of its *own* licensee.

Respondents' interpretation would therefore render ¶ 3.7.7.3 superfluous,

and courts must avoid a statutory construction that makes some words surplusage.

Moyer v. Workmen's Comp. Appeals Board, 10 Cal. 3d 222, 230 (1973). Thus,

Respondents' interpretation would lead to absurd results that violate public policy

and make ¶ 3.7.7.3 unenforceable by anyone, thereby exempting wrongdoers from

liability. Respondents' interpretation cannot be reconciled with Civil Code § 1638

("The language of a contract is to govern its interpretation, if the language is clear

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and explicit, and does not involve an absurdity"). By wearing two hats, Respondents seek to avoid an obligation to provide the identity of their licensee engaged in unlawful actions, despite the plain language and intent of ¶ 3.7.7.3.

The RAA shows ICANN's intent that a person harmed by wrongful use of proxy-registered domain names is precisely the person who can present reasonable evidence of actionable harm to the Registered Name Holder, and receive the benefit of:

- Learning the identity of the RNH's licensee, or

- Recovering damages from the RNH.

The RAA signatories (Registrars and ICANN) do not benefit if the RNH provides the identity of the licensee only to ICANN. The only benefit accrues to the wronged individuals, such as Balsam. Paragraph ¶ 3.7.7.3 "benefits [wronged third parties] and only them." *Prouty v. Gores Technology Group,* 121 Cal. App. 4th 1225, 1232 (3d Dist. 2004). Respondents are simply incorrect when they claim that ¶ 3.7.7.3 does not identify Balsam by class. Answer at 2. Balsam, who was harmed, is in the class of persons who can present reasonable evidence of actionable harm to RNHs.

Additionally, it is not necessary that a contract be *exclusively* for the benefit of a third party in order for that party to sue as a third party beneficiary; i.e., the third party need not be the sole or primary beneficiary. *Martinez v. Socoma*

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Companies Inc., 11 Cal. 3d 394, 410 (1974); *Johnson v. Superior Court*, 80 Cal. App. 4th 1050, 1064 (2d Dist. 2000). Therefore, even *if* other parties somehow benefitted from ¶¶ 3.7.7 and 3.7.7.3 of the RAA, so long as those provisions show intent to promise performance that benefits Balsam's class – parties harmed by wrongful use of licensed domain names – then Balsam is still a third party beneficiary who can enforce the contract.

2. *ICANN's New Draft Advisory Shows Intent That Third Parties Other Than Registrars and ICANN Can Enforce ¶ 3.7.7.3*

On May 14, 2010, ICANN issued a News Alert announcing that it had posted a [Draft] Advisory as to ¶ 3.7.7.3 on its website for public comment. *See* Attachment A. ICANN's Draft Advisory on the Effect of Registrar Accreditation Agreement (RAA) Subsection 3.7.7.3, *available at* http://www.icann.org/en/ compliance/reports/draft-advisory-raa-3773-14may10-en.pdf (last visited May 18, 2010) is included as Attachment B. These documents are not in the record because ICANN issued them just last week. However, the Advisory is highly relevant to the instant dispute, because it shows ICANN's intent that parties other than Registrars and ICANN – i.e., not just signatory parties to the RAA – can enforce ¶ 3.7.7.3.

ICANN sets forth trademark infringement as an example of actionable harm.

> [B]y way of guidance ICANN notes that, for example, with respect to claims of intellectual property infringement, documentation of ownership of a trademark or copyright, along with documentation

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showing alleged infringement, should generally constitute reasonable evidence of actionable harm.

Draft Advisory at *3.

Thus, Respondents' interpretation that "to a party providing the Registered Name Holder reasonable evidence of actionable harm" means only signatory parties to the RAA (i.e., Registrars and ICANN), Answer at 23, is untenable. Neither a Registrar nor ICANN can show harm from the infringement of someone else's trademark. But since trademark infringement *is* actionable harm, obviously the harmed trademark owner is the party who can enforce ¶ 3.7.7.3, even though the trademark owner is not a signatory to the RAA. Put another way, if only Registrars and ICANN – the signatories to the RAA – could enforce ¶ 3.7.7.3, then trademark infringement could not be actionable harm.

D.   Respondents Rely to an Extraordinary Extent on a Distinguishable Case, and Cavalierly Dismiss the Statements of ICANN's Director of Contractual Compliance

1. *Register.com v. Verio is Distinguishable*

Respondents make much of *Register.com v. Verio Inc.*, 356 F.3d 393 (2d Cir. 2004), which arose in a different circuit, was based on an entirely different set of underlying facts, and has nothing to do with ¶ 3.7.7.3. Yet, Respondents argue that *Register.com* implies that Balsam cannot enforce ¶ 3.7.7.3. Answer at 17, 26-28.

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Notably, even in the section of ICANN's amicus brief quoted by

Respondents, ICANN twice stated that disputes and concerns should be handled

"within the ICANN process." Answer at 27. The Second Circuit concluded that

"ICANN deliberately included in the same contract that persons aggrieved by

Register[.com]'s violation of such a term should seek satisfaction within the

framework of ICANN's grievance policy." 356 F.3d at 399. Answer at 18.

As described immediately below, Balsam did exactly that – attempted to

work within the ICANN process – in a previous dispute with a different domain

registrar, based on similar facts.   ICANN indicated that *its* process as to disputes

under ¶ 3.7.7.3 was to do nothing, but to encourage harmed persons to enforce

¶ 3.7.7.3 against RNHs on their own. Respondents disregard this evidence

completely. Balsam's attempt to petition ICANN to take action on his behalf in

this particular case would have been futile.

2. *Balsam Previously Complained to ICANN Based on Similar Facts, and ICANN's Response Indicated That Balsam Could Enforce ¶ 3.7.7.3*

In 2007, Balsam complained to ICANN because Enom, a Proxy Registration

Service/RNH, refused to provide Balsam with the identity of its licensee who had

sent unlawful spams using privately registered domain names to hide its identity.

(ER 71, 79.) Stacey Burnette, ICANN's Director of Contractual Compliance,

responded to Balsam's complaint. (ER 71, 79, 89.) Respondents denigrate

Burnette's position by referring to her merely as "an ICANN employee," Answer

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at 28, rather than acknowledge her significant role as ICANN's Director of Contractual Compliance, in order to undermine the import of her response.

ICANN responded that under ¶ 3.7.7.3, a Proxy Registration Service does *not* have to provide the identity of its licensee. It *can* choose to protect the licensee's identity, but then it *must* accept liability for the harm.

> Under Section 3.7.7.3 of the RAA . . . Enom must accept liability for harm caused by the wrongful use of the Registered Name as long as Enom continues to withhold the identity of the licensee.
>
> ICANN will not pursue compliance action against Enom, as it is our determination that Enom has not violated the RAA based on the information provided in your letter dated 12 September 2007.

Email from Stacey Burnette, ICANN Director of Contractual Compliance, to Daniel Balsam (Sep. 19, 2007) (emphasis in original). (ER 89.)

Tellingly, *nothing* in ICANN's response to Balsam stated that only ICANN and Registrars may enforce ¶ 3.7.7.3 of the RAA. In fact, just the opposite is true: ICANN's email implicitly acknowledged that if Balsam were harmed by spam involving licensed domain names, then Balsam is a member of the class intended to be protected by ¶ 3.7.7.3, and the RNH is liable to Balsam if it does not identify its licensee. Therefore, ICANN rejects Respondents' interpretation of ¶ 3.7.7.3 that would deny any remedy to the person actually harmed.

E.   **The *Solid Host* Court Found Liability**

In *Solid Host v. NameCheap Inc.*, the court found that "although NameCheap is an ICANN-accredited registrar, it did not act in that capacity in this

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case." 652 F. Supp. 1092, 1103 (C.D. Cal. May 19, 2009) (order denying

defendant NameCheap's motion to dismiss), "Instead of occupying the neutral

position envisioned for registrars by the statute, NameCheap is, by virtue of the

anonymity service it provides, the registrant of a domain name that allegedly

infringes Sold Host's trademark." *Id*. at 1105. "NameCheap's status as an

accredited registrar does not shield it from liability in cases where it did not act as

a registrar." *Id.* at 1106.

Respondents are correct that the court held that Solid Host was not a third

party beneficiary of ¶ 3.7.7.3 of the RAA. *Id*. at 1118-19. Answer at 21.

However, the court's analysis of ¶ 3.7.7.3 and the interaction with ¶ 5.10 was

extremely superficial – merely quoting the RAA with no actual analysis.[4]

Respondents utterly fail to address Balsam's point in his Opening Brief at 40

that *Solid Host* found that NameCheap was liable to Solid Host under ¶ 3.7.7.3 as a

third party beneficiary of the separate agreement between Enom and NameCheap

mandated by ¶ 3.7.7. *Id.* at 1119.

Solid Host is distinguishable because in *Solid Host*, there were two separate

parties involved – eNom the Registrar and NameCheap the Proxy Registration

Service. Although the court found that NameCheap had no "direct" liability under

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[4] Balsam noted the lack of analysis at oral argument (ER 42) and in his Opening
Brief at 39.

¶ 3.7.7.3, the court still found that "Solid Host has adequately alleged a breach of the eNom/NameCheap contract as a third party beneficiary. It therefore denies NameCheap's motion to dismiss Solid Host's third party beneficiary claim." *Id.*[5]

But here, it is *not* the case that the Registrar and the Proxy Registration Service are two separate parties. Here, Tucows wears both hats. Following the *Solid Host* logic, there must be liability as to the Proxy Registration Service… if not directly under ¶ 3.7.7.3 of the RAA, then pursuant to ¶ 3.7.7. which required Tucows the Register to include ¶ 3.7.7.3 in the contract with *itself* when it chose to act as a Proxy Registration Service/RNH.

Although Tucows signed the RAA in its role as a Registrar (ER 35, 166-67), that should not immunize it when it takes on additional, *non-Registrar* functions as a Proxy Registration Service/RNH.[6] *Solid Host*, 652 F. Supp. at 1106. Because Tucows signed the RAA (as Registrar), Respondents cannot claim in good faith claim that they were unaware that ¶ 3.7.7 required them (as the RNH) to accept

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[5] *Solid Host* also noted that "Because they involve factual questions of intent, third party beneficiary claims are often not appropriate for resolution via motion to dismiss." 652 F. Supp. 2d at 1119.

[6] *See also Verizon California Inc. v. OnlineNIC Inc.*, No. C-08-2832 JF (RS), 2008 U.S. Dist. LEXIS 104516 at *1-3 (N.D. Cal. Dec. 19, 2008), *aff'd* 2009 U.S. Dist. LEXIS 84235 at *3 (N.D. Cal. Aug. 25, 2009) (awarding $33 million to Verizon because OnlineNIC was the RNH – not just the Registrar – of cybersquatting domain names). Opening Brief at 26-27.

liability for wrongful use of their licensed domain names unless they promptly identify their licensees.

Respondents also fail to address Balsam's point in his Opening Brief at 41 that the U.S. District Court for the Central District of California inconsistently interprets ¶ 3.7.7.3. In *Silverstein v. E360Insight. com et al*, the court denied Moniker's motion to dismiss on underlying facts more similar to the instant facts than are the *Solid Host* facts. No. CV 07-2835 CAS (VBKx) at *6 (C.D. Cal. Oct. 1, 2007) (order denying defendant Moniker Online Services LLC's motion to dismiss). (ER 90-92, 99.) Silverstein alleged that Moniker – a Proxy Registration Service – was the RNH of domain names used for unlawful spamming. The court held that Silverstein could bring a third-party beneficiary claim against Moniker for breach of ¶ 3.7.7.3.

F.   Paragraph 3.7.7.3 Does Not Require Subpoenas

Respondents' argument that a person needs to subpoena a RNH to obtain the identity of its licensee flies in the face of the plain language of the RAA, ICANN's own statements, rules of civil procedure, and industry standards. Moreover, Respondents do not respond to subpoenas anyway. (ER 91.)

1. *The Plain Language Does Not Support a Subpoena Requirement*

Nothing in ¶ 3.7.7.3 requires a person to send a subpoena to a RNH to obtain

the identity of its licensee. *All* that is required is that a person "provid[e] the

Registered Name Holder [with] reasonable evidence of actionable harm."

It is undisputed that Balsam repeatedly provided Respondents with evidence

of the unlawful spams, before and after the district court in *Balsam v. Angeles*

entered judgment in Balsam's favor. (ER 65-66, 167, 191-94.) The fact that the

district court entered judgment in Balsam's favor (ER 223-25) shows that the

spams were actionable and harmed Balsam. Respondents should have identified

their licensee.

2. *ICANN Made it Clear that No Subpoena is Necessary When Demanding That a RNH Identify its Licensee*

Balsam previously petitioned ICANN when a Proxy Registration Service/

RNH refused to identity its spammer-licensee. (ER 71.) ICANN responded:

> The only way that the Registered Name Holder can be absolved from
> liability is when the Registered Name Holder discloses the identity of
> the licensee to a party providing the Registered Name Holder
> reasonable evidence of actionable harm.

Email from Stacey Burnette, ICANN Director of Contractual Compliance, to

Daniel Balsam (Sep. 19, 2007). (ER 89.)

Nothing in ICANN's response stated or even hinted that Balsam had to send

a subpoena to Enom in order to obtain the identity of its licensee. This Court

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should presume that if the lack of a subpoena were the only "problem" with

Balsam's demand, then ICANN would have said so.

Furthermore, in the May 2010 [Draft] Advisory re: ¶ 3.7.7.3 at *3, ICANN

expressly stated that "'reasonable evidence of actionable harm' does *not* imply a

requirement of the filing of a formal process (such as a UDRP complaint, civil

lawsuit, *or the issuance of a subpoena*)…" (emphasis added). *See* <u>Attachment B</u>.

3. *A Subpoena Requirement Would Create an Enormous Obstacle to Enforcement Because Subpoenas Can Only Be Served in a Pending Action*

Respondents use the fact that Balsam *happened* to have an active lawsuit in

the *Balsam v. Angeles* matter as a means to justify a broad-based subpoena

requirement before *any* RNH has to provide *any* information to *any* injured person

pursuant to ¶ 3.7.7.3. Answer at 31-32. But Respondents' argument is fatally

flawed, because it ignores rules of civil procedure.

To serve a subpoena, a person would have to file a lawsuit, because

subpoenas can only be served as discovery in a *pending action. See, e.g.,* Cal.

Code Civ. Proc. §§ 1985 *et seq.* and Fed. Rules Civ. Proc. § 45. Moreover, filing a

DOE lawsuit against unknown parties for the purpose of sending a subpoena would

require a separate motion to the court for permission to serve discovery prior to

service of the summons.

Balsam could have sent a post-judgment subpoena to Respondents,[7] but not everyone who receives spam from a proxy-registered domain name will have an active lawsuit. For most spam recipients, sending a subpoena would *first* require filing a lawsuit, moving the court for permission to serve a subpoena, and hoping to receive information back in time to substitute a DOE and serve the identified licensee within the required time period.

A subpoena requirement would therefore create an enormous financial and logistical barrier against enforcement by injured consumers and businesses harmed by wrongful use of domain names by persons protected by Proxy Registration Services. This would violate public policy by granting tortfeasors a near free pass to avoid liability for their wrongful actions, in direct contradiction of ICANN's stated policy in ¶ 3.7.7.3 of encouraging RNHs to identify their licensees.

Respondents gloss over the procedural problem of a subpoena requirement by glibly stating that Balsam "ignores two core facts of which he is clearly aware: he can file suit against Doe defendants (this case names Does 1-100) and, most importantly, that he was already a plaintiff in an existing action." Answer at 31-32. It is true that *Balsam* happened to be a plaintiff in another action, but this issue

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[7] Although, the effort would have been futile, *infra*, because Respondents do not respond to subpoenas, *infra*.

is likely to rise again in the future, by another injured party if not Balsam, and as to

another RNH/Proxy Registration Service if not Tucows.

4. *A Subpoena Requirement Would Create a Chicken-and-Egg Problem*

Subpoenas can only be served *after* summons are served, Cal. Code Civ.

Proc. §§ 2020.010, 2025.210(b), so one cannot serve a summons in a lawsuit

where the defendant's identity is unknown *prior* to a response to a subpoena.

Therefore, a subpoena requirement would create a procedural chicken-and-egg

problem, with the direct result that a harmed party could obtain the identity of a

RNH's licensee wrongfully using a domain name only at the expense of judicial

economy.

Nothing in Respondents' Answer addresses the basic issue that if a plaintiff

– *any* plaintiff – wanted to subpoena a RNH for the identity of its licensee, that

plaintiff could not do so without first serving a defendant, and that service might

well be impossible if the Proxy Registration Service/RNH were protecting the

licensee's true identity. Hence, the chicken-and-egg problem. Moreover,

Respondents' claim that Balsam knew the identity of the operator of the domain

name, at the time of service in the *Balsam v. Angeles* action, Answer at 31, is false.

If Balsam had known that information, this issue would not have arisen.

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5. *The Industry Standard Among Proxy Registration Services is to* **Not Require Subpoenas**

Other Proxy-Registration Services/RNHs, such as Network Solutions and Enom, have provided Balsam with the identity of spammers using privately registered domain names when Balsam provided them with reasonable evidence of actionable harm… and without requiring a lawsuit or a subpoena. (ER 72, 80.) Respondents' manufacturing of a subpoena requirement for identifying a licensee is contrary to industry standards.

6. *Tucows' Own Reseller Agreement Indicates that Subpoenas are Unnecessary*

When Tucows employs separate entities to act as "resellers" of its Registrar services, Tucows requires resellers to inform customers who use the *ContactPrivacy.com* Proxy Registration Service that Tucows reserves the right to disclose their identity even *without* a subpoena.

> 33. **WHOIS PRIVACY SERVICE.** The following terms and conditions will apply if you subscribe to the Whois Privacy Service:
>
> …
> (g) Right to Suspend and Disable. We shall have the right, at our sole discretion and without liability to you or any of your Contacts, suspend or cancel your domain name *and to reveal Registrant and Contact Whois Information in certain circumstances*, including but not limited to the following: (i) when required by law; (ii) in the good faith belief that disclosure is necessary to further determination of an alleged breach of a law; *(iii) to comply with a legal process served upon Tucows;* (iv) to resolve any and all third party claims including but not limited to ICANN's or a Registry's dispute resolution policy; (v) to avoid financial loss or legal liability (v) to avoid financial loss or legal liability *[sic]*; (vi) if we believe that you or one of your

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Contacts is using the Whois Privacy Service to conceal involvement with illegal, illicit, objectionable or harmful activities; or (vii) to transmit SPAM, viruses, worms or other harmful computer programs.

Tucows Exhibit A – Registration Agreement, http://opensrs.com/docs/contracts/ exhibita.htm (last visited May 14, 2010) (emphasis added). Respondents reference this document in their Answer at 20, n.6.

As shown by Tucows' own reseller agreement, there are seven itemized circumstances under which Tucows may disclose the identity of the true registrant of a domain name, and only *one* of them – (iii) – is in response to a subpoena. Since Respondents specified (iii) as a standalone condition, then logically a subpoena would *not* be necessary for disclosure in any of the other six situations.

In short, Respondents' own reseller agreement demonstrates that Respondents are fully aware that subpoenas are unnecessary to cause Tucows to disclose the identity of the operator of a domain name.

7. *Respondents Do Not Respond to Subpoenas*

Finally, Balsam believes that Tucows does not respond to subpoenas anyway. Tucows *twice* ignored subpoenas sent by William Silverstein of Los Angeles. (ER 90-92.) Respondents criticize Balsam for his purported failure to send a subpoena, Answer at 31, but Respondents never deny Balsam's assertion that they do not respond to subpoenas.

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G.   Public Policy Requires That a Proxy Registration Service/RNH Accept its Contractual Liability for Harm Caused By Wrongful Use of its Licensed Domain Names

Contracts should be interpreted in a manner that serves the public interest.

Prouty, 121 Cal. App. 4th at 1235. Here, interpreting the RAA so as to provide a

remedy to the person harmed by wrongful use of a licensed domain name supports

public policy. Paragraph 3.7.7.3 specifically creates liability for RNHs who

license their domain names to third parties, and nothing in ¶ 5.10 immunizes RNH

from liability. But, even *if* ICANN – created by the U.S. government to manage

Internet domain names – intended to allow RNHs to contract away their liability

(which would violate Cal. Civil Code § 1668), *The Ratcliff Architects v. Vanir*

Construction Management held that "public policy may dictate the existence of a

duty to third parties," even if a contract "specifically excluded third party

beneficiaries from having any rights under the contract." 88 Cal. App. 4th 595,

605 (1st Dist. 2001).

Respondents identify no public policy that supports their position that a

Proxy Registration Service/RNH does *not* have to provide the identity of its

licensee just because it happens to *also* be a Registrar. Indeed, Congress stated in

the CAN-SPAM Act that registering domain names so as to impair the ability of

the recipient of an email to identify the sender constitutes material falsity, 18

U.S.C. § 1037(a)(4), (d)(2), and the Ninth Circuit has stated that proxy-registered

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domain names used for spamming are materially false and actionable, *Kilbride*, 584 F.3d at 1259. California similarly prohibits misrepresented information contained in or accompanying email headers. Cal. Bus. & Prof. Code § 17529.5(a)(2). Public policy requires imposing liability on the legal owner of a domain name who refuses to identify a licensee engaged in harmful conduct.

Respondents cavalierly declare in a section heading that "Not Every Wrong Has a Remedy," Answer at 29, utterly disregarding Cal. Civil Code § 3523. Curiously, not a single word in that section actually supports the premise of the section heading. Instead, this section incorrectly argues that the *Balsam v. Angeles* district court never found that Balsam had been harmed, incorrectly assumes that Balsam had to subpoena Tucows for the information, ignores the fact that Tucows does not respond to subpoenas, incorrectly claims that ¶ 3.7.7.3 does not confer any benefit on Balsam and is not part of the ICANN agreement, and blithely ignores the chicken-and-egg problem as to serving subpoenas before serving a named defendant.

Finally, Respondents claim that even if Balsam suffered any wrongs they were of his own doing, Answer at 32, blatantly ignoring the undisputed fact that Respondents *never* (let alone "promptly") provided the identity of their licensee using their domain name *AdultActionCam.com*.

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H.   **Corporate Officers are Liable for Their Own Wrongful Actions**

Respondents do not dispute Balsam's argument that corporate officers are

liable for their own wrongful actions. Opening Brief at 54-55. By failing to so

argue in their Answer, Respondents waived such argument. *Independent Towers*

of Washington, supra.

I.   **Respondents Falsely Claim that the District Court in *Balsam v. Angeles*
Did Not Find that that Balsam Had Been Damaged**

Cal. Business & Professions Code § 17529(d), (e), (g), (h), expressly states

Legislative findings that recipients of unlawful spam suffer actual damages.

In the Order Granting Motion for Default Judgment, the district court in the

Balsam v. Angeles action:

- Noted that Balsam alleged that defendants were responsible for the

  unlawful transmittal of 1,125 email messages.

- Granted Balsam's request for damages of $1,000 per email.

- Entered judgment in the amount of $1,125,000. (ER 223-25.)

Respondents' disingenuous claim that that "The district court in that case

made no findings as to whether or not Balsam was harmed by unlawful spam

advertising <adultactioncam.com>", Answer at 5 and 30, ignores the implicit

finding that Balsam had been harmed, because the district court would not

otherwise have entered judgment awarding damages. (ER 223-25.)

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Respondents also incorrectly claim that "Balsam compounded his procedural errors in this lawsuit by failing to file a notice of related case. ER 038-040." Answer at 32. However, the district court below expressly stated that the *Balsam v. Angeles* case was not related. (ER 39.)

J.   The District Court Abused its Discretion by Refusing to Give Balsam the Opportunity to Amend the Complaint

Balsam requested leave to amend in his Opposition to Defendants' Motion to Dismiss. (ER 76-77.)

In the briefs to the district court below, Balsam expressly said that he could state new facts to allege liability (ER 76-77), and nothing said at oral argument contradicted that.

Balsam suggested in his Opposition to Respondents' Motion to Dismiss that he could plead that Tucows has "direct" liability for the 1,125 unlawful spams advertising *AdultActionCam.com* pursuant to Cal. Business & Professions Code § 17529.5 and the Consumers Legal Remedies Act ("CLRA"), Cal. Civil Code § 1750 *et seq*. It is undisputed that Tucows is the legal owner of *AdultActionCam. com*. Because Tucows' domain name was advertised in the spams, Tucows has liability pursuant to Cal. Business & Professions Code § 17529.5(a)… completely aside from the RAA and whether or not Balsam is an intended third party beneficiary.

The World Intellectual Property Organization supports liability against Proxy Registration Services/RNHs for wrongful acts involving domain names, since the Proxy Registration Services are the legal owners of the domain names. In *Siemens AG, supra*, the WIPO administrative panel held that *ContactPrivacy.com* (Tucows) was properly named as a Respondent to the dispute since it was the legal owner of the wrongfully-used domain name. Similarly, in *The John Hopkins Health System Corporation, The John Hopkins University v. Domain Administrator*, WIPO Case No. D2009-1958 at ¶ 6B (Feb. 27, 2009), *available at* http://www.wipo.int/amc/en/domains/decisions/html/2008/d2008-1958.html, the WIPO administrative panel held that "it was appropriate for the Complainants to have proceeded against the proxy service company as the nominated Respondent." Therefore, the district court below was incorrect when it dismissed Balsam's complaint, impliedly holding that Balsam could not possibly allege any facts that would entitle him to relief.

Balsam could also amend the complaint to add more detail about his attempt to petition ICANN in a previous, identical dispute. (ER 89.)

Finally, Balsam could also amend the complaint to allege that he is a third party beneficiary of any contract created to ¶ 3.7.7 of the RAA.

III. CONCLUSION

Respondents seek to profit by providing Proxy Registration Services and hiding the identity of customers who send unlawful spam. The Registrar Accreditation Agreement between ICANN and Tucows – the contract that enabled Tucows to become a Registrar – includes language that requires the Registered Name Holder of a domain name (which includes Proxy Registration Services) to accept liability for wrongful use of domain names that it chooses to license to third parties, unless it promptly identifies the licensee. ICANN has stated that the wronged party – and not just Registrars and ICANN (the signatory parties to the RAA) – is a third-party beneficiary of ¶ 3.7.7.3 and can enforce it. ICANN also makes it clear that RNHs are required to identify their licensees *without* subpoenas.

In the end, Respondents are seeking to have their cake and eat it too. Respondents seek to profit and actually profit by acting as a RNH and providing Proxy Registration Services to spammers, even as they claim immunity from all liability involving a domain names for which Tucows is the legal owner.

Public policy dictates that spammers not be allowed to go scot-free when the legal owners of spamvertised domain names *happen* to be Registrars too. Surely ICANN – an entity chartered in the public interest – did not intend such an outcome. ICANN acknowledged public policy by requiring RNHs who choose to hide their licensees' identities to accept liability for the harm. Affirming the order

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of the district court below may open the door to a deluge of unlawful and untraceable spam, for which neither the legal owner nor licensee of the domain names would have any liability, and for which no recipient would have any remedy.

This Court should reverse the district court and hold Respondents liable to Balsam, since they did not promptly identify their licensee. Alternatively, this Court could remand to allow Balsam to amend the complaint.

THE LAW OFFICES OF DANIEL BALSAM

Dated: May 21, 2010   By   /s/ Daniel L. Balsam
                                    Daniel L. Balsam
                                    Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS (Federal Rules of Appellate Procedure, Rule 32(a)(7)(C))

1.   This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X]   this brief contains 6,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Signature: /s/ Daniel L. Balsam, California State Bar #260423

Attorney for: Appellant Daniel L. Balsam

Date: May 21, 2010

Dan Balsam

From:	Dan Balsam [legal@danbalsam.com]
Sent:	Monday, April 26, 2010 12:04 PM
To:	'Bret Fausett'; 'Imani Gandy'
Cc:	'timothy@twalton.net'
Subject:	Balsam v Tucows, Extension for Reply Brief

Mr. Fausett,

I contacted the Ninth Circuit to request an extension on my Reply Brief. Factoring in the
Court-determined time for service, the due date is May *21* (not May 19 per my previous
email).

The Clerk directed me to attach this email to the brief when it's e-filed.

Thank you,
Dan Balsam

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<u>Attachment A</u>
ICANN News Alert (May 14, 2010)

From: ICANN News Alert [mailto:communications@icann.org]
Sent: Monday, May 17, 2010 1:53 PM
To: [REDACTED]
Subject: ICANN News Alert -- Public Comment: Draft Advisory on the Effect of Registrar Accreditation Agreement (RAA) Subsection 3.7.7.3

ICANN

News Alert

http://www.icann.org/en/announcements/announcement-14may10-en.htm

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Public Comment: Draft Advisory on the Effect of Registrar Accreditation Agreement (RAA) Subsection 3.7.7.3

14 May 2010

ICANN has observed community comment concerning the interpretation of RAA Subsection 3.7.7.3. In order to provide clarity, ICANN is posting for public comment the following draft advisory http://www.icann.org/en/compliance/reports/draft-advisory-raa-3773-14may10-en.pdf [PDF, 216 KB]. The forum will be open through 9 July 2010.

One central clarification: if a Registered Name Holder licenses the use of a domain name to a third party, a licensee, the third party is not the Registered Name Holder of record (or "registrant"). This advisory also describes under what conditions that a Registered Name Holder is to identify the licensee and to whom.

Community members are invited to review the draft advisory and comment on all aspects of the document. At the end of this Public Comment period, ICANN Staff will review the comments submitted, prepare a summary analysis of the various submissions, and post the final version of the advisory.

The Public Comment Forum is located here: http://www.icann.org/en/public-comment/public-comment-201007-en.htm#raa-3773

Sign up for ICANN's Monthly Magazine

<u>Attachment B</u>
ICANN's Draft Advisory on the Effect of Registrar Accreditation Agreement
(RAA) Subsection 3.7.7.3 (May 14, 2010), *available at* **http://www.icann.org/**
en/compliance/reports/draft-advisory-raa-3773-14may10-en.pdf

[Draft] Advisory
2010

ICANN

[DRAFT] Advisory re: RAA Subsection 3.7.7.3

Summary and Purpose

The purpose of this advisory is to clarify that if a Registered Name Holder licenses the use of a domain name to a third party, that third party is a licensee, and is not the Registered Name Holder of record (also referred to as the "registrant" or "domain-name holder" in the ICANN RAA, UDRP, and other ICANN policies and agreements). This advisory also will clarify that a Registered Name Holder licensing the use of a domain is liable for harm caused by the wrongful use of the domain unless the Registered Name Holder promptly identifies the licensee to a party providing the Registered Name Holder with reasonable evidence of actionable harm.

Definition of Registered Name Holder

RAA Section 3.7.7 requires a registrar to enter into a registration agreement with a Registered Name Holder for each registration sponsored by the registrar. RAA Section 3.3.1 requires a registrar to provide the name and postal address of that Registered Name Holder in response to any queries to the registrar's Whois service.

At times, a Registered Name Holder allows another person or organization to use the domain name. For example, a website designer might be the Registered Name Holder of record for a domain name used by a client, or a "proxy service" might be the Registered Name Holder of record for a domain name used by a client that prefers not to disclose its identity/contact information. In either of these situations, the Registered Name Holder is the person or entity

Draft

[DRAFT] Advisory re: RAA Subsection 3.7.7.3
14 May 2010
Page 2 of 3

listed as the registrant/Registered Name Holder by the applicable Whois service (in the examples above, the website designer or the proxy service, not the client of the website designer or the proxy service).

Such circumstances are addressed by RAA Subsection 3.7.7.3. Subsection 3.7.7.3 requires a registrar to include in its registration agreement a provision under which the Registered Name Holder agrees that if the Registered Name Holder licenses the use of the domain name to a third party, the Registered Name Holder is still the registrant of record. The Registered Name Holder has to provide its own full contact information, and provide and update accurate technical and administrative contact information adequate to facilitate timely resolution of any problems that arise in connection with the registration. These technical and administrative contacts include the addresses where complaints should be sent regarding such problems.

Acceptance of Liability under RAA Section 3.7.7.3

RAA Section 3.7.7.3 also provides that the Registered Name Holder shall accept liability for harm caused by the wrongful use of the registered name unless the Registered Name Holder promptly identifies the licensee to a party that has provided the Registered Name Holder with reasonable evidence of actionable harm.

Exactly what constitutes "reasonable evidence of actionable harm" or "prompt" identification is not specified in the RAA, and might vary depending on the circumstances. Under the arrangement provided for in RAA 3.7.7.3, if a court (or arbitrator) determines that the Registered Name Holder was presented with what the court considers to be "reasonable evidence of actionable harm" and the court finds that the Registered Name Holder's identification of the licensee was not "prompt," then the court could assign the Registered Name Holder with liability for the harm caused by the wrongful use. It would ultimately be up to a court or arbitrator to assess and apportion liability in light of the promptness of a Registered Name Holder's identification of a licensee. However, by way of guidance, ICANN notes that any delay over five business days in the Registered Name Holder identifying the

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licensee would not be "prompt" as that term is used in the RAA. A court (or arbitrator) will also decide whether the documentation presented to the Registered Name Holder met the "reasonable evidence of actionable harm" standard provided for in the RAA, but by way of guidance ICANN notes that, for example, with respect to claims of intellectual property infringement, documentation of ownership of a trademark or copyright, along with documentation showing alleged infringement, should generally constitute reasonable evidence of actionable harm. Also by way of guidance, "reasonable evidence of actionable harm" does not imply a requirement of the filing of a formal process (such as a UDRP complaint, civil lawsuit, or the issuance of a subpoena), but again it will be up to a court or arbitrator to decide whether the evidence presented constitutes "reasonable" evidence.

Conclusion

In summary, if a Registered Name Holder licenses the use of the domain name to a third party, that third party is a licensee, and is not the registrant/Registered Name Holder. A Registered Name Holder that licenses the use of a domain to a third party still has to provide its own contact information (and keep it updated), and also accepts liability for harm caused by the wrongful use of the name unless the Registered Name Holder promptly identifies the licensee to a party providing the Registered Name Holder with reasonable evidence of actionable harm.

RAA 3.7.7.3 Any Registered Name Holder that intends to license use of a domain name to a third party is nonetheless the Registered Name Holder of record and is responsible for providing its own full contact information and for providing and updating accurate technical and administrative contact information adequate to facilitate timely resolution of any problems that arise in connection with the Registered Name. A Registered Name Holder licensing use of a Registered Name according to this provision shall accept liability for harm caused by wrongful use of the Registered Name, unless it promptly discloses the current contact information provided by the licensee and the identity of the licensee to a party providing the Registered Name Holder reasonable evidence of actionable harm.

http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm - 3.7.7.3