

Turner Broadcasting System, Inc. (“Turner”) appreciates this opportunity to comment on the Initial Report (the “Initial Report”) published by the ICANN Policy Development Process Working Group (“WG”) on issues relating to the accreditation of privacy and proxy service providers (“P/P Providers”).

## **Introduction**

As the parent company of both Cable News Network, Inc. (“CNN”) and The Cartoon Network, Inc. (“TCN”), among others, Turner has experienced first-hand the difficulties that privacy and proxy services (“P/P Services”) can create for both trademark owners and the consuming public. To give one example: in May *The New York Times* reported on an online degree business that was using the famous CNN trademark on various websites to lend its fake universities – with intentionally familiar-sounding names like Grant Town and Columbiana – an undeserved boost of credibility.<sup>1</sup> The *Times* alleged that the sites were all operated by the Pakistani software company Axact. Yet Axact vigorously denied the accusation. And there was no way for the *Times*, or CNN, or consumers to determine through a basic WHOIS lookup who was in fact behind the fraudulent websites, because they were using P/P Services. As the story noted, the orchestrating force behind the fake education empire “remains obscured by proxy Internet services . . . .”

Nor is that type of misuse of the CNN trademark unique to that particular story. As the worldwide leader in news, CNN is frequently fighting online retailers who misuse the famous CNN trademark to try to deceive unsuspecting consumers into purchasing various products – such as diet pills or “brainpower” supplements or fake online degrees – by falsely claiming that those products were “featured on CNN.” CNN must in turn police such misuse of its trademark to protect its reputation and to protect the loyal viewers who depend on that reputation. Doing so can be frustrated by P/P Services, which fraudulent online retailers often use to mask their WHOIS details.

While the online battles that TCN must fight are different, they are no less critical. Specifically, TCN is often faced with the misuse of its well-known trademarks and beloved children’s characters in online content that is not suitable for its young audience – whether because the content is pornographic, or related to online gambling, or otherwise age-inappropriate. Again, TCN must in turn police such misuse of its trademarks (and its copyright interests in its characters) to protect its reputation and to protect the loyal viewers – and their parents – who depend on that reputation. And again, doing so can be frustrated by P/P Services, which pornographic websites often use to mask their WHOIS details.

Turner offers these comments on the Initial Report with that background in mind. But Turner does not intend to suggest that P/P Services are necessarily illicit. Turner itself may want to use P/P Services in certain narrow and temporary cases: for example, to acquire a domain name related to a new show title that it has not yet publicly announced. But those narrow exceptions should not drive the standards for ICANN’s accreditation of P/P Providers. Rather, such standards must recognize that P/P Services are by their nature intended to thwart attribution and accountability on the Internet. As such, they must be accredited in a way that ensures that

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<sup>1</sup> [http://www.nytimes.com/2015/05/18/world/asia/fake-diplomas-real-cash-pakistani-company-axact-reaps-millions-columbiana-barkley.html?\\_r=0](http://www.nytimes.com/2015/05/18/world/asia/fake-diplomas-real-cash-pakistani-company-axact-reaps-millions-columbiana-barkley.html?_r=0).

trademark and copyright owners such as CNN and TCN can effectively and efficiently protect consumers against online fraud – or pornography, phishing, malware, etc. – that is falsely perpetrated in their names.

### **Turner supports most of the Initial Report . . .**

The Initial Report largely succeeds in establishing clear and predictable processes for trademark and copyright owners to fight the types of online fraud outlined above – and certainly stands as a marked improvement over the status quo, in which P/P Providers operate essentially unregulated. For example, Turner agrees with the Initial Report’s recommendation that P/P Providers must either promptly forward to their customers (“P/P Customers”) all electronic communications that they receive (except for spam filtered out by commercially reasonable safeguards), or promptly forward to those P/P Customers at least those electronic communications they receive that contain allegations of illegal activity such as trademark or copyright infringement.<sup>2</sup> Turner also agrees that once that initial relay is made, a P/P Provider must notify the trademark or copyright owner if it becomes aware of a “persistent delivery failure” and should perform a verification or re-verification of its P/P Customer’s email address at that time.<sup>3</sup> Such basic “relay” functions are an essential first step to ensuring that intellectual property owners can at least contact whomever is behind a particular misuse.

Of course, “relay” by itself is not enough, because bad actors are likely to ignore whatever initial communication a P/P Provider relays. In such cases trademark and copyright owners must have a reliable and predictable method by which to request disclosure of the contact information a P/P Provider has for its P/P Customer that would ordinarily appear in the publicly accessible WHOIS database. Again, the Initial Report’s “Annex E – Illustrative Draft Disclosure Framework for Intellectual Property Rights-holders” (the “Disclosure Framework”) largely does that.<sup>4</sup> Turner recognizes that the Disclosure Framework represents a carefully considered and heavily negotiated “equipoise” that attempts to balance the interests of intellectual property owners, P/P Providers, and P/P Customers alike.<sup>5</sup> It largely does so, and goes far toward providing intellectual property owners with the high degree of certainty and predictability that they need as to if, when, and how they can obtain disclosure.

Turner especially supports Section III(D) of the Disclosure Framework, which provides that P/P Providers cannot refuse disclosure solely for lack of a court order, subpoena, pending civil action, or UDRP/URS proceeding, or because a request for disclosure is founded on intellectual property infringement taking place on a website associated with a domain name, rather than in the domain name itself.<sup>6</sup> In fact, it is not an exaggeration to say that Section III(D) is a deal-breaker: without it Turner could not support the remainder of the Disclosure Framework (or, for that matter, the Initial Report). The whole purpose of the Disclosure Framework is to answer these questions: when and how can trademark and copyright owners obtain disclosure? If the WG’s answers to those questions were: only after a civil action or UDRP/URS, and only with a court order or

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<sup>2</sup> Initial Report at 11.

<sup>3</sup> Initial Report at 11-12.

<sup>4</sup> Initial Report at 84-93.

<sup>5</sup> Initial Report at 84.

<sup>6</sup> Initial Report at 91.

subpoena, then what was the point of the rest of the Disclosure Framework, or of the extensive negotiations that went into creating it? And could such a rule even be considered an “accreditation” recommendation at all? Arguing that the only times that P/P Providers must disclose is when they are ordered to do so by a court or other tribunal is nothing more than arguing that P/P Providers must follow the law. But if the WG’s accreditation standards were nothing more than “follow the law,” then what value or purpose would they add?

Turner also agrees with Section III(D)’s treatment of content, and specifically with its clear rule that disclosure may not be denied because a request is founded on intellectual property infringement taking place on a website associated with a domain name, rather than in the domain name itself. All of the examples that Turner outlined above illustrate why this part of III(D) is critical. The harm to consumers from the fake online university websites comes not from the use of CNN in those websites’ domain names, but in their content. The harm to consumers from diet pills or brain supplements that purport to have been “featured on CNN” comes not from the use of CNN in those websites’ domain names, but in their content. And while the harm to young consumers from pornographic or other adult-oriented websites that feature well-known TCN characters may come from those websites’ use of TCN trademarks in their domain names, it need not always. Section III(D) is critical to ensuring that Turner can protect its fans by effectively and efficiently policing such online misuse.

**... but not all of it.**

While Turner thus largely supports the Initial Report, there are certain specific sections where Turner sees room for improvement. With respect to “relay”, specific improvements are needed concerning what P/P Providers must do when learning of a persistent delivery failure of their initial electronic relay to their P/P Customer.<sup>7</sup> Specifically, the WG should require P/P Providers to forward a further form of notice to their P/P Customer in such cases, and should not allow P/P Providers to charge trademark and copyright owners any kind of cost-recovery fee for doing so. Again, the example of a website selling “brainpower” supplements by misusing the CNN mark is illustrative. In such a case, it is not sufficient for a P/P Provider to simply give up trying to contact its P/P Customer if the first email to the customer is returned as undeliverable. Presumably the P/P Provider has more information about other means of contacting the P/P Customer (phone number, physical address, etc.) at that time than CNN does. Why should the P/P Provider not at least try to use that alternative contact information to attempt to relay CNN’s infringement claim? And if they do so, why should they then be able to pass the costs for doing so on to CNN? CNN derives no benefit from the existence of the P/P Service in that situation. CNN did not ask for the P/P Service to stand between it and the website operator who is misusing its trademark to try to sell supplements. The only two parties benefiting from the P/P Service in such a situation are the P/P Provider (who freely made the business decision to offer the P/P Service for a fee) and the P/P Customer (who freely made the business decision to purchase the P/P Service for a fee). Any costs that later spring from the business relationship that the P/P Provider and the P/P Customer willingly entered into must be borne by them alone (to allocate between themselves as they see fit) – not passed on to unsuspecting trademark and copyright owners (and, by extension, to the consuming public), who had nothing to do with that relationship, and who derived no benefit from it.

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<sup>7</sup> Initial Report at 14.

The Disclosure Framework also needs improvements in multiple places. Some are narrow. For example, the timeframes referenced in Sections III(A) and (B)<sup>8</sup> should be kept short (no more than 14 calendar days total should suffice) to ensure that trademark and copyright owners like TCN, for example, can obtain the contact information for the proprietor of a pornographic website quickly enough to limit the number of children exposed to any inappropriate content. Similarly, the “cost recovery fee” for processing disclosure requests that is referenced in Section I(B)(iii)<sup>9</sup> should be dropped, for all of the reasons discussed above (again, why should CNN bear any costs that are generated by a P/P Service that it did not request and from which it derives no benefit?). And Sections II(A)(5) and II(C)(5)<sup>10</sup> must be amended to clarify that owners of common-law trademarks will not be excluded from the process outlined in the Disclosure Framework. If a pornographic website is misusing a new TCN show title for which the USPTO (for example) has not yet issued a trademark registration, then why should TCN – whose ownership of the trademark is no less valid the day before the USPTO issues the registration as the day after – be excluded from the process outlined in the Disclosure Framework?

Other necessary improvements are broader. One is that Section III(F) – which outlines the appeal process in which P/P Providers must participate if they decide to *refuse* a disclosure request<sup>11</sup> – should not be extended to decisions to *grant* disclosure requests. The Disclosure Framework is ambiguous on this point. By its terms, Section III(F) only applies “[i]n the event of a final refusal to disclose by the Provider.” But Section III(F) then concludes with a clause that the appeal process “should be similarly accessible to the Customer for purposes of an appeal.” Why a P/P Customer would want to appeal a P/P Provider’s decision to *refuse* to disclose is not clear (isn’t that what the P/P Customer would want?). And of course this ambiguity can be resolved by simply deleting that final clause.

But assuming that the final clause was included to give P/P Customers the ability to appeal P/P Provider decisions to *grant* disclosure requests, then there are at least three problems with it. First, such an appeal (the logistics of which are left undefined) would necessarily add confusion and delay to the carefully negotiated process that is outlined in the Disclosure Framework. How long would TCN have to wait to be able to identify the proprietor of a pornographic website while that proprietor appeals its P/P Provider’s decision to disclose? What disincentive would P/P Customers have to simply appeal every decision to disclose in order to slow down the process to the point that it loses whatever utility it may have had in the first place? Second, such an appeal ignores the fact that other portions of the Initial Report acknowledge that P/P Providers retain the ability to *immediately* terminate a P/P Service (and hence publish the P/P Customer’s contact information to the world – not just disclose it to one complainant) for any grounds outlined in their Terms of Service.<sup>12</sup> Why should a P/P Provider be able to immediately terminate a P/P Service simply because a P/P Customer fails to pay up (which harms nobody other than the P/P Provider), but then be required to satisfy some undefined appeal process simply to disclose (not publish to the world) in a case of trademark infringement (which harms both the trademark owner and the consuming public)? Third, such an appeal ignores the contractual relationship between P/P

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<sup>8</sup> Initial Report at 90.

<sup>9</sup> Initial Report at 85.

<sup>10</sup> Initial Report at 86 and 89.

<sup>11</sup> Initial Report at 92.

<sup>12</sup> Initial Report at 85.

Providers and P/P Customers. If P/P Providers and P/P Customers want to agree to some form of notice/appeal before any partial or complete terminations of the P/P Service, then they can negotiate those terms (so long as whatever process they agree to is otherwise consistent with the Disclosure Framework). Trademark and copyright owners – who are not parties to the contract between the P/P Provider and the P/P Customer – cannot do that. The whole point of the Disclosure Framework – including but not limited to Section III(F) – is to account for that contractual imbalance.

For another necessary improvement to the Disclosure Framework, the WG should amend Sections III(C)(ii) and (iii) to clarify that P/P Providers can refuse to disclose when the P/P Customer has provided – or the P/P Provider has independently found – a reasonable basis for believing that the P/P Customer is not infringing the trademark or copyright in question (or that its use is defensible) – *not* simply for *any* reason that the P/P Provider finds adequate, sufficient, or compelling.<sup>13</sup> The problem with allowing P/P Providers to refuse to disclose for *any* reason that they find adequate, sufficient, or compelling is not merely that those words are ambiguous, which only invites further legal wrangling in the future (though that is certainly true). It is that the Disclosure Framework – as a function of its exhaustiveness, which is commendable – has already addressed *every* potential reason a P/P Provider might have for refusing to disclose:

- Refusing to disclose because the P/P Provider has terminated the P/P Service – covered by Section III(C)(i).
- Refusing to disclose because the P/P Customer has surrendered its domain name registration in lieu of disclosure – covered by Section III(C)(iv).
- Refusing to disclose because the complaint is pretextual – covered by Section III(C)(v).
- Refusing to disclose for lack of a court order, subpoena, pending civil action, or UDRP/URS – covered by Section III(D).
- Refusing to disclose because the request is founded on alleged intellectual property infringement in content on a website associated with the domain name – covered in Section III(D).<sup>14</sup>

The only reason left that is not covered elsewhere is the most obvious one – that the intellectual property owner has not made its case. Amending Sections III(C)(ii) and (iii) to clarify that P/P Providers can refuse to disclose when the P/P Customer has provided – or the P/P Provider has independently found – a reasonable basis for believing that the P/P Customer is not infringing the trademark or copyright in question (or that its use is defensible) plugs that one last remaining hole. It also has the added benefit of keeping Sections III(C)(ii) and (iii) consistent with Sections II(A)(6)(a),<sup>15</sup> II(C)(6)(a),<sup>16</sup> and III(F).<sup>17</sup> Drafting Sections III(C)(ii) and (iii) to instead allow P/P Providers to refuse to disclose for any reason that they find adequate, sufficient, or compelling not only leaves that gap unfilled, it also adds uncertainty and ambiguity to a process that is otherwise straightforward. Why the WG would choose to do so in Sections III(C)(ii) and (iii) – when the rest of the Disclosure Framework is precise and comprehensive – is not clear.

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<sup>13</sup> Initial Report at 91.

<sup>14</sup> Initial Report at 91.

<sup>15</sup> Initial Report at 86.

<sup>16</sup> Initial Report at 89.

<sup>17</sup> Initial Report at 92 n.61.

To illustrate why the decision concerning which formulation to use for Sections III(C)(ii) and (iii) is important, consider the case of CNN attempting to discover who is behind a fake online degree program misusing the CNN trademark. CNN submits its trademark infringement complaint to the P/P Provider under Section II(C). If Sections III(C)(ii) and (iii) read how Turner is proposing they should read, the P/P Provider can then either disclose or tell CNN that it is refusing to disclose because it has a reasonable basis for questioning the merits of CNN's trademark claim (or for one of the other reasons enumerated in Section III(C)). CNN can then ask for a reconsideration of that decision under Section III(E), and then appeal it if needed under Section III(F). Or perhaps it may submit a new trademark infringement notice under Section II(C) to attempt to address whatever shortcomings the P/P Provider identified in the original submission. Regardless of which of these paths it chooses, CNN at least knows what it has to do, and how to do it.

Conversely, if Sections III(C)(ii) and (iii) allow P/P Providers to refuse to disclose for any reason that they find adequate, sufficient, or compelling – what happens then? CNN receives a response from the P/P Provider that it is refusing to disclose because it found an adequate reason not to. But that reason may or may not have *anything* to do with the merits of CNN's trademark infringement claim. So what is CNN supposed to do? Of course, Section III(B)(ii) would require the P/P Provider to at least tell CNN what its specific reason is.<sup>18</sup> But if the P/P Provider can pick any reason it wants – not simply those enumerated in Section III(C) – regardless of whether that reason is related to the merits of the underlying trademark claim, then where does that leave CNN? Must it appeal the “adequacy” of the reason under Section III(F) and then hope that over time a body of precedent develops to clarify which reasons are adequate and which are not? How exactly would it prosecute that appeal if the “adequacy” of the reason has nothing to do with its trademark claim? What evidence or arguments would it present? Presumably the only evidence and arguments it has relate to its trademark claim. But under this alternative formulation of Sections III(C)(ii) and (iii), the “adequacy” of the P/P Provider's “reason” may have nothing to do with that claim. Nor can CNN simply go back and submit another notice under Section II(C) to attempt to address whatever shortcomings the P/P Provider identified in the original submission – because, again, the “adequacy” of the reason may have nothing to do with the notice. Limiting Sections III(C)(ii) and (iii) to apply only when the P/P Provider has found a reasonable basis to doubt CNN's trademark claim avoids all of this Kafkaesque uncertainty.

## Conclusion

Whatever the merits of P/P Services in certain cases, they are not without costs. The fact that the orchestrating force behind the fake education empire referenced at the beginning of this comment “remains obscured by proxy Internet services . . . .” is one clear example of those costs – not only for CNN, but also for the many consumers who may have been defrauded by the (obscured) bad actor in that case. Accreditation standards like those being debated by the WG represent one way to minimize those costs and to make sure that they are fairly allocated to those who benefit from P/P Services – namely, P/P Providers and P/P Customers. The Initial Report largely accomplishes both of those objectives. But it still has room for improvement, specifically on those issues regarding relay and the Disclosure Framework discussed above. Turner thanks the WG for considering these comments.

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<sup>18</sup> Initial Report at 90.