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Comments of the Intellectual Property Constituency

On Whois Review Team Draft Final Report

March 9, 2012

The Intellectual Property Constituency (IPC) of ICANN's GNSO appreciates this opportunity to comment on the Draft Final Report of the Whois Review Team. See http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf.

We commend the Review Team on this Draft Final Report. The Review Team has tackled a difficult and complex subject and produced some ambitious yet realistic recommendations. If promptly adopted and vigorously implemented, these steps could help reverse the depressing long-term trend in which ICANN has proven to be an ineffective steward of Whois as a critical public resource.

Since the Review Team began its work last year, we have seen a number of important initiatives within ICANN that are either addressed to, or that could have a significant impact on, the evolution and improvement of Whois. These include, but are not limited to, renegotiation of the Registrar Accreditation Agreement (RAA), and work toward internationalization of domain name registration data and toward the development of a successor to the "Whois protocol." While these initiatives had the potential to render some of the Review Team's recommendations obsolete or "overtaken by events," in fact for the most part they have not yet done so. Although the ICANN Board directed that the RAA negotiation process produce draft amendments for consideration at the upcoming Costa Rica meeting, this process has thus far failed to deliver. Work on IRD and a new protocol seems to have lacked focus and direction. (The proposed SSAC 051 "roadmap" now out for public comment may help in this regard.) As a result, the Review Team's recommendations remain on the whole current, relevant and actionable. IPC urges the Review Team to finalize its report, and the Board to adopt its recommendations, as soon as possible.

We offer the following more specific comments on some of the Review Team's main recommendations:

Recommendation #3: This may be the most important recommendation and it deserves immediate approval. More accurate and accessible Whois data should indeed be "a strategic priority" for ICANN. IPC also applauds the recommendation that "a senior member of the executive team [be] responsible for overseeing WHOIS compliance." We recommend that that senior executive be the CEO, and that fulfillment of data accuracy objectives should be a major factor in performance evaluations and bonus decisions for this office.

Recommendation #5:   We agree that the NORC Data Accuracy Study has provided a baseline against which improvements in data accuracy can and should be measured. We support the goal of 50% reduction in "unreachable" Whois entries each year. We note that registrations held behind proxy or privacy registration services are, today, essentially unreachable, and that these registrations are today a pervasive source of Whois inaccuracy and a serious threat to the public policy objectives served by accessible, accurate Whois data. Thus, the implementation of the 50% annual reduction target is closely tied to reform of the privacy and proxy registration "system" that exists today.

Recommendations #6 and 7: Moving to a more objective and quantifiable set of benchmarks for improving Whois accuracy requires the annual reports and status reports called for by these recommendations, which IPC supports.

Recommendation #8:   On many occasions, IPC has called for ICANN to set clear requirements for accredited registrars to cancel registrations that are associated with obviously false contact data, or for which no verifiable contact data can be promptly obtained. The GNSO Drafting Team that compiled topics for RAA amendments listed as one of its high priority items for the revised RAA to "define circumstances under which registrar is required to cancel registration for false Whois data and set reasonable time limits for registrar action." See http://gnso.icann.org/issues/raa/raa-improvements-proposal-final-report-18oct10-en.pdf, at 21. We read the Review Team's recommendation for "a clear, unambiguous and enforceable chain of contractual agreements with registries, registrars and registrants to require the provision and maintenance of accurate Whois data" to encompass the high priority item identified by the Drafting Team, though of course it also extends well beyond it. On this basis, we support this recommendation.

Recommendation #9:   IPC strongly supports better communication of the requirements for accurate Whois data to all current and prospective gTLD registrants. The RAA has always required that every gTLD registrant consent to the public availability of Whois data the registrant provides. This requirement, which is important for reducing or eliminating conflicts between contractual Whois requirements and national data protection laws, would be greatly enhanced by the communication effort called for by the Review Team.

Recommendations #10-11:   We support the concept that privacy services should be incorporated into the Whois system developed and managed by ICANN. In bifurcating the treatment of privacy services and proxy services, the Review Team may be over-emphasizing differences that in context are not particularly significant with regard to whether a Whois query produces a "reachable" result.

As noted below, we do not believe that an ICANN accreditation system is the only way to manage this issue. We are concerned that the time needed to develop and implement such a system could lead to unnecessary delay in tackling the extremely serious and pervasive problem of Whois registrations that are not associated, in publicly accessible Whois, with a full set of actual registrant contact data. However, IPC commends the Review Team's recommendation that any private registrations permitted in this system must be clearly labeled as such, must comply with "standardized relay and reveal processes and timeframes," and must be backed up

by "periodic due diligence checks" on the underlying registrant contact data. These requirements must be actively enforced by ICANN, as provided for in Recommendation 11.

We note that, shortly before the Review Team published its draft final report, an opinion letter was published on the ICANN website in which the Spanish Data Protection Agency states unequivocally that the .cat registry's current policy of unrestricted public access to Whois data, as required by its registry agreement with ICANN, "is not contrary" to Spain's data protection law and "does not violate" that law or its implementing regulations. See http://www.icann.org/en/registries/rsep/puntcat-cat-request-05oct11-en.pdf, at pages 24-31. Since Spanish data protection law is required to comply with the framework set forth in the European Union's Data Protection Directive (95/46/EC), this opinion is extremely important in evaluating the impact of the privacy issue on Whois policy.

Recommendations #12-16: It appears that the recommendations of the Review Team on proxy registrations must be read in context with the discussion on pages 83-84 of the draft final report. IPC agrees with the unanimous view of the Review Team (page 83) that "the status quo regarding proxy registrations is not sustainable," for the reasons stated there. This discussion goes on to describe somewhat divergent approaches for dealing with the problem. In general, IPC continues to prefer the approach set out in its July 2011 comments on the Review Team's discussion paper: that ICANN should create official guidelines for what constitutes a valid privacy/proxy service, hopefully with the cooperation of registrars but if necessary without it, and should also embody minimum standards in revised provisions of the RAA for proxy services offered in conjunction with registration. The Review Team's Recommendation 14 sets out a good list of what should be included in "voluntary best practice guidelines". While such guidelines and the use of encouragement and incentives could produce real progress in this area, we share the skepticism of at least some members of the review team "that such measures will provide a satisfactory solution over time." (page 84)

As noted above, we are not persuaded that proxy and privacy services, which have very similar adverse impacts on the accuracy and accessibility of Whois data, require the markedly disparate treatment that the Review Team recommendations would give them. The accreditation approach recommended for privacy services has its merits in the proxy field as well. At the same time, and consistent with our previous comments, we urge the Review Team to give further consideration to an approach drawn from the GNSO RAA Amendments Drafting Team's compilation of topics. Specifically, High Priority Topics #4 and #5 in that compilation referenced RAA provisions that spell out the obligations, with regard to data escrow, and relay and reveal functions, of any privacy or proxy services that are made available in connection with registrations sponsored by a registrar; and that the sponsoring registrar assume responsibility for compliance by these services with those obligations (as well disclosing which services fall in this category). See http://gnso.icann.org/issues/raa/raa-improvements-proposal-final-report-18oct10-en.pdf, at 20. This may be a more immediately feasible first step than the development and implementation of a full-blown accreditation system for such services.

Finally, it should go without saying – but the Review Team says it well – that no "approach will be successful without proactive ICANN compliance measures." (p. 84)

     <u>Recommendation #17</u>: IPC strongly supports prompt action toward bringing thick Whois into reality across the entire gTLD space. We have noted in our comments on the Thick Whois preliminary issues report several ways in this goal might be advanced. See http://forum.icann.org/lists/thick-whois-preliminary-report/pdf7B8sh4sCoN.pdf, at 3-4. These include the exercise of ICANN's existing contractual authority to direct VeriSign to migrate the .com registry to a thick Whois model. IPC continues to support a centralized ICANN-mandated site for access to all gTLD Whois data, as proposed in the "alternative" formulation of Recommendation #17, but considers that it could be more expeditious and immediately feasible to concentrate on bringing the only remaining thin Whois outliers -- .com, .net and .jobs – into the well-established thick Whois mainstream.

     <u>Recommendation #18-20</u>: IPC agrees in principle with these recommendations. Internationalization of Whois is an important and urgent challenge, one which ICANN has not yet effectively stepped up to. We support the need for swift action on this matter but believe it is important to delineate the proper role for ICANN vis-a-vis other bodies, especially the Internet Engineering Task Force. We also applaud the Review Team's implicit recognition that, while many critical technical issues must be addressed, this is not just a decision for technologists but should engage the entire ICANN community. The recommended approach of including placeholders for internationalized registration data in registry and registrar agreements is a timely one, as the RAA is under revision and many new registry agreements will be entered into in the near future. IPC will defer further comment on this topic until its review of the SSAC 051 roadmap document now pending for public comment.

     We conclude by reiterating our commendation to the Whois Review Team for their hard work and productive results, and urge ICANN to give prompt and favorable consideration to their recommendations.

     Respectfully submitted on behalf of the IPC by Steve Metalitz, President