

# COALITION FOR ONLINE ACCOUNTABILITY

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## Comments of the Coalition for Online Accountability (COA)

September 4, 2015

COA appreciates this opportunity to comment on the Preliminary Issue Report on “Next Generation gTLD Registration Directory Services to Replace WHOIS” (“Report”). See <http://whois.icann.org/sites/default/files/files/rds-prelim-issue-13jul15-en.pdf>.

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners (listed below). COA and its participants have engaged actively in many aspects of ICANN’s work since the inception of the organization, including through the Intellectual Property Constituency of the GNSO. COA seeks to enhance online transparency and accountability by working to ensure that domain name Whois databases remain publicly accessible, accurate and reliable, as key tools against online infringement of copyright, as well as to combat trademark infringement, cybersquatting, and other forms of fraudulent or criminal misconduct. See <http://www.onlineaccountability.net/>. Accordingly, Whois issues have always been at the forefront of COA’s engagement with ICANN, so we are particularly interested in the Report and the issues raised in it.

In general, COA supports the Report. It can serve as a useful roadmap for the way forward on registration directory services policy, and provide the basis for a sound and flexible charter for the Working Group expected to be convened to recommend the necessary policy revisions and clarifications. However, that support is subject to some caveats.

It is important to remember that the future Working Group’s role is not simply to endorse and implement the recommendations of the Whois Experts Working Group (EWG), or some variant thereof, calling for adoption of an entirely new registration data system to replace, root and branch, the long-standing Whois service. While the Report does spell out that on each issue, the Working Group’s job is decide IF Whois must be replaced, and IF SO, with what new system, the Report also subtly places a thumb on the scale in favor of dramatic change and against adaptation of the status quo. This pervasive bias is evident from the very title of the document (“Services to Replace WHOIS”) and extends throughout the Report, beginning with the assertion that “WHOIS policy and the underlying protocol are still in need of comprehensive reforms” (p.3).

COA agrees that the recommendations of the EWG should form a crucial starting point for the new Working Group’s efforts, and that it should give considerable weight to the EWG recommendation for a new system; to COA’s knowledge, this is the most comprehensive and

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American Society of Composers  
Authors & Publishers (ASCAP)

Entertainment Software Association (ESA)

Software & Information Industry Association  
(SIIA)

Broadcast Music Inc. (BMI)

Motion Picture Association of America (MPAA)

Time Warner Inc.

Recording Industry Association of America (RIAA)

The Walt Disney Company

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best thought out alternative proposal to the status quo, and it should be treated as such. However, at each step in the process, the Working Group will need to make a choice between recommending incremental changes that could be made to the existing system, and scrapping the status quo and starting over. Conceding all the flaws and shortcomings of the current system, it is far from self-evident that the latter course is always preferable, especially taking into account the extended time period that it will take to design and implement the new system. In fact, the EWG itself recognized this point, concluding its final report by suggesting that consideration of its recommendations be framed by asking whether the RDS is preferable to today's WHOIS, and if not, whether the current WHOIS system should continue (p. 35).

In striving for a better system for RDS users of future decades, the Working Group also needs to bear in mind the best interests of RDS/Whois users of today and tomorrow -- encompassing the 5-10 year span before any new system could be fully designed and implemented. The Working Group's assignment will be to weigh these possibly competing interests; to accommodate them both to the extent possible; and where not possible, to recommend a choice between them. This should be clarified in the Final Issue Report.

In weighing these interests, the Working Group will need to make sure that it has accurately captured the baseline that exists today (against which any proposed improvements to be derived from a new system must be measured). That baseline is a moving target; it has moved even since the EWG Final Report was issued sixteen months ago. The Working Group's appreciation of this baseline may not always be enhanced by the way the Report characterizes it. For instance, to state as the status quo that "gTLD registration data [is] accessible for any purpose" (p.39) is not accurate, and has not been accurate since at least 2001, when the first version of current section 3.3.5 of the RAA was adopted, specifying uses of Whois data that registrars are required to prohibit under the terms and conditions of their query-based public access services.

Another potentially significant change in the baseline that has occurred since issuance of the EWG Final Report is IETF's approval of the Registration Data Access Protocol (RDAP), as noted in the Report (p. 27). To the extent that RDAP "addresses many WHOIS protocol deficiencies" that are part of the status quo, the Working Group needs to consider the extent to which the "baseline" now incorporates correction of these deficiencies, and how that impacts the balance to be struck between the advantages and disadvantages of junking the existing system. The Report asserts that "the underlying protocol [is] still in need of comprehensive reforms" (p. 3). Is this still the case now that RDAP has been approved and is on track to be implemented?

The Report proposes an ordering of 11 topics to be considered by the Working Group (see pp. 5, 38-51). COA believes that this topics list, based on the work of the EWG, appears comprehensive, but urges that the Working Group be accorded the flexibility to re-order and redefine them as it thinks most effective. For instance, it may be impossible to address fully the topic of data accuracy ("What steps should be taken to improve data accuracy?") before concluding the topic of data elements ("What data should be collected?"), which appears after accuracy on the list. As another example, the question of achieving compliance with policies is a cross-cutting one which should not be deferred until after six previous topics about the content of those policies have been concluded; compliance should be an important factor in recommending what those policies should be.

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Similarly, just as the final issue report should not rigidly confine the Working Group to a list of topics to be addressed in a particular order, so the proposal for a three-phase process as set forth in the draft Working Group charter should be interpreted flexibly. COA applauds the idea of having the Working Group first publish its conclusion on Phase 1 for review by the GNSO council (so long as that also includes the opportunity for public review and comment, as provided on p. 70) before proceeding to Phase 2. But the detailed chart (p. 66) of interdependencies in phases 2 and 3 must be considered as a guideline rather than a fixed recipe. In particular, the idea of postponing until the very end of the process any consideration of identifying and assessing risks and benefits of the design choices made on the other topics may be both imprudent and inefficient. Moreover, treating the chart of interdependencies as a guideline rather than a fixed sequence (such that topics in Group (A) can still be revisited based on the outcomes of discussions on topics in Group (B), and so forth) better accounts for the extent to which all of the issues to be addressed are interrelated – which the Report repeatedly (and correctly) highlights.

Thank you for considering the views of COA.

Respectfully submitted,

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