

**Comments of the Internet Committee of the International Trademark Association (INTA) on the
“WHOIS Policy Review Team Final Report”
June 7, 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 Final Report (Final Report). We are pleased to see that the Final Report has incorporated several initiatives supported by the Internet Committee in previous comments, and we support the recommendations of the WHOIS Policy Review Team as set forth in the Final 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 inception¹ and restated in the Affirmation of Commitments (AOC) entered into by ICANN in 2009.² We applaud the efforts of the WHOIS Review Team. While we offer here comments on certain recommendations, in many instances these comments amplify the recommendations in the report, and should be understood in the context that we broadly endorse the Review Team’s final conclusions and recommendations to ICANN.

No. 1³: “It is recommended that WHOIS, in all its aspects, should be a strategic priority for ICANN the organization. It should form the basis of staff incentivization and published organizational objectives.”

We fully support making WHOIS a strategic priority for ICANN in both word and action. Despite weaknesses in the availability and accessibility of WHOIS data and failures by ICANN as enumerated in the Final Report, WHOIS data is routinely relied upon by millions of Internet users as the primary means by which online accountability is provided and functions as a keystone for the

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 All numbered recommendations correspond directly to the Final Report.

facilitation of commerce (including but not limited to domain name transactions and portfolio management.) WHOIS has always been a tool to facilitate contacting a domain owner or administrator to resolve issues—without limitation as to the kind of issue that could be addressed.⁴ The vast bulk of the issues that arose twenty or thirty years ago may have been technical, but this merely reflects the homogeneity of the developmental, pre-commercial Internet⁵- not that use of WHOIS was limited. Any suggestion now that the purpose of the WHOIS database is limited solely to its initial functions of technical stability and interoperability ignores the much more widespread use of, and need for, WHOIS data by Internet users generally to advance the goals of transparency and accountability in Internet commerce.

Use of the WHOIS protocol to ensure accountability also underscores the use of WHOIS data by law enforcement and by the trademark community for intellectual property enforcement purposes. These include:

- identifying cybersquatters and others who infringe trademarks online;
- investigating those conducting piracy, product counterfeiting, online fraud or phishing schemes over the Internet (many of which involve some degree of trademark enforcement to give otherwise anonymous activity the cover of brand name credibility);
- preventing or limiting damage to customers and business partners who are victimized by online frauds that are facilitated by trademark infringement, including infringing domain name registrations; and
- assisting law enforcement in their efforts to protect consumers against a wide range of criminal activity and online misconduct.

Implementing these recommendations, monitoring and reporting on the fulfillment of data accuracy objectives, and monitoring the effectiveness of ICANN Compliance Team performance as tied directly to these WHOIS recommendations would significantly advance ICANN's core principles

⁴ See Comments of the Whois Subcommittee of the International Trademark Association on the Preliminary Task Force Report on the Purpose of Whois and Whois Contacts (Feb. 8, 2006), at <http://forum.icann.org/lists/whois-comments/msg00025.html> (collecting and analyzing the lack of restrictions on use in all documentation of original Whois protocols).

⁵ See *id.* (noting that, upon the availability of commercial domain name registrations, Network Solutions' first dispute resolution policy explicitly referred to the use of information from the Whois database in the resolution of legal disputes).

of accountability and transparency, which cannot be achieved without a fully functioning and robust WHOIS protocol.

No. 2: “ICANN’s WHOIS policy is poorly defined and decentralized. The ICANN Board should oversee the creation of a single WHOIS policy document, and reference it in subsequent versions of agreements with Contracted Parties. In doing so, ICANN should clearly document the current gTLD WHOIS policy as set out in the gTLD Registry and Registrar contracts and the GNSO Consensus Policies and Procedure.”

No. 3: “ICANN should ensure that WHOIS policy issues are accompanied by cross-community outreach, including outreach to the communities outside of ICANN with a specific interest in the issues, and an ongoing program for consumer awareness.”

The WHOIS protocol, through inadequate compliance, ineffective articulation of policy and insufficient contractual provisions, has been undermined by inaccurate, incomplete and outdated registration data. The Final Report endorses 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 supports this development and looks forward to working with ICANN in the articulation and publication of a meaningful WHOIS policy which will ensure the integrity of the DNS and improve the overall online experience of Internet users. We concur with the Review Team’s conclusion that the current implementation of WHOIS services does not help to build consumer trust. Indeed, the current implementation of an inconsistent, unarticulated and scattershot WHOIS policy exacerbates the frustrations of those who rely on WHOIS information. The adoption of a unified policy, coupled with an outreach campaign to make consumers aware of the policy and mechanisms to enforce the policy, is likely to increase consumer confidence in ICANN and the WHOIS policy overall.

That said, the laudable goal of articulating and consolidating WHOIS policy should not come at the expense of allowing a reduction in ICANN’s commitment to WHOIS. The fundamental premise that WHOIS must remain open and accessible, with improved accuracy and reliability, must remain.

No. 4: “ICANN should act to ensure that its compliance function is managed in accordance with best practice principles, including that:

a) There should be full transparency regarding the resourcing and structure of its compliance function. To help achieve this, ICANN should at a minimum, publish annual reports that detail the following relevant to ICANN's compliance activities: staffing levels; budgeted funds; actual expenditure; performance against published targets; and organizational structure (including the full lines of reporting and accountability).

b) There should be clear and appropriate lines of reporting and accountability, to allow compliance activities to be pursued pro-actively and independently of other interests. To help achieve this, ICANN should appoint a senior executive whose sole responsibility would be to oversee and manage ICANN's compliance function. This senior executive should report directly and solely to a sub-committee of the ICANN Board. This sub-committee should include Board members with a range of relevant skills and should include the CEO. The sub-committee should not include any representatives from the regulated industry, or any other Board members who could have conflicts of interest in this area.

c) ICANN should provide all necessary resources to ensure that the compliance team has the processes and technological tools it needs to efficiently and pro-actively manage and scale its compliance activities. The Review Team notes that this will be particularly important in light of the new gTLD program, and all relevant compliance processes and tools should be reviewed and improved, and new tools developed where necessary, in advance of any new gTLDs becoming operational.”

The Internet Committee endorses this recommendation in its specificity and applauds the call for commitment to and urgent implementation of WHOIS reform in light of the anticipated launch of potentially thousands of new gTLDs. Creating a unified, transparent, high-level role for WHOIS enforcement should increase the uniformity of policy compliance enforcement and response. Institutionalizing the necessary tools to allow WHOIS funding and staffing will allow the role to function without interference, and, more importantly, convey the external message that WHOIS policy enforcement operates independently of any stakeholder groups. A mechanism should be created to allow public access to the Compliance Team, similar to the prominent link to the WHOIS Data Reporting site at <http://wdprs.internic.net>.⁶ The Internet Committee also proposes that ICANN require all registries and registrars to provide their own public — and prominently located

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/>.

— interfaces for soliciting complaints regarding inaccurate WHOIS information, and that such reports be automatically entered into the Internic system to enable tracking of WHOIS data problem reports. We urge ICANN to establish a process and timeline for investigation, resolution and public reporting of such claims as part of the metrics and incentives for the Compliance Team.

Data Accuracy Recommendations from the Final Report

Before discussing the Internet Committee’s specific comments, we would like 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 current Compliance Team by its recent senior recruitments and current efforts to develop WHOIS data validation or verification procedures.

No. 5: “ICANN should ensure that the requirements for accurate WHOIS data are widely and pro-actively communicated, including to current and prospective Registrants, and should use all means available to progress WHOIS accuracy, including any internationalized WHOIS data, as an organizational objective. 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.”

The Internet Committee supports this recommendation and proposes, among available means to progress WHOIS accuracy, the following examples:

- a) A standard informational page should 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. In addition, ICANN should encourage registries and registrars to undertake a public campaign to educate registrants and potential registrants of the requirements for accurate WHOIS information and the appropriate recourses to protect registrant privacy.
- b) ICANN should designate a set of “standard” languages in which all IDN WHOIS data will be made available.
- c) Recognizing the difficulties some registrants may have in navigating domain name application forms, ICANN should work with registries to create a standard application template (with standard instructions and explanations) for use by all registrars. One goal of such a template is to 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.

- d) 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.

No. 6: “ICANN should take appropriate measures to reduce the number of WHOIS registrations that fall into the accuracy groups Substantial Failure and Full Failure (as defined by the NORC Data Accuracy Study, 2009/10) by 50% within 12 months and by 50% again over the following 12 months.”

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 WHOIS registrations that fall into the accuracy groups ‘Substantial Failure’ and ‘Full Failure’ is not unreasonable, although it still leaves a significant number of WHOIS registrations that fall into the accuracy groups Substantial Failure and Full Failure.

No. 7: “ICANN shall produce and publish an accuracy report focused on measured reduction in WHOIS registrations that fall into the accuracy groups Substantial Failure and Full Failure, on an annual basis.”

The Internet Committee supports this recommendation and further proposes that the annual report should publicly report such data broken down by registry and registrar. In order to measure progress towards the goal of decreasing the number of WHOIS registrations that fall into the accuracy groups ‘Substantial Failure’ and ‘Full Failure’, there must be a consistent and ongoing measurement of the scope of the problem. It is important that this measurement 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. Moreover, the Final Report incorporates as Recommendation No. 16 the Draft Final Report’s recommendation⁷

⁷ Draft Final Report Recommendation 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.”

(No. 7) for an annual report on the progress toward achieving the goals set out by the WHOIS Review Team. It is important to continue to measure ICANN’s efforts toward meeting the recommendations set forth by the WHOIS Review Team, and we urge the production and publication of an annual progress report on these recommendations.

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. We also propose that such contractual provisions include a requirement that registries annually provide and forward to ICANN for publication individual accuracy reports focused on the measured reduction in WHOIS registrations that fall into the accuracy groups Substantial Failure and Full Failure, including specific data for each registrar.

No. 9: “The ICANN Board should ensure the Compliance Team develop[s], in consultation with relevant contracted parties, metrics to track the impact of the annual WHOIS Data Reminder Policy (WDRP) notices to registrants. Such metrics should be used to develop and publish performance targets, to improve data accuracy over time. If this is unfeasible with the current system, the Board should ensure that an alternative, effective policy is developed (in accordance with ICANN’s existing processes) and implemented in consultation with registrars that achieves the objective of improving data quality, in a measurable way.”

The Internet Committee supports this recommendation for establishing metrics to measure the effectiveness of the current WDRP process. However, to be complete, these metrics should be linked to an overall metric that shows the ongoing overall level of WHOIS data accuracy across the Internet. Thus, the Internet Committee proposes 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 as to the overall effectiveness of the WDRP and/or any alternative policy that might be implemented to improve WHOIS data quality.

Internationalized Domain Names (IDNs) Recommendations

No. 12: "ICANN should task a working group within 6 months of publication of this report, to determine appropriate internationalized domain name registration data requirements and evaluate available solutions (including solutions being implemented by ccTLDs). At a minimum, the data requirements should apply to all new gTLDs and the working group should consider ways to encourage consistency of approach across the gTLD and (on a voluntary basis) ccTLD space. The working group should report within one year of being tasked."

No. 13: "The final data model, including (any) requirements for the translation or transliteration of the registration data, should be incorporated in the relevant 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."

No. 14: "In addition, metrics should be developed to maintain and measure the accuracy of the internationalized registration data and corresponding data in ASCII, with clearly defined compliance methods and targets, as per the details in Recommendations 5-9 in this document"

The Internet Committee supports these recommendations for IDNs and applauds the recommendation of a definite timeline for implementation. Recognizing the global nature of ICANN and the Internet and the increasing use of IDNs, the Internet Committee further calls on ICANN to designate a set of "standard" languages in which all IDN WHOIS data will be made available. By creating a standard set of languages for all WHOIS data, ICANN will "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 increase the ability of the public to police the accuracy of WHOIS data. Finally, the creation of a set of standard languages will increase the public's perception of the accessibility and effectiveness of WHOIS data.

Privacy & Proxy Recommendations from the Final Report

As a preliminary matter the Internet Committee gratefully acknowledges the consideration the Review Team has given our comments on the Draft Report and generally supports the enhanced recommendations relating to Privacy and Proxy services as described in the Final Report. We

support the development of a consistent and well-defined policy detailing the requirements for privacy and proxy services and reiterate our support for an accreditation system for those services. Similarly, the Internet Committee strongly supports the recommendations providing for standardized relay and reveal mechanisms and time frames, and a mix of incentives and sanctions to encourage compliance by privacy and proxy services.

No. 10: “The Review Team recommends that ICANN should initiate processes to regulate and oversee privacy and proxy service providers.

ICANN should develop these processes in consultation with all interested stakeholders.

This work should take note of the studies of existing practices used by proxy/privacy service providers now taking place within the GNSO.

The Review Team considers that one possible approach to achieving this would be to establish, through the appropriate means, an accreditation system for all proxy/privacy service providers, As part of this process, ICANN should consider the merits (if any) if establishing or maintaining a distinction between privacy and proxy services.

The goal of this process should be to provide clear, consistent and enforceable requirements for the operation of these services consistent with national laws, and to strike an appropriate balance between stakeholders with competing but legitimate interests. At a minimum this would include privacy, data protection, law enforcement, the industry around law enforcement and the human rights community.

ICANN could, for example, use a mix of incentives and graduated sanctions to encourage proxy/privacy service providers to become accredited, and to ensure that registrars do not knowingly accept registrations from unaccredited providers.

ICANN could develop a graduated and enforceable series of penalties for proxy/privacy service providers who violate the requirements, with a clear path to de-accreditation for repeat, serial or otherwise serious breaches.

In considering the process to regulate and oversee privacy/proxy service providers, consideration should be given to the following objectives:

- *Clearly labeling WHOIS entries to indicate that registrations have been made by a privacy or proxy service;*
- *Providing full WHOIS contact details for the privacy/proxy service provider, which are contactable and responsive;*
- *Adopting agreed standardized relay and reveal processes and timeframes; (these should be clearly published, and pro-actively advised to potential users of these services so they can make informed choices based on their individual circumstances);*
- *Registrars should disclose their relationship with any proxy/privacy service provider;*
- *Maintaining dedicated abuse points of contact for each provider;*
- *Conducting periodic due diligence checks on customer contact information;*
- *Maintaining the privacy and integrity of registrations in the event that major problems arise with a privacy/proxy provider; and*
- *Providing clear and unambiguous guidance on the rights and responsibilities of registered name holders, and how those should be managed in the privacy/proxy environment.”*

The Internet Committee supports this recommendation. The recommended changes are essential to provide brand owners and law enforcement with the tools needed to enforce national and local laws against those abusing privacy and proxy services, and further suggests that these “objectives” be reclassified as “requirements.” In addition, we encourage ICANN to establish a single point of contact within the ICANN WHOIS Compliance Team for addressing and resolving proxy and privacy service enforcement issues.

Finally, ICANN should set an appropriate timeline for implementing these guidelines so that this recommendation does not simply languish upon approval. To that end, the Internet Committee agrees with the timeline set forth in recommendation No. 15, which states that “ICANN should provide a detailed and comprehensive plan within 3 months after the submission of the Final WHOIS Review Team Report that outlines how ICANN will move forward in implementing these recommendations.”

Conclusion

In summary, for all the reasons discussed in this comment and our March 16, 2012, comment which is incorporated herein by reference,⁸ 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 the 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 134-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.

⁸ <http://forum.icann.org/lists/whois-rt-draft-final-report/msg00019.html>.