

Comments of the INTA Internet Committee on the
Whois Policy Review Team – Discussion Paper
July 22, 2011

The Internet Committee of the International Trademark Association (INTA), is pleased to provide comments in response to the request for community input on the Whois Policy Review Team Discussion Paper.

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

ICANN should clarify its existing Whois policy by taking measures to inform and educate the public and its contracted business partners, such as its registrars and registries, on the importance of the Whois policy and of complying with its terms. As one of ICANN's most important substantive policies, a description of the Whois policy and its function in the Domain Name System (DNS) should be clearly visible on the ICANN homepage, so the public can understand the purpose and function of the policy, and the roles, rights, and responsibilities of registrants, registrars, registries, and all other Internet stakeholders. In particular, for consumers and other members of the public, ICANN should describe the implications of providing false or misleading Whois information. A direct link should be created on the ICANN homepage to the Whois Data Problem Reporting System (WDPRS) <http://wdprs.internic.net/> and ICANN should take other measures to inform relevant stakeholder communities on the WDPRS, such as through targeted educational programs and publications. ICANN should also provide dedicated staff support to ensure the system is performing robustly and meeting its goals.

2. *How should ICANN clarify the status of the high level principles set out in the Affirmation of Commitments and the GAC Principles on Whois?*

As indicated in question 1, ICANN should take measures to ensure all Internet stakeholders, including its contracted business partners, such as its registrars, are informed of the importance of Whois, and their obligations in ensuring that Whois data is current and accurate. ICANN must bolster its contractual compliance activity to meet its responsibilities under the Affirmation of Commitments.

3. *What insight can country code TLDs (ccTLDs) offer on their response to domestic laws and how they have or have not modified their ccTLD Whois policies?*

Most ccTLDs provide the entire Whois record at the registry level, regardless of whether domains are registered directly with the registry or through registrars, while some provide the

entire record only to certain groups such as law enforcement agencies, certification authorities, and registrars that need access to the full record for administrative purposes. The extent of information that is shared is generally determined by local law. For instance, DENIC publishes all contact information, and German law requires the contact information to be placed on the website if engaged in business (Impressum). France has a similar requirement. While there may be a need to balance local privacy laws with access to the full Whois record, administrative mechanisms could be implemented to ensure greater transparency, as is the practice in the Netherlands. In fact, a thick registry Whois model has been employed in many new gTLDs for many years without any evidence of legal problems or objections from national authorities on privacy grounds. Moreover, ICANN, on the unanimous recommendation of the GNSO Council, has established a procedure that can be invoked by any registry that believes it faces a conflict between its contractual Whois obligations and requirements of national privacy laws (see, <http://www.icann.org/en/announcements/announcement-18dec07.htm>) and to date, this procedure has never been invoked.

- 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?*

INTA supports open access to accurate ownership information for every domain name in every Top-Level domain registry via a publicly accessible Whois database for addressing legal and other issues relating to the registration and use of the domain name. Available information should include the identity of and accurate, reliable contact details for the true owner of the domain name. Quintessentially, in most circumstances, publishing on the Internet is a public act, and the public should be able to determine who they are dealing with. This public interest is particularly important in the case of domains that contain commercial content, or that are registered by entities, where legally cognizable privacy interests, if any, are greatly reduced. Open access should remain the default and where a domain has been registered using a privacy or proxy service, there should be clear, enforceable contractual mechanisms and procedures for the relay of communications to the beneficial owner, and for revealing the identity and contact information of the beneficial owner to a party who has alleged reasonable evidence of actionable harm, as provided in the registration agreement provisions required by Registrar Accreditation Agreement section 3.7.7.3.

- 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?*

As discussed above, where a domain has been registered using a privacy or proxy service, there should be clear, enforceable contractual mechanisms and procedures for the relay of

communications to the beneficial owner, and for revealing the identity and contact information of the beneficial owner to a party who has alleged reasonable evidence of actionable harm, as provided in the registration agreement provisions required by Registrar Accreditation Agreement section 3.7.7.3. Due to the high degree of non-compliance with the 3.7.7.3 provisions, privacy/proxy services should be governed by a uniform body of rules and procedures that is overseen by ICANN, including standardized relay and reveal processes. Privacy/proxy services would have to assent to these and affirm their compliance in an annual statement to ICANN in order to operate.

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

ICANN's current Whois related compliance activities are largely ineffective and subject to abuse. ICANN does not have the tools or the resources to be effective in its Whois-related compliance activities. In fact, despite acknowledging the rollout of potentially hundreds of new gTLDs, ICANN has plans to increase its compliance staff by only nominal amounts that will likely be insufficient even to maintain the current level of compliance oversight, let alone make much-needed improvements. A key weakness is the absence of a mechanism or standardized procedure to ensure that Whois records are accurate.

7. Are there any aspects of ICANN's Whois commitments that are not currently enforceable?

Accuracy is one area of particular concern as noted in the response to question 6 above.

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

One option would be to include clear obligations within the registry and registrar contracts and provide clear advisories on those obligations if it becomes aware of differing interpretations within the ICANN community. However, this would still require significant resources to monitor compliance and to ensure that an effective enforcement mechanism or regime is in place. Another option would be to implement a thick Whois model at the registry level in order to streamline such efforts by having only one validation point. In fact, the provision of Whois information at the registry level under the thick Whois model was deemed by the IRT to be essential to the cost-effective protection of consumers and thus, was advanced as one of only five of its key recommendations.¹

¹ <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>

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

In light of the now imminent expansion of gTLDs, the compliance department must be expanded significantly in both staff and authority in order to ensure meaningful enforcement of existing Whois commitments. As discussed above, direct contractual accreditation of privacy and proxy services (at least those affiliated with registrars or registries) would go a long way to promote compliance with obligations such as RAA 3.7.7.3.

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

At present there are no mechanisms in place to ensure the accuracy of Whois information provided by registrants. Instead there is a presumption by registries and registrars that Whois information provided by registrants is accurate and a lack of incentives to encourage registrants to refrain from providing misleading or inaccurate information. Consideration should be given to the implementation of a validation process funded by additional fees (validation fees) paid by registrants at the time of registration as well as penalties -- such as loss of the registration if information is found to be inaccurate in the validation process. At a minimum, in cases where Whois data problems have been reported, there should be enhanced obligations to verify any replacement data offered by the registrant, as opposed to applying the same presumption of validity once any change has been made to the inaccurate data.

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

By placing a priority on contractual compliance, registries can improve the integrity of Whois data within their top-level domains.

12. Are there barriers, cost or otherwise, to compliance with Whois policy?

Aside from costs, we believe there are no barriers to compliance with Whois policy. More importantly, with respect to costs, we believe the costs of NOT maintaining accurate Whois records far outweigh the cost of compliance. Costs of compliance should be shared by registrants, registries and registrars alike.

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

Crime and fraud upon Internet users are likely key motivators behind the provision of inaccurate Whois data or the use of privacy/proxy services and are the logical outgrowth of non-compliance with Whois policy.

14. Are there any other relevant issues that the review team should be aware of? Please provide details.

The Committee has not identified additional issues for the review team at this time.

Thank you for considering our views on these important issues. If you have any questions regarding our submission, please contact INTA External Relations Manager, Claudio DiGangi at: cdigangi@inta.org.

About INTA & The Internet Committee

The International Trademark Association (INTA) is a more than 131-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.