Submitted to: policies@dnc.org.nz

May 9, 2017

.NZ Domain Name Commission
PO Box 11 881
Wellington 6142, NZ

Re: .nz WHOIS Review Fifth Consultation

Dear Commissioners:

The International Trademark Association (INTA) appreciates this opportunity to comment on the .NZ WHOIS review. We thank the Commission for opening a fifth round of consultation on this important issue.

As discussed in our previous submissions, INTA supports open and accurate WHOIS data in order to access information vital to combatting malicious activities within the domain name system, including counterfeiting and fraud. INTA is especially concerned with WHOIS data as it relates to websites used for commercial purposes whether they are owned by corporate entities or individuals. The WHOIS directory is the primary method to identify individuals who may be behind any alleged infringement of intellectual property rights which ultimately cause harm to consumers.

We have reviewed the draft policy and identified several places where we believe further clarification or procedure would be valuable. These are, in summary:

1. further clarification of parties who would be eligible for the privacy option;
2. an obligation to be placed on individual registrants to immediately update their domain registration and to opt out of the privacy option if they are no longer eligible;
3. procedures for removal of the privacy option when the registrant is no longer or not eligible; and
4. specific policies and procedures for the release of information including withheld data in domain name and IP disputes.

1. **Further clarification of eligibility for the privacy option required**

We urge further clarification of who is eligible for the privacy option. The wording “not using the domain to any significant extent in “Trade”….” (emphasis added) in clause 8.3.2 of the draft policy is vague and lacks certainty.
There should be a clear threshold of what domains are eligible for the privacy option. We submit that this threshold should be any use in trade, including attempted or purported use, actual sales should not be required.

- It is in the public interest for consumers to be able to identify who is behind any website that is used in trade. This is especially valuable in the online environment where it is easier for fraudulent businesses to hide. The registrant address and telephone information available through the WHOIS lookup provides critical information to advance consumer protections by:
  - Allowing consumers to see where the person running the business is based;
  - Helping consumers assess whether the business is legitimate;
  - Ensuring more accountability from businesses to their customers; and
  - Giving customers additional means for contact. For example, the address details for individual registrants operating in trade may not be available on other public registers whereas registered businesses are required to publish such information as part of their business registration process.

- A clear threshold makes it easier for individual registrants when determining whether they are eligible to opt into the privacy option.

- Individual registrants using a domain for both personal and business reasons should not be able to hide behind the privacy option based on the argument that the personal component of the website dominates the website.

Accordingly, we recommend that the draft policy be amended so that it is clear that individual registrants making any use of the domain name in trade are not eligible for the privacy option.

We support the position adopted by the Domain Name Commission (DNCL) that the privacy option be limited to “natural persons”.

2. **Incorporate requirement that individual registrant remove privacy option if no longer eligible**

The policy should require:
- an individual registrant who has elected the privacy option to remove the privacy option promptly if they are no longer eligible for the option; and
- individual registrants to reconfirm their eligibility for the privacy option annually.

For example, we envisage there may be circumstances where:
- an individual registrant will legitimately elect the privacy option for a domain name to be used in a personal capacity; but
- subsequently the domain will start to be used in trade.

In this scenario, the individual registrant should be required to update the domain name settings to remove the privacy option when the domain starts to be used in trade.

3. **Establish procedures for removal of privacy option when registrant not eligible**

INTA recommends the development of procedures for the request for removal of the privacy option by a third party when the registrant is not (or is no longer) eligible.
INTA supports clause 8.4 of the draft policy as it gives the DNCL discretion to remove the privacy options from a particular domain name where it determines the registrant does not meet the criteria specified in 8.3. However, INTA recommends that the policy should go further:

- It should not be discretionary. In the event that the domain name does not qualify, then the privacy option should be removed.

- A procedure should be implemented that:
  - allows either the DNCL or third parties to seek the removal of the privacy option on the basis that the domain does not qualify; and
  - sets in place steps and time frames for the above.

This procedure would be valuable as it:

- gives people using the DNCL services options and certainty; and
- signals that registrants cannot use the privacy option inappropriately if they are not eligible.

4. Establish specific policies and procedures for the release of withheld data in domain name and IP disputes

We consider that the DNCL should include in the regime specific policies and procedures for the release of information (including withheld data) in intellectual property and domain name disputes. Canada has implemented two relevant policies in this area that we believe may provide useful models for the DNCL:

- **Release of information in intellectual property disputes:** The Request for Disclosure of Registrant Information – Rules and Procedure version 1.7 (May 20, 2015) (copy attached – also available at [https://cira.ca/sites/default/files/public/policy/request_for_disclosure_of_registrant_information_-_rules_and_procedures_version_1.7.pdf](https://cira.ca/sites/default/files/public/policy/request_for_disclosure_of_registrant_information_-_rules_and_procedures_version_1.7.pdf)) sets out procedures and eligibility requirements for the release of withheld data in intellectual property disputes concerning a domain and/or its content. This is useful as a model because it provides:
  a. a clear definition of what qualifies as a “dispute” under the policy and what IP rights are covered;
  b. a form to be completed by the requestor that steps through the requirements including establishing the IP rights; and
  c. a timeframe for informing the registrant of the release of the information that is appropriate for this type of dispute (registrant to be informed no less than 30 days, and no more than 60 days, after the release of the information).

- **Release of list of domains owned by same registrant when domain name dispute contemplated:** The Registration Information Access Rules and Procedures Version 1.5 (copy attached – also available at [https://cira.ca/sites/default/files/public/policy/registration_information_access_rules_and_procedures_version_1.5_1.pdf](https://cira.ca/sites/default/files/public/policy/registration_information_access_rules_and_procedures_version_1.5_1.pdf)) sets out procedures allowing a person wishing to initiate proceedings based on the CIRA Dispute Resolution Policy to request a list of
the other .ca domain names registered in the name of the same registrant. This policy is useful as it allows the requestor to learn more about the domain name registration, including the context of alleged IP rights infringements and whether the behavior in question is part of a pattern, and may provide additional communication options.

INTA supports the ongoing consideration and improvement of Whois directory services and appreciates the Commission’s consideration of our comments and concerns. Should you have any questions about our submission, I invite you to contact Lori Schulman, INTA’s Senior Director of Internet Policy at 202-261-6588 or at lschulman@inta.org.

Sincerely,

Etienne Sanz de Acedo
Chief Executive Officer

About INTA
INTA is a 139 year-old global, not-for-profit association with more than 7,000 member organizations from over 190 countries. One of INTA’s 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 also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA’s Internet Committee is a group of over 200 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.