Comments of the Intellectual Property Constituency
On the
"Preliminary Issue Report on 'Thick' Whois"

The Intellectual Property Constituency (IPC) of the GNSO appreciates this opportunity to comment on the "Preliminary Issue Report on 'Thick' Whois." See http://www.icann.org/en/public-comment/thick-whois-preliminary-report-21nov11-en.htm.

IPC strongly supports the recommendation that a Policy Development Process be initiated on whether or not to require a thick Whois structure for all incumbent gTLDs. Our support for a single portal for access to authoritative registrant contact data in a particular gTLD is well documented and consistent.[1] Our purpose in submitting this brief comment is, first, to amplify, and in some instances correct, statements in the preliminary issue report regarding the advantages of thick Whois; and second, to underscore that a PDP is not the only way to advance the goal of uniform thick Whois in the gTLD environment, and that the initiation of such a process must not be allowed to stall or obstruct these other methods of advancing this valuable goal.

1. Amplifications and Corrections of Preliminary Issue Report

The preliminary issue report well states many of the advantages of centralization of Whois data via a single portal, including reducing the volume of transfer disputes; promoting uniformity in Whois data submission and display; archival and restoration benefits; increased stability; and improvements in data quality and in accessibility of Whois data. The following amplifies on some of these advantages.

IPC supports open access to accurate ownership information for every domain name in every top-level domain registry, to facilitate the resolution of legal and other disputes related to the registration and use of the domain name. Simplifying access to this information through thick Whois will help prevent abuses of intellectual property, and will protect the public in many ways, including by reducing the level of consumer confusion and consumer fraud in the Internet marketplace. Thick Whois enables quicker response and resolution when domain names are used for illegal, fraudulent or malicious purposes.

Currently, in those gTLD registries that follow a thin Whois model, all contact data associated with a particular domain name registration is decentralized and held by the registrar sponsoring that registration. This leaves public access to this data vulnerable to registrar technical failure, insolvency, or simply non-compliance with its contractual obligations regarding

[1] See, e.g., (http://forum.icann.org/lists/e-gtld-transition/msg00002.html) and http://forum.icann.org/lists/net-agreement-renewal/pdfcKJIbvsq63.pdf.

Whois data. As amply documented in the recent Whois Policy Review Team Draft Report, see http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf, as well as many other sources, and consistent with the experience of IPC members, ICANN's current contract compliance capabilities fall far short of being able to deal comprehensively and effectively with issues of registrar non-compliance. Centralization of this data via a thick Whois model would significantly lessen the contractual compliance burden, as well as providing a critical back-up when Whois data is simply not accessible from the sponsoring registrar.

Indeed, there is already evidence that registrant contact data in the thick Whois model is more accessible and more accurate than in the thin Whois model. In the detailed study of Whois accuracy carried out for ICANN by NORC, Whois data from both thick and thin registries was assessed. See http://www.icann.org/en/compliance/reports/whois-accuracy-study-17jan10-en.pdf. NORC found that Whois data was accessible 100% of the time from thick Whois registries, but in .com no Whois data whatever could be accessed 2.4% of the time (for .net, the corresponding figure was 1.5%). The NORC study also measured the prevalence of patently false or incomplete data as much higher in thin registries than in thick registries. NORC found that, even when Whois data was accessible at all in .com and .net, 5.9% of Whois data in both registries was patently false or obviously incomplete. The rates in thick registries were lower, ranging from 2.4 to 4.4%. To be clear, IPC is not advocating thick Whois as a panacea for the serious (and perhaps worsening) problem of inaccurate Whois data; but it is one step that, along with a number of other changes, could move us toward a solution.

Finally, with the increasing internationalization of the gTLD registrant pool and concomitantly of gTLD registration data, the Whois system faces difficult challenges about how registration data should be collected and displayed when provided by registrants whose primary languages use a script that does not employ Latin characters. Those challenges are currently under study within ICANN; but however they are resolved, the outcome will almost certainly be better if Whois data is centralized at the registry level, rather than being held by hundreds or thousands of registrars, who may apply data collection or display standards inconsistently, and who will face little if any realistic prospect of enforcement to require them to follow a uniform approach.

While the preliminary issue report does a good job of summarizing some of these advantages of thick Whois, it also includes a couple of incorrect or incomplete statements that deserve further comment.

- The comparison of thick and thin Whois outputs on pages 9-10 understates the difference, because it truncates the thick Whois output from CNN.ORG. That output goes on to include full contact information on both administrative and technical contacts for that domain name.

- The chart on page 12 is inaccurate with respect to Whois in .name. This registry unequivocally follows a thick Whois model, with the registry holding a complete set of registration data. Public access to this data is organized in four tiers. Contrary to footnote 8 of the preliminary issue report, a full set of the data is available to requesters without payment, if the requester enters into an agreement with the registry under the Extensive Whois Data tier. (A different tier, Detailed Whois Data, allows access to a

somewhat less comprehensive set of data upon payment of a nominal fee, which may be waived.) See http://www.icann.org/en/tlds/agreements/name/appendix-05-15aug07.htm.

- Thus, the preliminary issue report slightly overstates the extent to which thin Whois is in use today. Regardless of what formal policy ICANN might ultimately adopt, thick Whois has already become the norm in the gTLD world. Apart from .com and .net, which employ thin Whois mainly as a vestige of the initial arrangements for bringing competition to the domain name registration business before the turn of the millennium, the only outlier is .jobs.

2. Other Means of Achieving Uniform Thick Whois

While IPC fully supports the recommendation of the preliminary issue report, we also underscore that there are means other than a Policy Development Process through which the outlier gTLD registries -- .com, .net and .jobs – can be brought into the gTLD mainstream by migrating to a thick Whois system. These means may – or may not -- be more direct and more expeditious paths to the goal of uniform thick Whois than the PDP route. If a PDP is initiated on this topic, it must be launched explicitly without prejudice to ICANN pursuing these other routes to this goal.

The first route is through ICANN exercise of its capability, under its existing registry contracts, to require thick Whois in those registries that do not now provide it. Section 3.1(h) of the current .com registry agreement with VeriSign provides:

> Centralized Whois. Registry Operator shall develop and deploy a centralized Whois for the .com TLD if mandated by ICANN insofar as reasonably feasible, particularly in view of Registry Operator's dependence on cooperation of third parties.

Under this provision, ICANN could at any time direct VeriSign to migrate the .com registry to a thick Whois model. Although neither the .net nor the .jobs agreements contains a similar provision,[2] the fact is that .com is by far the largest of these three registries, and that a single company – VeriSign – operates all three registries. Consequently, invocation by ICANN of its prerogatives under Section 3.1(h) of the .com agreement would be a major step toward the objective of uniform thick Whois, even though it would not fully achieve that goal. IPC is not advocating here for ICANN to take this step immediately, but it must be made certain that the initiation of any PDP as recommended in the preliminary issue report does not foreclose this option.

[2] However, the .jobs agreement includes an obligation for the registry to forward all Whois data (including registrant contact data) to a third-party recipient, designated by ICANN from time to time, "only for purposes of providing free public query-based access to up-to-date data concerning domain name and nameserver registrations in multiple TLDs." See http://www.icann.org/en/tlds/agreements/jobs/appendix-5-05may05.htm, "Whois Data Provider Specification." Thus, ICANN currently has the right to insist on centralized access to Whois data in .jobs, but not through the .jobs registry. There is a similar provision in the .net agreement but it applies only to "thin Whois" data.

The second route is through renegotiation of the registry agreements with these three registries. The .com agreement expires in November 2012, and the terms of any renewal of the agreement are required to be "similar to the terms generally in effect under the Registry Agreements of the 5 largest gTLDs," with certain exceptions not applicable here. See http://www.icann.org/en/tlds/agreements/verisign/registry-agmt-com-22sep10.htm , Section 4.2. Since all but one of these gTLDs (.net) already operates under a thick Whois model, .com may thus be required to migrate to the same model upon renewal of its registry agreement next year. It is essential that any PDP that is launched be structured and sequenced so that it will not obstruct or delay this outcome.

Although the .jobs registry agreement does not expire until ten years after initial delegation of the TLD (i.e., in September 2015), that agreement is subject to an obligation "to engage in good faith negotiations at regular intervals (at least once every three calendar years following the Effective Date)." http://www.icann.org/en/tlds/agreements/jobs/jobs-agreement.htm, at section 4.3. The .net agreement, which extends to mid-2017, contains an identical provision. http://www.icann.org/en/tlds/agreements/net/net-registry-agreement-01jul11-en.htm, at section 4.3. Neither agreement contains any restriction on the ability of the parties to negotiate amendments at any time. Thus there is no bar to amending these agreements at any time to provide for thick Whois. Any PDP resulting from the preliminary issues report must be structured so as not to impose any obstacle to such an amendment.

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IPC appreciates this opportunity to express its support for the preliminary issues report, and looks forward to prompt action toward bringing thick Whois into reality across the entire gTLD space.