



July 7, 2015

Via Electronic Mail

comments-ppsai-initial-05may15@icann.org

Re: Public Comment on GNSO Privacy & Proxy Services Accreditation Issues Working Group Initial Report by Google Inc.

Google appreciates the efforts of members of the Privacy and Proxy Accreditation Issues Working Group, but for the reasons explained herein, we are doubtful that these efforts will lead to useful WHOIS reform. Below, we offer some general comments on the WHOIS effort and the report's approach, followed by specific comments on a number of the report's recommendations.

First, the ICANN community has been debating WHOIS-related topics for many years with very little to show for the time and energy expended. As a result, we believe it may be more productive to focus this energy on topics that affect the security of the DNS and are more likely to generate community consensus.

Previous efforts to address WHOIS¹ have not produced meaningful changes to either policies or ongoing operations, and those few efforts that have resulted in consensus policies² generally only deal with edge cases and are rarely invoked. Given that the current working group is, once again, unable to come to a consensus on key elements of the recommendations, including the only ones likely to meaningfully affect most users' interactions with the system, we believe that the effort to reform WHOIS is stalled.

As a result, we believe that the ICANN community should consider focusing on work that better and more directly addresses underlying issues rather than devoting more time to WHOIS-related work. For example, WHOIS is often discussed as an important tool in

¹ Notably, no changes to ICANN's WHOIS framework were made as a result of the work of the WHOIS Task Force chartered in June 2005, or the follow-up WHOIS Working Group chartered in April 2007. Only a fraction of the WHOIS Policy Review Team's recommendations, developed in 2012, have been implemented.

² In over a decade of almost continuous work on WHOIS, at times with up to three simultaneous task forces, the GNSO has produced only three consensus policies and one procedure, none of which have any effect on how WHOIS data is populated, verified or accessed.

addressing security threats such as botnets or phishing, so the community would be better served by work that helps to better understand how the DNS enables such attacks and how registries and registrars can better engage with other stakeholders to directly address these challenges.³

Second, the report's overall framework is impractical and ineffective, and it has a disproportionate effect on individuals and small businesses. The report's recommendations ignore a fundamental flaw in their design: they can only reach a small fraction of privacy and proxy providers. Moreover, this flaw has an unfairly disproportionate impact on individuals and smaller businesses. Any ICANN policy will necessarily only affect a fraction of privacy and proxy providers, and any sufficiently motivated registrant will still have access to unaccredited providers.⁴ This makes the open discussion regarding commercial use of privacy and proxy services in the draft report largely moot—commercial entities can and will continue to routinely use unaccredited privacy and proxy services regardless of ICANN's rules. Registrar-provided privacy and proxy services simply offer the general public the same type of privacy that has long been available to corporations and wealthy individuals through arrangements such as shell corporations. While it is unfortunate that individuals and small businesses need to engage in an additional service in order to maintain their privacy in conjunction with their domain name registrations, we believe that the democratization of these services through registrar-based offerings have expanded the breadth and quality of user participation, content creation, and free speech on the Internet.

The focus on registrar-provided offerings to the exclusion of other types of privacy and proxy services is an attempt to take these options away from individuals and small businesses both because individuals and smaller entities will be less likely to seek out stand-alone privacy and proxy options, and because stand-alone solutions tend to be more expensive than registrar offerings. We believe strongly that any policy around the use of privacy and proxy services in conjunction with domain names should be fairly applied and consider relevant services provided, regardless of whether the service is offered by a registrar or an entity outside of the traditional domain name ecosystem.

The report's recommendations also ignore a long history of corporations and individuals making use of proxy and privacy services. Corporations, in particular, often use proxies or subsidiaries to provide local contacts, as in the case of registered agents, to provide privacy as in the case of law firms or "shell companies" acting on behalf of their principals, or in furtherance of necessary business arrangements, as in the case of the separation between Google Inc. and Charleston Road Registry Inc. All of these offline arrangements have well-established legal and operational

³ In the context of security threats, Google has suggested that ICANN expand the scope of its proposed framework for new gTLD registries to address security threats to include appropriate engagement with registrars and registrants, as well as to better understand the role that DNS intermediaries play in addressing security threats.

⁴ Indeed, the report makes no attempt to grapple with the question posed in its charter regarding registrars' obligations to accredited providers.

models; similarly, online businesses merit consistent treatment and should not be subject to an arbitrarily stricter set of rules that serve to limit privacy and flexibility. And indeed, the proposed privacy and proxy rules would not and likely could not prohibit corporations from availing themselves of these structures (because banning such practices would fall outside of ICANN's remit⁵), so, again, they will have a disproportionate impact on individuals and small businesses.

Based on these high-level observations, we make the following specific recommendations regarding the proposals in the draft report:

- **Accredited privacy and proxy services should not be required to either Publish or Disclose registrant contact information other than when required by relevant law and utilizing relevant legal procedures.**⁶ Privacy and proxy providers should not be required to present, process, or honor any forms required by ICANN in place of relevant legal processes.⁷ Similarly, frameworks for responses to both Intellectual Property Rights-Holders and Law Enforcement should be replaced with a general requirement for privacy and proxy services to operate in accordance with relevant law. There are already a number of pre-litigation options available for intellectual property rights holders, including ICANN-imposed mechanisms such as the URS and UDRP as well as legal processes such as the DMCA.
- **Privacy and proxy services should ensure that communication submitted to them should be properly forwarded to the registrant⁸, but should not be responsible for adjudicating disputes over specific types of content or behavior on behalf of the registrant.** Disputes around intellectual property, in particular, are highly complex and fact-driven, and neither registrars nor privacy and proxy providers are in a position to mediate claims regarding the use of intellectual property, particularly in situations involving user-generated content.⁹ The proper role of these providers is to provide an alternative means of contactability, so the accreditation process should focus on their ability to effectively do so.
- **Privacy and proxy services may choose to Publish or Disclose registrant contact information under other circumstances, but they should have clear policies, included in their terms of service, on when they will do so.**¹⁰ Registrants should understand the services they are being offered. If Privacy and Proxy Services elect to

⁵ We do note, however, that at least one ICANN-accredited registrar also provides services as a registered agent, and are concerned that the recommendations, as written, would apply to the registered agent arrangement in some situations.

⁶ See Initial Report on the Privacy & Proxy Services Accreditation Issues Policy Development Process Section 1.3.2, May 5, 2015 (Initial Report) (discussing the possibility for and scope of ICANN-imposed disclosure and publication procedures), *available at* <http://gnso.icann.org/en/issues/raa/ppsai-initial-05may15-en.pdf>.

⁷ See *id.* at 10, Recommendation 15 (proposing an alternate form for certain requests).

⁸ To this end, we support Recommendation 16 of the Report. See *id.* at 11.

⁹ See *id.* at 11, Recommendation 19 (potentially proposing to impose such obligations on privacy and proxy providers).

¹⁰ To this end, we support Recommendations 6 and 8. See *id.* at 8.

Publish or Disclose registrant contact information in situations other than when required by national law, this should be made clear to the registrant at the time they elect the service. Just as importantly, privacy and proxy providers must apply their published policies on Publication and Disclosure fairly and consistently.¹¹

- The report provides no practical mechanism for registrants to choose between accredited privacy or proxy providers. **If the report includes support for choice between proxy providers, possible mechanisms should be elaborated; otherwise the recommendation should be removed as impractical.**¹²
- **We support the recommendation that privacy and proxy providers should facilitate the transfer, renewal, or restoration of domain names.**¹³ Proxy and privacy services must not interfere with a registrant's ability to manage their domain names. In most cases, simply performing the function of facilitating communication with the registrant should be sufficient to ensure proper management of the domain, but in some circumstances, such as submitting a report in conjunction with a restoration during the Redemption Grace Period, the provider may need to take action on behalf of the registrant. No registrant should lose any rights or protection otherwise available via the RAA or their registration agreement by virtue of taking advantage of a registrar-provided privacy or proxy service.
- **Privacy and proxy services should be available to all types of registrants, regardless of whether the registrant engages in any kind of commercial activity.**¹⁴ Registrars as well as privacy and proxy providers should not be contractually required by ICANN to categorize the use of an Internet service or to determine how a registrant may or may not use their website both now and in the future. Further, it is not practical or operationally feasible to restrict privacy and proxy services to websites involved in commercial transactions.
- **Privacy and proxy providers should maintain and publish statistics on the number of Publication and Disclosure requests they receive, as well as the number of instances in which those requests are honored.** As we have seen in other fora, transparency around the types and frequency of requests helps shed light on how laws and policies affect users and the flow of information online. Currently, we don't have any useful statistics to fully understand to what extent privacy and proxy services are receiving requests, the nature of those requests, and whether those requests are in fact valid or not.¹⁵

¹¹ The working group may wish to look to Section 3(c) of Specification 11 to the new gTLD registry agreement as an example of an existing ICANN requirement for a contracted party to operate in a transparent and consistent manner.

¹² To this end, we have concerns regarding Recommendation 20. *See id.* at 13.

¹³ *See id.* at 9, Recommendation 9.

¹⁴ As such, we support Recommendation 3 as well as the predominant view of the Working Group expressed in Section 1.3.3 that registrants should be able to make use of privacy and proxy services regardless of whether they engage in commercial transactions. *See id.* at 7, 97.

¹⁵ For an example of similar efforts by tech industry to publish statistics on notice-and-takedown requests from a variety of requestors, see Google Transparency Report. <http://www.google.com/transparencyreport>.

Conclusion

While we appreciate the opportunity to comment on the GNSO Privacy & Proxy Services Accreditation Issues Working Group Initial Report, many of the comments, as well as the overall scope of the Working Group's efforts, are misguided. While we understand some of the concerns raised in the report, the recommendations contained within the report will not resolve the issues they are ostensibly designed to address. As such, the ICANN community should instead focus its efforts on solving the real problems underlying WHOIS concerns, such as addressing security threats such as botnets or phishing. The community would be better served by work that helps to better understand how the DNS enables such attacks and how registries and registrars can better engage with other stakeholders to directly address these challenges.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andy Abrams', written in a cursive style.

Andy Abrams
Senior Trademark Counsel, Google Inc.