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*Via Electronic Mail*

November 20, 2009

Comments of the Whois Subcommittee of the Internet Committee of the International Trademark Association on  
ICANN's Study on the Prevalence of Domain Names Registered Using a Privacy or Proxy Service among the Top 5 gTLDs

The preliminary results of the above-captioned ICANN study (the "study") reveal that approximately 15 to 25 percent of domain names registered under the top 5 gTLDs are likely to have been registered using a privacy or proxy service.<sup>1</sup> Although, based on ICANN's definition of the categories observed all 25 percent of the identified domains likely represent proxy or privacy registrations, under either interpretation the study reveals that a substantial number of domain names (possibly millions) are registered using such services.<sup>2</sup> As tools to conceal one's identity, proxy and privacy services can be and are used for *bona fide* and *mala fide* purposes.

Proxy and privacy services frequently present obstacles for law enforcement authorities and trademark owners in locating and contacting the true owners of problematic domain name registrations and web sites. Therefore, such services prevent the institution of swift legal action to prevent the abuse of intellectual property, phishing, e-mail spamming, Internet fraud and other schemes that confuse and deceive Internet and e-mail users. On November 12, 2008, the INTA Board of Directors adopted a Resolution supporting continued open access to ownership information contained in the Whois database, including the identity of, and accurate, reliable

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<sup>1</sup> <http://www.icann.org/en/compliance/reports/privacy-proxy-registration-services-study-28sep09-en.pdf>

<sup>2</sup> We take issue with regard to NORC's initial classification of the 580 domains in the study that appear to have been registered using a proxy or privacy service. NORC has ranked the domains, as if there is a straight priority ranking among the domains at issue, when in fact the different categories test for different types of services. The middle category, "2" or "probable," for instance, captures two different kinds of domains: a) proxy service domains with addresses not shared by other domains in the study; and b) privacy service domains where the registrant name may have been left undisturbed, but the contact information replaced with that of the privacy service. Even among proxy service domains, while the categorization seems reasonable (3 = "privacy" or "proxy" in registrant name, shared address; 2 = "privacy" or "proxy" in registrant name, unique address; 1 = registrar name in registrant field, shared address) we disagree with the labels associated with these categories, particularly insofar as category 1 is labeled "Less Probable." In fact, unless the registrar is itself warehousing large quantities of domains (and we suspect the registrars will, in response to validation requests, confirm that they do not own these domains on their own behalf), a record with a registrar name in the registrant field and a shared address still seems "highly likely," or at least "possible" to represent a proxy registration. For this reason, we believe that ICANN's higher estimate of 24.6% of domains registered using proxy or privacy services is more accurate.

contact information for the true owner of a domain name registration.<sup>3</sup> In March 2009, the Intellectual Property Constituency (“IPC”) published a Survey of Major Proxy Registration Service Practices (the “Survey”) and wrote a letter dated April 24, 2009 to Mr. Doug Brent, the then Chief Operating Officer of ICANN, regarding how proxy registration services violate both the letter and spirit of Registrar Accreditation Agreement (“RAA”) Section 3.7.7.3 (the “Letter”). The November 2008 Board Resolution and the 2009 Survey and Letter reinforce the importance of having domain name owners provide accurate domain name ownership information and having proxy service providers and privacy service providers comply with RAA Section 3.7.7.3.

Regrettably, the study was not scoped to reveal the extent to which the privacy and proxy services are used for unlawful purposes and/or are in violation of RAA Section 3.7.7.3. The study only shows there are a substantial percentage of registered domain name holders that use a privacy or proxy service. An inquiry into the actual purposes for using proxy and privacy services is imperative so an informed policy concerning such services can be crafted that balances legitimate privacy concerns with the need to limit the use of such services for wrongful purposes. In fact, the Affirmation of Commitments between ICANN and the DOC requires it.<sup>4</sup>

In addition, we are concerned that the study does not accurately illustrate and categorize the difference between proxy and privacy services. First, the study’s definitions of proxy and privacy services, on page two, could be clearer in pointing out that the main difference between the services is that in a privacy service, the underlying registrant’s name remains in the Whois registrant field, while in a proxy service, the proxy service provider lists its own name as the registrant (while both usually replace or anonymize all other information). Second, the study states on page five:

The data collected from the sample suggests that, of registrants using a proxy or privacy service, approximately 85% used a proxy service to register their domain name and 15% of registered name holders used a privacy service. This is supported by the fact that the registrant name field in 580 Whois records for those domain names contained the key word “proxy” or the term “privacy.”

This criteria contradicts the definition of proxy and privacy services offered in the Study and above, insofar as in most instances in which the Whois information uses the word “privacy” – i.e. the name of the underlying registrant has been replaced with the name of the service provider (whose name may include the word “privacy”) - the service is actually a *proxy* service provider. For example, Gee Whiz Domains Privacy Service c/o Privacy Admin, BelgiumDomains LLC Privacy Service, Oneandone Private Registration, PrivacyProtect.org, and Moniker Privacy Service are all proxy service providers, not privacy service providers. Given the important distinction between privacy and proxy services, the study should clarify whether this distinction was taken into account. If not, we submit a substantial difference in the percentages is likely.

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<sup>3</sup> See International Trademark Association, Continued Open to the Whois Database (Nov. 12, 2008) [http://inta.org/index.php?option=com\\_content&task=view&id=1918&Itemid=153&getcontent=3](http://inta.org/index.php?option=com_content&task=view&id=1918&Itemid=153&getcontent=3).

<sup>4</sup> See Affirmation Section 9.3.1

Finally, although we recognize that the following may not be testable within the scope of the study, it is worth noting that the study's results should not be taken to suggest that the public can easily identify the domain owner in the approximately 75% of domains that are likely not registered through proxy or privacy services. In many situations, a domain name owner provides false information in the Registrant field and therefore does not show up in the study as either a proxy service provider or privacy service provider. Domain name owners that provide false Registrant information, like the proxy and privacy services, provide an obstacle in locating and contacting the true owners of problematic domain name registrations and web sites, and therefore have the same net effect, enabling wrongdoers to perpetrate fraud, infringement and other illegal acts with impunity. Similarly, the study does not appear to identify situations in which a domain name owner provides false Whois information to the proxy service provider or privacy service provider, creating a second level of obfuscation.

Thank you for considering our views on these important issues. If you have any questions regarding our submission, please contact Claudio DiGangi, External Relations Manager, Internet & the Judiciary at: [cdigangi@inta.org](mailto:cdigangi@inta.org)

#### **ABOUT INTA AND THE WHOIS SUBCOMMITTEE**

The International Trademark Association (INTA) is a more than 131-year-old global organization with members in 190 countries. One of INTA's key goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last decade, INTA has also served as the leading voice of trademark owners in the development of cyberspace, including as a founding member of ICANN's Intellectual Property Constituency. INTA's Whois Subcommittee is a group of nearly forty trademark attorneys and professionals charged with monitoring adoption or modification of Whois policies in new and existing TLDs and advocating for adequate access to domain ownership information.

INTA has a particular interest in policy relating to the Whois database, because the information contained in the Whois database assists trademark owners and authorities in policing abuses of intellectual property and preventing consumer confusion and consumer fraud. Moreover, the information in Whois also allows Internet users and consumers from all walks of life to identify the owners of web sites selling goods or disseminating information over the World Wide Web.