

## Comments of Time Warner Inc.

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<http://www.icann.org/en/public-comment/whoisrt-discussion-paper-09jun11-en.htm>

Time Warner Inc. welcomes this opportunity to respond to the Discussion Paper issued by the Whois Review Team. We commend the Review Team for its work thus far and for seeking community input through the Discussion Paper. Before turning to the specific questions posed in the Discussion Paper, we offer the following general observations about Whois.

Whois data – including information about second-level domain name registrants – is the foundation for most Internet-related investigations and transactions. The Time Warner companies rely constantly upon our ready access to this data. Whois data is the starting point in virtually every investigation of cases of online trademark and copyright infringement; but we (and myriad other companies) also use it for routine tasks associated with properly managing domain name portfolios, and for initiating and completing commercial transactions involving domain names. Access to the same data is also essential to law enforcement agencies, consumer protection organizations, and individual Internet users who wish to establish with whom they – or their children – are dealing when they visit online sites. But this data cannot support all these vital functions unless it is accurate, complete, up-to-date, and readily accessible to all Internet users.

Accessible, accurate Whois data in the gTLD environment is thus one of the most crucial Internet resources over which ICANN has held stewardship for more than a dozen years. We take the Review Team's role as consisting primarily of evaluating the quality of that stewardship and recommending how to improve it in the future. For that reason, we consider this to be one of the most critical of the reviews mandated by the Affirmation of Commitments between ICANN and the U.S. Department of Commerce.

### 1. Clarifying Whois Policy (questions 1-2)

We can appreciate the frustrations of some Review Team members about the fact that there is no single document setting forth ICANN's overall policy with regard to Whois. We believe, however, that this policy can be readily discerned from a review of the documents listed on page 4 of the Discussion Paper. Notably, paragraph 9.3.1 of the Affirmation of Commitments encapsulates the main objectives of that policy: "to maintain timely, unrestricted and public access to accurate and complete Whois information, including registrant, technical, billing, and administrative contact information." ICANN has sought to implement this policy, like most others within its purview, through contractual arrangements with gTLD registries and with accredited registrars. The Review Team can fulfill its responsibilities by evaluating how well those contractual arrangements advance the basic goal, and how effectively ICANN is enforcing compliance with those contractual obligations. We urge the Review Team to focus its efforts in these areas, rather than in the perhaps elusive goal of articulating a completely comprehensive overarching statement of policy in this area.

## 2. Impact of ccTLDs (questions 3, 11)

Time Warner commends the Review Team for looking to the experience of ccTLDs on Whois policy and implementation, even though ICANN plays only a limited role in this area. In particular, as discussed below, ccTLDs may have much to teach the gTLD world in terms of improvements in the accuracy of Whois data, such as through the use of registrant data verification.

## 3. Privacy and Proxy Services (questions 4, 5)

One of the most troubling trends to take place during ICANN's stewardship of the Whois system is the dramatic proliferation of proxy registrations of gTLD domain names, and ICANN's evident inability to bring these into line with its paramount policy goals. According to ICANN's own statistics, nearly one-fifth of all gTLD registrations are now associated with Whois data that does not identify or enable any direct contact with the beneficial registrant, but instead only with a third party proxy registration provider, often an alter ego of the registrar or reseller that handles the registration.<sup>1</sup> Whether or not a member of the public would ever be able to learn the identity or be able to contact the party actually responsible for the registration (and for activities occurring on a site to which the domain name resolves) depends entirely on whether this proxy registration provider chooses to make that information available. In Time Warner's experience, some proxy registration providers are responsible, and will divulge this information upon being presented with evidence that the registration is being used to carry out abusive activities. Many others, however, do not.

While Time Warner does not oppose the concept of proxy registration in limited circumstances, the development of this vast universe of 20 million or more gTLD domain name registrations, for which the identity and contact data of the registrant is hidden and, all too often, completely inaccessible, is a direct attack on ICANN's chief policy goal for Whois. That goal is Whois data that is accurate and accessible to the public. Proxy registration data is neither. Unless and until ICANN is able to bring this universe of proxy registrations under some reasonable degree of management and control, its claim to responsible stewardship of the Whois system will ring hollow.

To a considerable extent, this policy failure is the product of an inadequate Registrar Accreditation Agreement (RAA). A drafting team commissioned by the GNSO council identified this area as a top priority for RAA revision.<sup>2</sup> At the San Francisco ICANN meeting in March 2011, a vote by the registry and registrar stakeholder groups in the GNSO Council blocked any forward progress on this revision process. Even a much more modest proposal – that ICANN issue a registrar advisory to provide more guidance on the applicable language in the RAA – shriveled under opposition from registrars, and was never implemented.<sup>3</sup>

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<sup>1</sup> See ICANN Study on the Prevalence of Domain Names Registered using a Privacy or Proxy Service among the top 5 gTLDs.

<sup>2</sup> See Final Report on Proposals for Improvements to the Registrar Accreditation Agreement [page 20, items 4-6].

<sup>3</sup> See Summary & Analysis of Comments for: Draft Advisory on the Effect of Registrar Accreditation Agreement (RAA) Subsection 3.7.7.3 ("Draft Advisory").

Time Warner urges the Review Team to identify the proliferation of proxy registration services, and the consequent inaccessibility and inaccuracy (for all practical purposes) of a huge swath of gTLD Whois data, as a major flaw in ICANN's implementation of its Whois policies, and to recommend that ICANN take immediate steps to correct it. These steps could include, among others, clarification and vigorous enforcement of the existing RAA provisions on licensing of Whois data, prompt revision of the RAA to address this problem more effectively, and accelerated steps toward thick Whois requirements across the gTLD space so that registries would be in a position to address the problem that too many registrars have helped to create and that far too few registrars have sought to work cooperatively to solve. Voluntary "best practices" guidelines for registrars may have a role to play, but are unlikely to be meaningful absent the other steps listed above.

Time Warner recognizes that some registrants have legitimate privacy concerns which are sometimes in tension with ICANN's goals of public accessible and accurate Whois data. We believe that the scope of these concerns has been greatly exaggerated by some and that (as the Review Team notes on page 4 of the Discussion Paper) mechanisms are already in place to help registrars or registries to manage this tension when it comes to conflicting legal requirements that impede their compliance with their contractual obligations to ICANN. If further adjustments to the implementation of ICANN policies are needed to address specific, concrete and well-defined privacy concerns, Time Warner is ready, willing and able to participate in discussing them. But the experience of recent years tells us that hidden gTLD Whois data through proxy registration is not the solution.

#### 4. Whois data accuracy (questions 10-11)

Inaccurate Whois data – out-of-date, incomplete or simply blatantly false – has been a persistent problem. Inaccurate data undermines the goals of the service, erodes public confidence in the online environment, complicates online enforcement of consumer protection, intellectual property, and other laws, and increases the costs of online transactions. ICANN has taken some steps to quantify the scope of this problem but has done very little to address it.

The RAA puts the entire responsibility for Whois data accuracy on a party with whom (except in very limited circumstance) ICANN has no contractual relationship – the registrant. Registrars – ICANN's contracted partners – have the obligation to investigate reports of false Whois data, but have no responsibility to check the accuracy of the data submitted (at the time of registration, after a report of inaccuracy or at any other point), nor even the obligation to cancel the registrations of those who knowingly submit false Whois data. It is not surprising that this system produces unacceptably high levels of inaccurate data. Clearly, the solution must involve shifting the responsibility for Whois data accuracy to those in a position to achieve it and who have contractual obligations to ICANN – registrars, registries or both.

ICANN has already taken steps toward this goal in the gTLD environment. In three of its registry agreements – .mobi, .tel and .asia – it has imposed Whois data quality obligations that flow through registries to registrars. ICANN was asked to do the same for all the coming new gTLDs, but it refused to do so. However, ICANN has indicated a preference for new gTLDs that verify registrant contact information throughout the registration life cycle by providing those new gTLD applicants an extra point in the evaluation process. It may be that a marked

improvement in Whois data accuracy will only occur once these practices become the norm throughout the new gTLD environment.

5. Compliance (questions 6-9, 12-13)

As discussed above, some of the key RAA provisions that influence the accessibility and accuracy of Whois data are weak, ambiguous or both. This certainly inhibits the effectiveness of ICANN's compliance efforts. To overcome this, ICANN's compliance staff should be more aggressive in pursuing non-compliance with the RAA and bolder in issuing interpretations of the RAA provisions that will, for instance, encourage proxy services associated with registrars or resellers to divulge their customer information when presented with evidence of abusive registrations. At the same time, there is a limit to what can be achieved under the current version of the RAA, so ICANN should accelerate efforts to revise it so that it more effectively advances long-standing Whois policies.

It also stands to reason (and experience confirms) that ICANN could more effectively enforce compliance with 21 registries than with 900 registrars. 19 of the 21 registries today operate in a "thick Whois" environment in which the public may obtain the full set of accessible registrant contact within a gTLD from a single source – the registry. Public access to Whois data is not a problem in these registries. The two outliers, unfortunately, are the two largest – .com and .net – and not coincidentally, these are the registries where public access to Whois (through registrars) is inconsistent and sometimes simply unavailable. Every new gTLD will be a thick registry; .com and .net will be even more isolated than now. The thin registry model was created in order to stimulate a competitive marketplace in registration services. Now that that marketplace has been achieved, ICANN should set out a timetable for converting these two outliers to thick registries. Improved compliance with Whois data accessibility policies will be among the beneficial results of this change.

Time Warner thanks the Review Team in advance for its consideration of our comments. If you have any questions or need more information, please do not hesitate to contact the undersigned.

Respectfully submitted,

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