**Comments of the Internet Committee of the International Trademark Association (INTA)
on the "WHOIS Policy Review Team Draft Report"
March 16, 2012**

The Internet Committee of the International Trademark Association (Internet Committee), appreciates this opportunity to provide comments to the Internet Corporation for Assigned Names and Numbers (ICANN) on the WHOIS Policy Review Team Draft Report (Draft Report).

We support the recommendations of the WHOIS Policy Review Team as set forth in the Draft Report.

Public access to reliable, accurate and complete WHOIS data was embedded in the domain name system (DNS) when responsibility for the DNS was first assigned to ICANN in 1998. That responsibility was reflected in the registrar contracts developed by ICANN at its inception,[1] and was restated in the Affirmation of Commitments (AOC) ICANN entered into in 2009.[2]

Despite weaknesses in the availability and accessibility of WHOIS data, and failures by ICANN as enumerated in the Draft Report, WHOIS data is routinely relied upon by millions of Internet users as the primary mechanism for online accountability. To that extent, any suggestion that the purposes of the WHOIS database are limited solely to technical stability and interoperability[3] ignores the much more widespread need for and use of WHOIS by Internet users generally to advance the goals of transparency and accountability in Internet commerce.

One principal way in which the WHOIS protocol helps promote accountability is the use of WHOIS data by law enforcement and the trademark community for intellectual property enforcement purposes. These purposes include:

- To facilitate commerce (e.g., domain name sales, transfers, and general portfolio management)
- To identify cybersquattters and others who infringe trademarks online;
- To investigate those conducting piracy, product counterfeiting, online fraud or phishing schemes over the Internet (many of which involve some degree of trademark counterfeiting to give otherwise anonymous activity the cover of a brand's credibility);

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[1] ("Registrar shall provide an interactive web page and a port 43 Whois service providing free public query-based access to up-to-date (i.e., updated at least daily) data concerning all active Registered Names sponsored by Registrar for each TLD in which it is accredited"). Registrar Accreditation Agreement, p. 3.3.1.
http://www.icann.org/en/registrars/ra-agreement-17may01.htm#3 .

[2] ICANN renewed its commitment to enforce "existing" WHOIS policy and ICANN agreed to "implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information."
http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm.

[3] *See*, STET, Chairman Crocker's comments at http://forum.icann.org/lists/whois-rt-draft-final-report/msg00001.html.

- To prevent or limit damage to customers and business partners victimized by online frauds that are facilitated by trademark infringement and cybersquatting; and
- To assist law enforcement in their efforts to protect consumers against a wide range of criminal activity and online misconduct.

To the extent that the WHOIS protocol has, through inadequate compliance, ineffective articulation of policy and insufficient contractual provisions, been undermined by inaccurate, incomplete and outdated registry data, we applaud the efforts of the WHOIS Review Team and, subject to added comments below, broadly endorse the Review Team's conclusions. We are all the more gratified to see many of the conclusions and recommendations advocated by the Internet Committee adopted by the cross-constituency Review Team.[4]

To the extent that the Draft Report reflects a step towards publication of a single WHOIS policy, made clearly visible and accessible, not just to ICANN stakeholders but to the wider Internet community, the Internet Committee applauds this development. We look forward to working with ICANN in the articulation and publication of a meaningful WHOIS policy to ensure the integrity of the DNS and improve the overall online experience of Internet users more generally.

In addition, the Internet Committee offers these comments in further support of the recommendations made concerning data accuracy, internationalized domain names, and proxy and privacy services.

Data Accuracy Recommendations

Before discussing the Internet Committee's specific comments, we would like to take the opportunity to commend ICANN for recognizing the continuing issues in WHOIS data accuracy and its attempts to address these issues through the implementation of ameliorating steps, including the preliminary steps it has taken to enhance its Compliance Team by its recent senior recruitments.

As to the specific data accuracy recommendations made in the Draft Report, the Internet Committee adds the following comments:

No. 5: "ICANN should take appropriate measures to reduce the number of unreachable WHOIS registrations (as defined by the NORC Data Accuracy Study, 2009/10) by 50% within 12 months and by 50% again over the following 12 months." [5]

The Internet Committee supports this recommendation and proposes the additional goal of a further 50% reduction in the following 12 months. Adding a third 50% reduction goal to the ultimate number of unreachable WHOIS registrations (as defined by the NORC Data Accuracy

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[4] *See*, for example, INTA's comments on the Discussion Paper, dated July 22, 2011. http://forum.icann.org/lists/whoisrt-discussion-paper/pdfy9vxI1Y5fU.pdf.
[5] All numbered recommendations are taken directly from the Draft Report.

Study) is not unreasonable, although it still leaves a significant number of unreachable WHOIS registrations.

No. 6: "ICANN shall produce and publish an accuracy report focused on measured reduction in "unreachable WHOIS registrations", on an annual basis."

The Internet Committee supports this recommendation and further proposes that said report should include a public reporting of such data broken down by registry and registrar. In order to measure progress towards the goal of decreasing the number of unreachable WHOIS registrations, there must be consistent and ongoing measurement of the scope of the problem. This measurement must continue beyond the immediate reduction goals for WHOIS registration inaccuracies in order to continue to monitor changes in the scope of the problem as the Internet continues to develop and change.

No. 7: "ICANN should provide at least annual status reports on its progress towards achieving the goals set out by this WHOIS Review Team, published by the time the next WHOIS Review Team starts. This report should include tangible, reliable figures needed."

We support this recommendation and further propose that ICANN commission an additional WHOIS data accuracy study, similar to the NORC Data Accuracy Study that can be re-commissioned every five years to provide continuing data on the overall state of WHOIS data accuracy. The Internet Committee believes that it is important periodically to review the registrar and registry practices and policies with regard to WHOIS information and how these practices and policies are impacting WHOIS registration data accuracy as the Internet continues to develop and change. This is particularly important in light of the anticipated launch of many new gTLDs.

No. 8: "ICANN should ensure that there is a clear, unambiguous and enforceable chain of contractual agreements with registries, registrars, and registrants to require the provision and maintenance of accurate WHOIS data. As a part of these agreements, ICANN should ensure that clear, enforceable and graduated sanctions apply to registries, registrars and registrants that do not comply with its WHOIS policies. These sanctions should include de-registrations and/or de-accreditation as appropriate in cases of serious or serial non-compliance."

The Internet Committee supports this recommendation and proposes that such contractual provisions also include a requirement that registries annually provide and forward to ICANN for publication individual accuracy reports focused on the measured reduction in unreachable WHOIS registrations for the registry, including specific data for each registrar.

We applaud the recent update to the ICANN website instituting a prominent link to the WHOIS Data Reporting site at http://wdprs.internic.net.[6] We hope that this link will help promote the

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[6] At the ICANN website visitors see the query, "Need Help?" and may choose from a list of options that include "Whois data correction." See http://www.icann.org/.

collection and correction of inaccurate WHOIS data. ICANN should also require all registries and registrars to provide their own public ─ and prominently located ─ links or interfaces to the WPDRS for soliciting complaints regarding inaccurate WHOIS information. We urge ICANN to establish a process and timeline for investigation and resolution of such claims to further facilitate the collection of such information.

No. 9: *"ICANN should ensure that the requirements for accurate WHOIS data are widely and pro-actively communicated to current and prospective Registrants. As part of this effort, ICANN should ensure that its Registrant Rights and Responsibilities document is pro-actively and prominently circulated to all new and renewing registrants."*

We support this recommendation and further propose that a standard informational page be added to all registrar interfaces for the application for new domain names advising applicants of the need for accurate WHOIS information and the penalties for providing inaccurate or incomplete information. ICANN should also encourage registries and registrars to educate registrants and potential registrants of the requirements for accurate WHOIS information and the appropriate recourses to protect registrant privacy.

Further, recognizing the difficulties some registrants may have in navigating domain name application forms, ICANN should work with registries to create a standard data input template (with standard instructions and explanations) for use by all registrars. Such a template should allow an applicant-registrant to duplicate contact information within a single application between the various roles without requiring the applicant-registrant to re-key such information into the online form. We also strongly support amendment of the registry contracts for the .com, .net and .jobs TLDs to bring a "thick" WHOIS data model to those registries so that they are in line with the WHOIS requirements for all other gTLD registries. The requirement of "thick" WHOIS information is essential to equalize the responsibility of policing the Internet across all registries and registrars and to close existing potential havens for unscrupulous and criminal activity on the Internet.

Internationalized Domain Names (IDNs) Recommendations

No. 18. "ICANN Community should task a working group within 6 months of publication to finalize (i) encoding, (ii) modifications to data model, and (iii) internationalized services, to give global access to gather, store and make available internationalized registration data. Such working group should report no later than one year from formation, using existing IDN encoding. The working group should aim for consistency of approach across the gTLD and – on a voluntary basis – the ccTLD space."

No. 19. "The final data model and services should be incorporated and reflected in Registrar and Registry agreements within 6 months of adoption of the working group's recommendations by the ICANN board. If these recommendations are not finalized in time for the next revision of such agreements, explicit placeholders for this purpose should be put in place in the agreements for

the new gTLD program at this time, and in the existing agreements when they come up for renewal (as is the case for adoption of consensus policies.)"

No. 20. "Requirements for registration data accuracy and availability in local languages should be finalized (following initial work by IRD-WG and other similar efforts, especially if translation or transliteration of data is stipulated) along with the efforts on internationalization of registration data. Metrics should be defined to measure accuracy and availability of data in local languages and (if needed) corresponding data in ASCII, and compliance methods and targets should be explicitly defined accordingly."

The Internet Committee supports these recommendations for IDNs. Further, recognizing the global nature of ICANN and the Internet and the increasing use of IDNs, the Internet Committee recommends that strong consideration be given to designating a set of "standard" languages in which all IDN WHOIS data will be made available. A standard set of languages for all WHOIS data, could "level the playing field" with regard to the obligations placed on all registries/registrars by WHOIS data requirements. Additionally, the accessibility of WHOIS data without regional bias will improve the ability of the public to police the accuracy of WHOIS data, and increase the public's perception of the accessibility and effectiveness of WHOIS data.

Privacy & Proxy Recommendations

As a preliminary matter – and an overarching comment – the Internet Committee enthusiastically supports ICANN's development of a consistent and well-defined policy that sets forth the requirements for privacy and proxy services clearly and concisely. In this regard, the Internet Committee believes it is critical that an ICANN policy include the key points noted below:

No. 10: "ICANN should develop and manage a system of clear, consistent and enforceable requirements for all privacy services consistent with national laws. This should strike an appropriate balance between stakeholders with competing but legitimate interests. At a minimum this would include privacy, law enforcement and the industry around law enforcement."

The Internet Committee supports this and agrees that WHOIS data should provide – at the very least – the following information in connection with privacy and proxy services:

- A simple statement as to whether the service is a proxy or privacy service *(No. 10 states that the "WHOIS entry must clearly label that this is a private registration.")*;

- Full contact details for the registrant *(No. 10 states, "Privacy Services must provide full contact details as required by the WHOIS which are available and responsive, as required by the framework mentioned above." and No. 14 states, "Proxy services provide full contact details as required by the WHOIS")*; and

- Full disclosure of the relationship between the registrar and the proxy service provider. *(No. 13 advises that "Registrars should be required to disclosure their relationship with*

any Affiliated Retail proxy service provider to ICANN." No. 16 goes on to add that *"For the avoidance of doubt, the WHOIS Policy, referred to in Recommendation 1 above, should include an affirmative statement that clarifies that a proxy means a relationship in which the Registrant is acting on behalf of another. The WHOIS data is that of the agent, and the agent alone obtains all rights and assumes all responsibility for the domain name and its manner of use.")*

In conjunction with these guidelines, it is essential that ICANN registries and registrars establish consistent procedures for all privacy and proxy services, such as:

- A reasonable and consistent timeline for relaying and revealing information *(Nos. 10 & 14 advising "Standardization of relay and reveal processes and timeframes, consistent with national laws.")*; and

- A means for enforcement, including establishing and maintaining a dedicated abuse point of contact *(Nos. 10 & 14 "Maintenance of a dedicated abuse point of contact for the privacy/proxy service provider.")*.

The Internet Committee believes that these factors are essential to providing brand owners and law enforcement with the tools needed to enforce national and local laws against those abusing privacy and proxy services. In addition, we encourage ICANN to establish a single point of contact (whether one individual or, more appropriately, a small, coordinated group of individuals) to facilitate enforcement and ameliorate the frustrations that brand owners currently experience in their enforcement efforts.

No. 11: "ICANN should develop a graduated and enforceable series of penalties for privacy service providers who violate the requirements with a clear path to de-accreditation for repeat, serial or otherwise serious breaches."

The Internet Committee recommends and supports the implementation of intermediate enforcement steps and penalties, such as establishing a schedule of fines, so that ICANN has more than one enforcement option against non-compliant privacy service providers. We believe it is critical to realistic enforcement that there be graduated penalties, so that the penalty is not simply "all or nothing."

No. 10: "Privacy service provider shall conduct periodic due diligence checks on registrant contact information."

No. 12: "ICANN should facilitate the review of existing practices by reaching out to proxy providers to create a discussion that sets out current processes followed by proxy service providers."

No. 14: "Due diligence checks on licensee contact information."

In addition to the above key points, we encourage periodic due diligence reviews of WHOIS data contact information to confirm the accuracy of this information, as too often this information is inaccessible or out of date. We also recommend that ICANN establish and enforce a privacy and proxy accreditation procedure to ensure that the above-referenced guidelines are followed and satisfied.

No. 15: "ICANN should encourage and incentivize registrars to interact with the retail service providers that adopt the best practices."

Moreover, the Internet Committee supports the establishment of best practice guidelines for privacy and proxy services. As the Internet evolves over time and use increases dramatically, it is essential that guidelines for WHOIS data be established so that there is consistency in the information provided by privacy and proxy services, as well as notice of enforcement expectations and penalties, should they fall short of these requirements.

Conclusion

The Internet Committee recommends an appropriate timeline for implementing these guidelines so that these recommendations do not simply languish upon approval. To that end, the Internet Committee suggests implementation of the recommendations within 6-12 months from the time of approval by ICANN.

In summary, for all the reasons discussed in this comment, the Internet Committee supports the recommendations of the WHOIS Policy Review Team. We appreciate the efforts of the WHOIS Policy Review Team and ICANN in furtherance of improvements to an evolving WHOIS system and INTA is available to assist or provide additional comments if requested to do so.

Thank you for considering our views on these important issues. Should you have any questions regarding our submission, please contact INTA's External Relations Manager, Claudio DiGangi at: cdigangi@inta.org.

About INTA & The Internet Committee

The International Trademark Association (INTA) is a more than 131-year-old global organization with members in over 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 served as a leading voice for trademark owners in the development of cyberspace, including as a founding member of ICANN's Intellectual Property Constituency (IPC).

INTA's Internet Committee is a group of over two hundred trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.