



COMMENTS OF GNSO INTELLECTUAL PROPERTY CONSTITUENCY

July 7, 2015

The Intellectual Property Constituency of the GNSO appreciates this opportunity to comment on the initial report of the Privacy and Proxy Service Accreditation Issues (PPSAI) Working Group (WG) (hereafter referred to as “Initial Report”). See <https://www.icann.org/public-comments/ppsai-initial-2015-05-05-en>.¹

Introduction

IPC has long believed that the status quo of a privacy and proxy service marketplace lacking even basic standards requires substantial reform. When the registrant contact data for nearly one-quarter of all gTLD domain name registrations is systematically concealed, even in cases in which the corresponding domain name is clearly being used for abusive and illegal behavior, the accountability and transparency functions historically fulfilled by the gTLD Whois system are substantially frustrated.

While IPC agrees there are valid reasons for the use of privacy² and proxy³ registration services (P/P services) in some circumstances, the current chaotic situation is unsustainable. Accordingly, although IPC remains disappointed that the substantive minimum standards for these services were stripped from the revised Registrar Accreditation Agreement (RAA) before the 2013 RAA was completed, we applauded the commitment in that agreement to establish an accreditation system for such services, and to prohibit accredited registrars from knowingly using privacy or proxy services not accredited under this system. The PPSAI WG grew out of this commitment, and IPC members have participated actively in it since its inception nearly two years ago.

In general, IPC commends the PPSAI WG for producing a constructive initial report. Its recommendations move us substantially forward toward a clear, balanced and enforceable set of standards for proxy and privacy registrations. Our participation in this process has been motivated by the need for a system that is predictable and fair for third parties seeking information about domain name registrants who are using domain names to carry out infringements of copyright, trademarks, and other intellectual property rights. But we have always been aware that no accreditation system is likely to advance unless it is also fair to and

¹ The Initial Report can be found at <https://www.icann.org/public-comments/ppsai-initial-2015-05-05-en>. Unless otherwise indicated, all citations in this comment are to the Initial Report.

² “1.2 ‘Privacy Service’ is a service by which a Registered Name is registered to its beneficial user as the Registered Name Holder, but for which alternative, reliable contact information is provided by the P/P Provider for display of the Registered Name Holder’s contact information in the Registration Data Service (Whois) or equivalent services.” Initial Report, Annex D – 2013 RAA Interim Privacy/Proxy Specification at p. 82.

³ “1.3 ‘Proxy service’ is a service through which a Registered Name Holder licenses use of a Registered Name to the P/P Customer in order to provide the P/P Customer use of the domain name, and the Registered Name Holder’s contact information is displayed in the Registration Data Service (Whois) or equivalent services rather than the P/P Customer’s contact information.” Initial Report, Annex D – 2013 RAA Interim Privacy/Proxy Specification, at p. 82.

considers the legitimate interests of registrants (i.e., customers of privacy/proxy services), and unless it preserves for the providers of such services reasonable levels of discretion and flexibility in how they structure and operate these revenue-generating services that are important to their bottom lines.

For that reason, the hallmark of the many hundreds of person-hours devoted by IPC participants to the PPSAI WG process has been to seek common ground and to arrive at workable and fair compromise solutions. As a general matter, we believe that the standards proposed in the initial report do a good job of achieving this balance.

These comments focus on several areas in which the recommendations of the initial report need clarification, re-examination, or reversal. These include:

- (1) Definition of covered services, and in particular whether lawyers and law firms are covered;
- (2) Publication of provider policies;
- (3) Relay, and escalation of relay requests;
- (4) Disclosure, and particularly the illustrative disclosure framework in Annex E;
- (5) Permissible uses of privacy/proxy registrations.

We look forward to participating in further deliberations of the WG in order to improve the initial report, and to deliver a final report as promptly as possible, and in time to achieve approval and implementation of the privacy and proxy service provider accreditation system before the expiration of the RAA Interim Specification⁴ on this topic at the end of next year.

A. Recommendation 1. Definitions (pp. 6-7)

The IPC notes that the current definition of a Privacy/Proxy Service Provider (“P/P Provider” or “Service Provider”) in Section 1.4 of the 2013 RAA Interim Privacy/Proxy Specification encompasses ANY provider of P/P services. Some have interpreted these definitions to extend to entities such as lawyers and law firms that register domain names on behalf of clients as an incidental part of larger and broader legal representation of their clients, and thus to require these firms to submit to ICANN accreditation in order to make such registrations. While we do not think the WG intended such a sweeping requirement, IPC urges it to clarify that the standards only apply to those providers who specialize in the provision of such services and for which it is a primary business offering.

The rationale for expressly excluding lawyers and law firms from accreditation requirements is two-fold. First, the provision of privacy and proxy services is not the dominant or primary business avenue for law firms—rather it is an ancillary service generally performed as a matter of convenience, and often on a one-off or temporary basis. Typically the registration of a domain name forms only a small part of the business relationship between the registrant and

⁴ See Initial Report, Annex D.

the lawyer or law firm—a relationship which already is regulated through various other means, as discussed below.

Indeed, if every entity that registers a domain name on behalf of someone else is to be considered a P/P Provider, that would subject a huge number of individuals and entities to the accreditation requirements. For example, advertising agencies, web developers, web designers, and individuals registering domain names for their family members and friends less savvy with domain name registration could then be subject to the accreditation requirements and have to be accredited by ICANN before they could register a domain name. Such an interpretation would render the accreditation framework impracticable to oversee, and the obligation of registrars to refrain from dealing with unaccredited P/P Providers far more difficult to fulfill. Consequently, IPC urges the WG to define more precisely and practically which entities must be accredited.

Second, lawyers have a unique and heightened duty to communicate with clients when they are contacted on a matter which in any way could be construed as pertaining to the lawyer or law firm's representation of that client. For example, in the United States, pursuant to the American Bar Association's Model Rules of Professional Conduct, Rule 1.4 on Communications, a lawyer is required to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required . . .".⁵ While we cite to the United States ethical obligations as an example, we believe a similar norm applies in most other jurisdictions. So it is duplicative and unnecessary to impose requirements on the lawyer/law firm that are actually less stringent than the ethical obligations already imposed on the lawyer/law firm by the relevant professional responsibility rules under which they practice.

In sum, domain name registration, through an external registrar—with whom the law firm has no affiliate relationship—in the context of broader representation should not result in a categorization of the lawyer/law firm as being a provider of proxy/privacy domain name registration services for which accreditation is required.

B. Recommendations 7 and 8. Publication of Provider Policies (pp. 8-9)

While IPC strongly supports the recommendations that accredited P/P Providers be required to post on their websites and elsewhere their policies concerning disclosure and publication, two clarifications are needed:

(1) Consistent with the Interim Specification (chapeau to Section 2), accredited Service Providers must be required not only to publish these policies but also to "abide by" them (i.e., carry them out). To omit this would be an unjustified step backward from the Interim Specification.

(2) Although the standards enable P/P Providers to retain some flexibility to set policies on topics such as the criteria for complying with third party requests (Rec. 7), or whether a customer will be notified of such requests (Rec. 8), this flexibility should be limited in those areas in which more specific criteria or obligations have been included in the accreditation

⁵ See e.g. ABA Model Rule 1.4: Communications at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications.html.

standards. In other words, assuming the illustrative framework for disclosure requests by copyright and trademark holders set out in Annex E becomes part of the accreditation standards, then for such requests the criteria published by the P/P Provider would have to be consistent with the framework, and P/P Providers would be required to attempt to notify their customers of such disclosure requests.

C. Recommendations 16-17 (Relay) and Specific topic 1 on escalation of relay requests (pp. 11-12 and 14-15)

The ability to communicate with registered name holders who use privacy/proxy services is essential for the investigation of all types of claimed abuse. In these investigations it is our primary intent to resolve issues directly with the registrant directly without having to involve third parties, such as P/P Providers or registrars, unless absolutely necessary. Hence we generally agree with recommendations 16 and 17 setting minimum standards for P/P Providers associated with the relay of third party requests.

Regarding recommendation 16, it was clear from the extensive discussions within the WG that most service providers would be expected to use automated systems to handle relays, and thus may use commercially reasonable safeguards such as CAPTCHA to filter out spam or other abusive communications. However, for smaller services such as those associated with certain specialized registrars, it could also be commercially reasonable to inspect each relay request manually as the filtering mechanism. IPC believes that option #1 should be interpreted flexibly, but must exclude any safeguard mechanism that routinely “filtered out” bona fide reports of domain name abuse, which would defeat the purpose of relay requirements. Such mechanisms should not be considered “commercially reasonable.”

Recommendation 17 describes important details regarding the proper relay of requests from a third party (Requester) to a registrant via a proxy service. While we agree that the failure of “delivery” (i.e. a technical failure) of communication should not be equated with the failure of a customer to respond to a request, it is important that Requesters be promptly notified of a persistent delivery failure when a P/P Provider becomes aware of it. This promotes full transparency, and ensures that data validation obligations as outlined in the WHOIS accuracy specification of the 2013 RAA are carried out.⁶

The WG did not reach agreement on obligatory next steps regarding escalation of requests that result in a persistent delivery failure. (Page 14) We believe that in this circumstance, this escalation path should be mandatory, i.e. “...*the provider MUST upon request forward a further form of notice to its customer.*”

Regarding fees to provide non-electronic means of communicating with the P/P Customer, we oppose the imposition of any such fees upon requesters. Abuse reporting mechanisms should remain easily accessible to all and not be used as a revenue generation tool. More fundamentally, it should be understood by customers of privacy/proxy services that the contact information they provide to the service for relay purposes must be functional and kept up to date. When customers fail to fulfill this responsibility, and persistent delivery failure of a

⁶ IPC commends the WG for making these data validation obligations generally applicable to P/P Providers. See Recommendation 5 of the initial report.

relay message results, it would be unfair and contrary to the entire framework of responsible accreditation standards to impose on requesters the resulting additional costs for non-electronic delivery of the relay message. These costs should either be built into the fee the provider charges customers for this service, or should be allocated to the specific customers whose failure to maintain a functional electronic contact point has made the additional costs necessary in order to achieve a message relay.⁷

D. Annex E – Illustrative Disclosure Framework (pp. 13, 84-93)

IPC appreciates the willingness of other participants in the WG to engage in constructive discussions with us toward developing a framework for dealing with disclosure requests based on the use of a domain names, registered via a proxy/privacy service, in instances of clear and verifiable copyright or trademark infringement. Establishing an effective and predictable system for obtaining contact details on the customer (i.e., the true registrant) in this situation is a critical element of a workable set of accreditation standards.

IPC believes that the framework set out in Annex E of the Initial Report goes far toward achieving its stated policy purposes, i.e., “to strike an appropriate balance among the interests of all parties,” and specifically “to provide Requesters a higher degree of certainty and predictability ...; to preserve for service providers a sufficient degree of flexibility and discretion in acting upon requests for disclosure; and to include reasonable safeguards and procedures to protect the legitimate interests and legal rights of customers.”⁸ However, on several specific points, IPC has concerns about the framework presented in Annex E. We urge the WG to review and re-calibrate the framework on the following topics before finalizing its report:

(a) Section I. B.iii: charging fees for processing disclosure requests

IPC does not agree that P/P Providers should be authorized to charge a fee for processing requests for disclosure. As with the relay function discussed above, a properly balanced disclosure function is a core element of a sound privacy/proxy service provider accreditation system, whose costs should be built into the (completely unregulated) fees that service providers may charge for the service. Having concealed, for a price, the information that would ordinarily appear in Whois, it would be inappropriate to then allow P/P providers to treat disclosure as a value-added service to Requesters, from which additional revenue can be realized. We appreciate that the framework proposes to authorize only a “standardized nominal cost-recovery fee,” and states that the fee must not “serve as an unreasonable barrier to access to the process.” However, besides drawing ICANN (as the accrediting party and the enforcer of accreditation standards) into an arena of standardizing and approving fees, for which we expect there will be strong institutional resistance, we do not believe the community should have a high level of confidence in ICANN’s ability to define and enforce concepts such as “cost-recovery,” “nominal

⁷ Alternatively, a Provider who does not wish to forward a further form of notice to its Customer at its or the Customer’s expense should either keep trying until it establishes contact (within a reasonable time) and/or terminate the service. The bottom line is that if a Customer cannot be reached for any reason (wrong info, technical issue, no budget/desire to try an alternative form of notice), then continuation of the service would undermine the contactability purpose of Whois.

⁸ See Initial Report, Annex E, at p. 84 (Policy Purpose).

fee,” or “unreasonable barrier” in this context. We recommend that the WG consider deleting section I.B.iii.

(b) Time limits in section III.

While allowing P/P customers 15 calendar days to respond after being notified of a disclosure request seems extremely generous, especially since that delays disclosure for at least that long even if no response is received, the problem should not be compounded by building in further delay after the 15 days has lapsed. IPC suggests that the “x” in section III.B. be replaced with “3 calendar days after receiving the Customer’s response, or 1 calendar day after the time for Customer’s response has passed.”

(c) Section III.C.ii and iii: reasons for non-disclosure

To bring greater coherence to the articulation of this critical standard, IPC recommends that the general standard be drawn from section III.C.ii and iii: i.e., whether the P/P customer has put forward a reasonable basis for believing that its use is either non-infringing or defensible, and/or that the P/P Provider has found such a reasonable basis for so believing. This is in addition to the non-disclosure reason stated in section III.C.v, which refers to specific information, facts or circumstances to show that the trademark or copyright complaint, even if valid, is a pretext. Taken together, these reasons should cover all the anticipated scenarios in which an otherwise valid (within the applicable criteria of section II) disclosure request can properly be denied.⁹ This standard best balances the interests of the parties involved, preserving for Providers an appropriate degree of discretion, while offering a reasonable degree of predictability to Requesters.

The WG may also wish to reorganize section III.C in the final report, so that the grounds for refusal of disclosure that relate to the response of the P/P customer (subparagraphs ii and v) are grouped together for clarity.

(d) Section III.F: appeal

This issue occupied a considerable amount of time in the WG’s discussion. A late addition to the draft was to provide for the P/P customer as well to initiate an appeal, even though the section only explicitly applies to what happens in the event of a final refusal to disclose by the Provider. This may be a case of false symmetry, since any appeal by the Customer of a decision by the Provider to disclose in response to a request inevitably builds further delay into the resolution of the request. IPC urges the WG to consider whether the most efficient way to address this complex issue is to eliminate the concept of an appeal, relying instead on a reconsideration process (based on current section III.E) in which both customer and requester would be enabled to submit additional information to a provider that has initially rejected the request for one of the reasons set forth in current section III.C.ii, iii or v.

(e) Remedy for wrongful disclosure or misuse of disclosed information (Section III.G and Annex I to Annex E)

⁹ In this regard, IPC considers it essential to preserve section III.D of the Illustrative Disclosure Framework, specifying reasons that cannot be solely relied upon to justify refusal of disclosure in response to requests that meet the stated criteria.

IPC believes that arbitration (in addition, of course, to any other available legal remedies) is the appropriate mechanism for dealing with claims that contact information was either wrongfully disclosed due to knowing false representations, or was knowingly misused. We believe that Option #1 appropriately states the applicable standards. Option #2 is unacceptable because Requesters should be entitled to seek the registrant contact information that would be publicly accessible but for the registrant’s use of a privacy/proxy service, so long as the applicable standards for disclosure are met, without subjecting itself to the jurisdiction of a court in a territory that may well have been intentionally chosen by the P/P Provider for its difficulties for Requesters, and without regard to the ability of such courts to adjudicate such disputes fairly or to accommodate foreign litigants.

E. Permissible uses of p/p registrations (a/k/a/ “online financial transactions”) (pp. 15-16 and Annex F statements pp. 94-98)

IPC notes the inclusion of three questions related to permissible use of privacy or proxy services in the context of websites associated with commercial activities.¹⁰ IPC finds it difficult to come to a conclusion on the main issue absent a clear answer to a point implicated in the second question: “adopt[ing] a definition of ‘commercial’ or ‘transactional’ to define those domains for which P/P service registrations should be disallowed.” Only after clearly defining these terms would it be possible to decide whether domain names that resolve to websites that fit such a definition should be prohibited from using privacy or proxy services. Clear definitions are the key to avoiding misinformation and mischaracterization of any proposal designed to strike a balance between a consumer right to be informed as to the source/origin of goods and services, and the right to privacy and free speech without fear of interference and/or retribution. Significant time and effort has been spent on discussing this question, and at the very least, this demonstrates to the IPC that the issue is worth pursuing and must not be dismissed out of hand within the context of this policy development process.

IPC agrees with the observation that the justification for privacy or proxy registration is very low when the domain name registered using a P/P service is ultimately used to carry out online financial transactions for commercial purposes. While anonymity is important to promote the robust exchange of ideas by reducing the risk of economic reprisal or official retaliation, that rationale is far weaker when the speech carried out through the use of the domain name is primarily to propose a commercial transaction. In such cases, the consumer’s interest in knowing with whom he or she is dealing online is far stronger. This calculus of interest is reflected in the many national laws or regulations worldwide that require commercial establishments to self-identify and to provide consumers with effective contact points.

In the offline world, established international consumer protection laws prohibit the concealment (and often require the disclosure) of the source and/or origin of goods and services. The IPC is unaware of any compelling reason why the same principle should not apply to the online world, especially in light of the vast amount of business that is transacted online (and the correspondingly huge risks of fraud). While the IPC acknowledges the important role that the internet plays in facilitating anonymous free speech, we note that the right of anonymous speech

¹⁰ Initial Report at p. 17.

does not necessarily extend to commercial speech, much less to commercial transactions, and the issue is worth exploration and potentially legal review.¹¹

It seems clear to IPC that, as a matter of principle, the use of proxy or privacy registrations to carry out online financial transactions for commercial purposes should be subject to requests for disclosure. However, in order to implement such a principle, clear and consistent definitions of terms such as “commercial” and “transaction” are imperative, and must be provided to and acknowledged by registrants.

The extensive discussion of this issue within the Working Group strongly suggests that great care must be taken to ensure that the implementation of such a principle does not unnecessarily implicate uses where justification for exclusion from privacy/proxy service is weak or nonexistent. Nor should implementation require monitoring of privacy and proxy registered websites by service providers, which we agree could be burdensome and unnecessary; hence, the proposal for a system triggered by requests for disclosure. Pending further defining the relevant terms and conducting a deeper examination into relevant laws and principles, as well as implementation issues, the IPC is not, at this point, recommending any a priori rule that would ban registrants who intend to use their registration for the purpose of facilitating online commercial transactions from using proxy/privacy services.

We note that at least some significant providers of such services currently ban some commercial uses in their terms and conditions of service.¹² IPC would strongly support identifying such policies as a best practice for service providers at a minimum, and we certainly think it is imperative that nothing in the ICANN accreditation standards impede a provider from adopting and enforcing such an exclusion.

IPC recommends that the WG flag for priority consideration during the implementation phase of this process the development of an illustrative framework mechanism for how complaints that a particular domain name is being used to carry out online financial transactions for commercial purposes should be submitted, processed, evaluated, and acted upon. Because we know that the development of this mechanism could be a protracted process that must include consideration of a number of diverse factual situations, we strongly recommend that it take place in parallel with the implementation phase of this process, and that it not delay the presentation of the Working Group’s conclusions to the GNSO Council and ultimately the Board.

IPC thanks the WG for its sustained and careful work in preparing the Initial Report, and stands ready to provide further information that will assist the WG in its vital task.

Respectfully submitted,

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¹¹ For some US legal precedents of relevance, see *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *Doe v. 2TheMart.com, Inc.*, 140 F.Supp.2d 1088 (W.D.Wash. 2001).

¹² See, e.g., Whoisproxy.com Ltd. Terms and Conditions at <http://www.whoisproxy.com/terms-and-conditions.php> (describing the service as “available for new and existing non-commercial domain names”, and listing as grounds for termination of the service “use of the domain name for commercial purposes”), as presented to the WG by Volker Greimann on March 4, 2014.