Time Warner Inc. ("Time Warner"), for itself and on behalf of HBO, Warner Bros. Entertainment and DC Entertainment appreciates this opportunity to comment on the Initial Report (the "Initial Report") published by the ICANN Policy Development Process Working Group ("WG") on issues relating to the accreditation of privacy and proxy service Services ("P/P Services"). Time Warner endorses and supports the comments of Turner Broadcasting System, Inc., the Coalition for Online Accountability ("COA") and the Motion Picture Association of America ("MPAA") and wishes to underscore a number of viewpoints in response to the Initial Report.

## Introduction

As the parent company of HBO, Turner Broadcasting System, Inc., Warner Bros. Entertainment and DC Entertainment, each of which is home a significant portfolio of famous brands, content and services, Time Warner is deeply invested in supporting an online marketplace which is safe for content owners as well as consumers. The ability for consumers, right owners and other stakeholders to identify and contact online purveyors of products and services is a cornerstone of a well-functioning marketplace, and while there are valid reasons for the use of privacy and proxy services ("P/P Services"), it is essential that current imbalances and pitfalls be addressed. We believe the Initial Report is a constructive step towards the goal of identifying and implementing a set of accreditation standards for P/P Services, recognizing the interests of legitimate registrants using P/P Services, while protecting right holders and consumers from fraud, piracy, malware etc.

## The Initial Report is a Good Start, but Improvements are Necessary

Time Warner agrees with the recommendation of the Initial Report relating to the initial relay of electronic communications/allegations of illegal activity to customers of P/P Services (P/P Customers), the notification of a "persistent delivery failure", and verification/re-verification of the P/P Customer's email address at that time. Such basic "relay" functions are an essential first step to ensuring that right holders can at least contact whomever is behind a particular misuse. Any accreditation standards need to ensure that automated systems used to handle relays do not filter out legitimate reports of abuse, and that in the event of a persistent delivery failure the P/P Service "*must* upon request forward a further form notice to its customer..", without saddling the right holder or consumer with any additional cost.

Since we expect that a number of P/P Customers may ignore initial communications, right holders must have a reliable and predictable method by which to request disclosure of the contact information a P/P Service has for its P/P Customer that would ordinarily appear in the publicly accessible WHOIS database. While the Initial Report's "Annex E – Illustrative Draft Disclosure Framework for Intellectual Property Rights-holders" (the "Disclosure Framework") largely does that[1], (in particular, Section III.(D)) Time Warner takes the view that certain improvements are necessary:

[1] Initial Report at 84-93.

- The "cost recovery fee" for processing disclosure requests that is referenced in Section I(B)(iii)[2] should be dropped. We do not see why Time Warner should have to bear any costs that are generated by a P/P Service operating for the benefit for a third party, and from which it derives no benefit.
- Sections II(A)(5) and II(C)(5)[3] must be amended to clarify that owners of common-law trademarks will not be excluded from the process outlined in the Disclosure Framework.
- The timeframes referenced in Sections III(A) and (B)[4] should be kept short (no more than 14 calendar days total should suffice), to ensure that harms such as protecting children from inappropriate content, or customers from malware can be addressed efficiently.
- Section III(F) – which outlines the appeal process in which P/P Services must participate if they decide to ***refuse*** a disclosure request[5] – should not be extended to decisions to ***grant*** disclosure requests. The Disclosure Framework is ambiguous on this point. By its terms, Section III(F) only applies "[i]n the event of a final refusal to disclose by the Service." But Section III(F) then concludes with a clause that the appeal process "should be similarly accessible to the Customer for purposes of an appeal." Why a P/P Customer would want to appeal a P/P Service's decision to ***refuse*** to disclose is not clear (isn't that what the P/P Customer would want?). This can be resolved by simply deleting that final clause. Assuming that the final clause was included to give P/P Customers the ability to appeal P/P Service decisions to ***grant*** disclosure requests, then there are at least three problems with it:
    - First, such an appeal (the logistics of which are left undefined) would necessarily add confusion and delay to the carefully negotiated process that is outlined in the Disclosure Framework.
    - Second, such an appeal ignores the fact that other portions of the Initial Report acknowledge that P/P Services retain the ability to ***immediately*** terminate the service (and hence publish the P/P Customer's contact information to the work – not just disclose it to one intellectual property owner) for any grounds outlined in their Terms of Service.[6]
    - Third, such an appeal ignores the contractual relationship between P/P Services and P/P Customers. If P/P Services and P/P Customers want to agree to some form of notice/appeal before any partial or complete terminations of the P/P Service, then they can negotiate those terms (so long as whatever process they agree to is otherwise consistent with the Disclosure Framework). Right owners – who are not parties to the contract between the P/P Service and the P/P Customer – cannot do that. The whole point of the Disclosure Framework – including but not limited to Section III(F) – is to account for that contractual imbalance.

[2] Initial Report at 85.
[3] Initial Report at 86 and 89.
[4] Initial Report at 90.
[5] Initial Report at 92.
[6] Initial Report at 85.

- The WG should amend Sections III(C)(ii) and (iii) to clarify that P/P Services can refuse to disclose when the P/P Customer has provided – or the P/P Service has independently found – a reasonable basis for believing that the P/P Customer is not infringing the intellectual property in question (or that its use of the intellectual property is defensible) – ***not*** simply for ***any*** reason that the P/P Service finds adequate, sufficient, or compelling.[7] The problem with allowing P/P Services to refuse to disclose for ***any*** reason that they find adequate, sufficient, or compelling is not merely that those words are ambiguous, which only invites further legal wrangling in the future (though that is certainly true). It is that the Disclosure Framework – as a function of its exhaustiveness, which is commendable – has already addressed ***every*** potential reason a P/P Service might have for refusing to disclose.[8]

**Conclusion**

Time Warner agrees that there are legitimate reasons for the use of P/P Services, but these should not prevent the implementation of important safeguards to protect the interests of consumers and right holders, where the system is being abused. It is important to move forward on a basis that recognizes the mutually supportive interests of right holders and consumers, as well as those of internet users more generally, all of which would be better serviced by a set of clear accreditation standards for P/P Services, which include protections and safeguards for all stakeholders. The Initial Report goes a long way towards defining reasonable and practical accreditation standards to preserve the benefits of P/P Services for legitimate users, while protecting the equally legitimate interests of other stakeholders, such as right holders and consumers.

Time Warner thanks the WG for considering these comments.

[7] Initial Report at 91.
[8] See Initial Report at 91.