



Comment on GNSO Privacy & Proxy Services Accreditation Issues Working Group Initial Report

Status: FINAL

Version: 9

8-Jul-2015

Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

Comment

The Business Constituency (BC) is pleased to see the work for implementing an Accreditation Process and the establishment of related policies progressing. Clear and effective policies for Privacy and Proxy Services are critical to the establishment of a trusted and secure Internet. Resolution of these issues is a critical next step in improving the current registration landscape. The BC remains mindful of the results of the GNSO study of WHOIS privacy and proxy abuse, which concluded that “a significant percentage of domain names used to conduct illegal or harmful internet activities are registered via privacy and proxy services to obscure the perpetrator’s identity.” The BC supported the study’s findings, which clearly demonstrated a need for improvements in both policy and enforcement.

The BC strongly supports adoption of the consensus proposals in the Initial Report. They are important steps in addressing problems contributing to the use of P/P services to perpetrate illegal activities. The consensus proposals will serve to improve the response of P/P providers to legitimate data access requests and can serve as the foundation of a compliance framework where relevant services are held accountable for implementation of agreed upon policies. The success of the recommendations depends on strong implementation of accountability measures such as revocation of accreditation and financial penalties. This would require ICANN to significantly enhance both its compliance capabilities and its interactions with LEAs.

In addition, the BC notes that additional work is required to facilitate obtaining necessary information held by P/P providers to combat these activities.

Under the 2009 Registrar Accreditation Agreement registrars are required to maintain contact information for the Registered Name. However, it can be difficult to obtain this information from registrars when P/P services have been used, even when proxy abuse and malicious activity has occurred. The BC believes that further work is necessary to determine a practical approach that provides data of malicious actors while maintaining consumer privacy protections.

We look forward to the consensus recommendations going forward and continuing work on other areas where consensus has not yet been reached.

Below are our specific comments on questions raised by the working group.

I. Agreed preliminary conclusions

1. Definitions

BC supports the proposed definitions and agrees that these recommended definitions should be used uniformly by ICANN, including generally in relation to WHOIS beyond privacy and proxy service issues.

2. NO DISTINCTION IN TREATMENT; WHOIS LABELING REQUIREMENTS; VALIDATION & VERIFICATION OF CUSTOMER DATA:

BC supports these preliminary conclusions.

3. MANDATORY PROVISIONS TO BE INCLUDED IN PROVIDER TERMS OF SERVICE & MINIMUM REQUIREMENTS TO BE COMMUNICATED TO CUSTOMERS:

The BC supports these preliminary conclusions.

4. CONTACTABILITY & RESPONSIVENESS OF PRIVACY & PROXY SERVICE PROVIDERS:

The BC supports these preliminary conclusions.

5. STANDARD FORM & REQUIREMENTS FOR ABUSE REPORTING & INFORMATION REQUESTS:

The BC supports these preliminary conclusions.

6. RELAYING (FORWARDING) OF THIRD PARTY REQUESTS:

The BC supports these preliminary conclusions.

7. DISCLOSURE OR PUBLICATION OF A CUSTOMER'S ID ENTITY OR CONTACT DETAILS :

The BC supports these preliminary conclusions.

8. DEACCREDITATION & ITS CONSEQUENCES:

The BC supports these preliminary conclusions.

II. Specific topics on which the WG has yet to finalize its preliminary conclusions

1. On Escalation of Relay Requests

Status of WG proposal:

"As part of an escalation process, and when the above-mentioned requirements concerning a persistent delivery failure of an electronic communication have been met, the provider [should] [must] upon request forward a further form of notice to its customer. A provider should have the discretion to select the most appropriate means of forwarding such a request [and to charge a reasonable fee on a cost-recovery basis]. [Any such reasonable fee is to be borne by the customer and not the Requester]. A provider shall have the right to impose reasonable limits on the number of such requests made by the same Requester."

- a. What should be the minimum mandatory requirements for escalation of relay requests in the event of a persistent delivery failure of an electronic communication?

The BC supports a requirement that the provider MUST forward a further form of notice to its customer. Such a requirement will support resolution of any issues directly with the website owner.

The BC does not support giving providers the ability to recover costs from the requester. The cost of handling notices should be treated as a cost of doing business to the provider and they can choose to recover them from their customers or not. The necessity of receiving and forwarding notices is a result of the core functions of the Privacy & Proxy service and should be recovered from those that are benefitting from the Privacy & Proxy service.

2. On Disclosure and Publication in relation to Requests by LEA and other Third Parties other than Trademark and Copyright Owners:

- a. Should it be mandatory for accredited P/P service providers to comply with express requests from LEA in the provider's jurisdiction not to notify a customer?

As a general matter, Providers will be required to comply with the law in the jurisdictions where they operate. In some jurisdictions the law requires or allows LEAs to request customers not be notified. To the extent policies regarding notification where the matter is not addressed by law need to be developed, they should be developed with active input from LEA representatives, which the BC understands have not been actively present in this Work Group. The BC looks forward to the input from the law enforcement community in order to develop an informed policy recommendation on this matter.

- b. Should there be mandatory Publication for certain types of activity e.g. malware/viruses or violation of terms of service relating to illegal activity?
- c. What (if any) should the remedies be for unwarranted Publication?

It is not necessary to establish a uniform policy based approach as the market will control this aspect of the service. Privacy and Proxy services which fail to provide the core function of the service and Publish data improperly will not survive as a Privacy and Proxy service provider.

- d. Should a similar framework and/or considerations apply to requests made by third parties other than LEA and intellectual property rights-holders?

Appendix E can serve as a model for other areas that may benefit from clarity around the standards and processes to identify legitimate requests from non-LEA sources. BC encourages such an approach, in particular around the identification of malicious botnets and their control centers.

III. Specific topics on which there is currently no consensus within the WG

- a. Should registrants of domain names associated with commercial activities and which are used for online financial transactions be prohibited from using, or continuing to use, P/P services? If so, why, and if not, why not?

The BC recognizes that this issue has been difficult for the Work Group to resolve and urges the Work Group to continue to work towards consensus to identify those types of activities which may be ineligible for P/P Services, even as the other agreed upon recommendations go forward. The BC believes that consultation with consumer protection authorities and privacy advocates with experience in these issues can be particularly helpful. The BC agrees that the task is not to define what constitutes commercial activity itself, but identify a subset of practices for which it is a reasonable to insist on transparency.

The BC notes that it is a longstanding principle of consumer protection that consumers have a right to know with whom they are doing business. For example, the *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (1999)* require businesses to provide accurate, clear and easily accessible information about themselves to identify the business, allow for dispute resolution, allow for service of legal process and allow law enforcement and regulatory officials to determine the location of the business. Similar requirements can be found in the OECD Consumer Protection Guidelines, the EU's E-Commerce Directive (Article 5), the Draft Resolution on Consumer Protection currently before the UN General Assembly and a variety of other national consumer protection statutes as outlined in the FWD Strategies and LegitScript analysis. Privacy laws have similar requirements so that data subjects may know who is collecting data about them. It should be noted that such requirements do not always require identification of specific individual and related personal contact information. Identification of a corporate contact point is often sufficient and should be accommodated in any consensus proposal. This same principle applied online will serve to create an enabling environment for consumer trust.

- b. If you agree with this position, do you think it would be useful to adopt a definition of "commercial" or "transactional" to define those domains for which P/P service registrations should be disallowed? If so, what should the definition(s) be?

As explained above, the BC believes further work is necessary to define types of activities which may be ineligible for P/P Services, thereby enabling the protection of consumers while maintaining privacy protections. The BC also believes that consultation with consumer protection authorities and privacy advocates with experience in these definitional issues can be particularly helpful. The BC agrees that the task is not to define what constitutes commercial activity itself, but identify a subset of practices for which it is a reasonable to insist on transparency.

--

These comments were drafted by Ellen Blackler with assistance from several BC members.

It was approved in accordance with the BC charter.