

On behalf of the International Anti-Counterfeiting Coalition (IACC), we are pleased to provide comments on the WHOIS Review Team's questions. IACC has been in favor of increasing transparency, and promoting procedural improvements that will lead to more effective implementation of ICANN policies. The IACC supports the Review Team as it reviews the WHOIS system and measures ICANN's compliance with its obligations to preserve that system. Such review can only result in increased transparency and stability of the Internet.

1. What measures should ICANN take to clarify its existing WHOIS policy?

Assurance of public access to complete, accurate and up-to-date WHOIS data has formed a core responsibility of ICANN since its inception. The continued relevance of this core responsibility was restated (and accepted) by ICANN in the Affirmation of Commitments. Notwithstanding this responsibility, ICANN has fallen far short of its promises in this regard.

Unfortunately, ICANN has attempted to fulfill its commitments concerning WHOIS through the contract provisions contained in the Registrar Accreditation Agreement ("RAA") and, specifically, those which impose obligations upon registrars to collect such data and to make that data accessible. That ICANN's attempts have been made solely within the context of its contractual relationships with registrars is unfortunate because ICANN has proved woefully deficient in its enforcement of the terms of those contracts. Not only are ICANN's compliance efforts best described by the catchphrase "too little, too late:", but they have been effectively non-existent as relate to WHOIS and, more specifically, registrant obligations to provide true and accurate WHOIS contact information.

This history demonstrates that ICANN must do far more than it has done to date should it intend to fulfill its promises concerning the WHOIS database. These include a greater emphasis on contract compliance, including the allocation of greater budgetary resources to compliance, as well as the publication of policies which demonstrate a clearer intention to fulfill ICANN's WHOIS obligations than has historically been the case. These changes should be published beyond the ICANN community so that registrants who abuse the WHOIS system will be given adequate notice that their domain name registrations are placed in jeopardy by failure to abide by requirements to provide true, accurate and complete WHOIS data.

In addition, a clearer articulation of registrar responsibilities with respect to the integrity of and access to WHOIS must be articulated. The registrar community has, not surprisingly, been reluctant to see clearer articulation of its legal obligations in this regard but ICANN's commitments pursuant to the AOC must take priority over the wishes of one ICANN constituency. ICANN's efforts to provide registrar guidance through an advisory of registrar deployment of proxy services represented but one, helpful first step in this regard.

4. How can ICANN balance the privacy concerns of some registrants with its commitment to having accurate and complete WHOIS data publicly accessible without restriction?

The IACC respectfully suggests that the question misstates the issue. It is not ICANN's responsibility to balance privacy concerns given its acknowledged commitment to providing accurate and complete WHOIS data. As the question states: ICANN is already subject to a commitment "to having accurate and complete WHOIS". Any effort, including that implied by this question, to vitiate that obligation is one which implicitly undermines the commitments already made by ICANN.

Having accepted the obligation to accurate and complete WHOIS information, ICANN must accept either the publication of a WHOIS database does not implicate privacy concerns given the numerous other options available to the Internet community to engage in free and anonymous speech without registering a domain name, or the balancing issue is a matter for resolution by other entities that are better able to resolve the purported legal conflict between privacy and the publication of a WHOIS database. Indeed, these points are related insofar as the Internet has evolved to provide numerous opportunities for anonymous speech which do not implicate the domain name system and even the most protective of national authorities still insure that businesses, non-governmental organizations and, indeed, the public airwaves, all have some degree of transparency to insure that there is accountability for their activities.

WHOIS is only an address book: something that does not adversely affect free speech, and one that carries far more benefits than potential drawbacks. ICANN could quell privacy concerns by emphasizing that anonymous actions on the web are still possible, but violations such as spam and phishing can be most effectively stopped by tracking down the holders of the offending domain names. Also, it would be in ICANN's interest to highlight that most other parts of the

world require accurate information for business licenses, trademark registration, and other services; domain name registration should be no different.

The policy can be further clarified by assuring the public that abuse of the protocol will not be tolerated, and that it only serves constructive purposes that can aid in preventing web-related offenses and fraud. ICANN should also reassure the public of its existing security measures, including the implementation of rate-limiting systems on WHOIS servers and websites that allow WHOIS queries.

5. How should ICANN address concerns about the use of privacy/proxy services and their impact on the accuracy and availability of the WHOIS data?

ICANN did attempt to take steps regarding use of proxy services, publishing a proposed draft advisory which was intended to specify a set of best practices governing the use of proxy services, such that their use can be reconciled with legitimate third party needs for the information WHOIS is intended to provide. To the extent that such an advisory is not or cannot be adopted in a manner ICANN considers consistent with its underlying contractual relationships, then further amendments to the RAA must incorporate changes designed to minimize the potential for abuse of the WHOIS system through proxy services, especially when such abuse is sanctioned or enabled by entities in privity of contract with ICANN.

More frequent meetings between the ICANN staff and the GAC would also be beneficial so that the GAC can be more fully informed of ICANN policy agendas. In addition, the necessity of multilingual access to ICANN records suggests that involvement from member nations should be more substantial, in turn creating a more efficient means toward consensus.

6. How effective are ICANN's current WHOIS related compliance activities?

Although ICANN recent compliance efforts evidence an improvement, these efforts are still too little too late. This is evidenced by ICANN's own studies showing widespread non-compliance with WHOIS requirements. Moreover, even ICANN's own studies suggest that ICANN's measurements are unduly forgiving in measuring compliance. Finally, all studies measure system-wide compliance and clearly understate the extent of the problem among those who employ the Internet to engage in illegal activity, like counterfeiting.

Moreover, since ICANN first started taking steps to insure compliance with the RAA, deficiencies in the RAA – some of which have been improved upon – demonstrate continuing limits to ICANN’s compliance efforts through the RAA. Moreover, as noted above, there has been no meaningful effort to enforce compliance by ICANN as against underlying registrants so efficacy of this potential compliance activity remains untested.

8. What should ICANN do to ensure its WHOIS commitments are effectively enforced?

ICANN must amend the RAA in a manner which reflects the interest of the Internet community at large and not only the Registrar constituency, whose interests are not necessarily compatible with the interests of the broader Internet community. The amendments should clarify responsibilities of both ICANN and registrar with respect to the operation of a transparent and accurate WHOIS system accessible to the broader Internet community and should provide clear tools available to ICANN which are both reasonable and meaningful in the event of noncompliance. ICANN should commit greater resources to compliance and insure that those resources are deployed to increase the accuracy and reliability of WHOIS data.

9. Does ICANN need any additional power and/or resources to effectively enforce its existing WHOIS commitments?

Yes. As noted above, better tools should be provided through the RAA and ICANN should allocate resources to insure compliance with WHOIS requirements by both registrars and registrants.

10. How can ICANN improve the accuracy of WHOIS data?

As noted above, amendment of the RAA, enforcement of its provisions as against both registrars and registrants that violate the requirements of accurate, complete and current WHOIS information and the publication of policies to the broader Internet community informing it of these changes.

11. What lessons can be learned from approaches taken by ccTLDs to the accuracy of WHOIS data?

Some ccTLDs (e.g. CCNIC) have implemented WHOIS data verification protocols that may be appropriate for examination. Registrant verification of

WHOIS data combined with action to delete non-compliant names should be considered as a compliance tool.

ccTLDs for countries with domestic privacy laws will have experience balancing local data privacy restrictions with the need to provide accurate and verifiable WHOIS data to law enforcement professionals and civil litigants. Some ccTLDs have implemented thick WHOIS requirements, especially at the registry level, and may provide insight into the operation of a registry based thick WHOIS and whether such systems lead to more accurate WHOIS data.

13. What are the consequences or impacts of non-compliance with WHOIS policy?

The IACC shares the concern of other constituencies with the impact of inaccurate WHOIS on transparency and stability on the Internet. Notwithstanding these existential concerns, however, the immediate concern for the IACC is the impact inaccurate WHOIS has on the ability of IACC membership to enforce their intellectual property rights. Years of experience with WHOIS since ICANN assumed custody over its management and operation has clearly demonstrated that the unscrupulous Internet users who are willing to infringe the intellectual property rights of others are also among the first to disregard their contractual obligations to provide true and accurate WHOIS contact data. The proliferation of online counterfeiting has been aided by ICANN's failure to administer the WHOIS system as contemplated by the ICANN's various agreements including, most recently, the AOC. The IACC does not, for a moment, intend to suggest that ineffective WHOIS compliance is the only cause of online counterfeiting. The IACC does believe, however, that the amount of online counterfeiting is directly caused by the ease with which online pirates can freely disregard the intended purposes of the WHOIS system by providing false contact information and, when found out, simply change data to other, equally invalid contact information.