Whois Review Team

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Commercial & Business Users Constituency Submission

GNSO//CSG//BC

Submission:

The Whois Policy Review Team (WRT) was launched in October 2010 in line with the Affirmation of Commitments, which stipulates

> "ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust."

To address issues of fraud, **infringement and consumer safety**; **to determine ownership** and **registration status**; and **to enhance user confidence**; business users, in particular, rely on access to **timely, unrestricted and public access** to **accurate and complete Whois** information including registrant, technical, billing and administrative contact information.

The BC supports ICANN's continuing effort to review Whois Policy and believes that the WRT should focus on three areas of current concern:

1. Measures to ensure timely, unrestricted and public access to accurate and complete Whois information

2. Penalties for those who fail to provide access to timely, unrestricted and public access to accurate and complete Whois information or for those who abuse this access and information

3. Development of policy to address abusive registrations that attempt to evade legal process and law enforcement through use of proxy and privacy registration services. Policy development in this area should be informed by rigorous studies now under consideration in GNSO Council:

   Privacy and Proxy "Abuse" study
   http://gnso.icann.org/issues/whois/gnso-whois-pp-abuse-studies-report-05oct10-en.pdf

   Proxy and Privacy "Relay and Reveal" study
   http://gnso.icann.org/issues/whois/whois-pp-relay-reveal-studies-report-11feb11-en.pdf

4. Strict enforcement that would require Thick Whois for all gTLD registries

The WRT is soliciting input from the community on its suggested set of issues:

1. Scope of Work and Roadmap
   https://community.icann.org/display/whoisreview/Scope+and+Roadmap+of+the+WHOIS+RT

2. Outreach Plan
   https://community.icann.org/display/whoisreview/Outreach+plan

3. Action Plan
   https://community.icann.org/display/whoisreview/Action+plan

4. List of Key Definitions

   1. Law Enforcement:
      Law Enforcement shall be considered to be an entity authorized by a government and whose responsibilities include the maintenance, co-ordination, or enforcement of laws, multi-national treaty or government-imposed legal obligations.

   2. Applicable Laws:
      Includes any and all local and national laws that regulate and/or control the collection, use, access, and disclosure of personally identifiable information. It may also include other relevant legal obligations, including U.N. Universal Declaration of Human Rights and the U.N. Guidelines for the Regulation of Computerized Personal Data Files.

   3. Producers and Maintainers of WHOIS Data:

      A. Producers: The individuals or organizations supplying contact data for inclusion into WHOIS data.

      B. Maintainers: The WHOIS Review Team proposes to subdivide this category in to:
      • Data Controllers: Individuals or organizations that define the data to be collected, require its release, and govern its use. May or may not be directly involved in these functions.
      • Data Processors: Individuals or organizations engaged in the collection, storage, and release of data, according to the terms defined by the Data Controller. They do -not- determine the nature or use of the data that they collect or maintain.

   4. Consumer:

      What is a "consumer"?
      There is no single universally agreed definition of 'consumer', and legal definitions in different jurisdictions vary widely. Some are narrow and limited to 'natural persons', while others are broader and include various types of organisations.

      The WHOIS review team has been considering a broad interpretation of the term 'consumer', as this would allow a broad range of perspectives to be considered by the review team. This appears to be consistent with the intention of the drafters of the AoC.
      In the global sense, "consumer" may mean:

      A. All Internet users including natural persons, commercial and non-commercial entities, government and academic entities.

      within the context of this review, a "consumer" w.r.t. WHOIS data and WHOIS Service may mean:

      B. Any consumer that acts as a Producer of WHOIS data (see above), Maintainer of WHOIS data and provider of WHOIS Service (e.g. Registrars), or User of WHOIS data (e.g. – individuals, commercial or non-commercial entities who legitimately query the WHOIS data).

Each of these issues is addressed below.

1. Scope of Work and Roadmap

The BC generally supports the Scope of Work and Roadmap as prepared by the WRT, with these suggestions:

In addition to identifying "good practice in other areas of the domain space (as a benchmarking tool)", the BC also recommends that the WRT identify specific examples of problems that have arisen due to restrictive, inaccurate or misused Whois. These specific examples should be highlighted and recommendations for measures to mitigate should be included in the final report.

The draft Scope and Roadmap should also include assessment of whether ICANN is adequately and appropriately using fact-based studies to inform Whois policy development. Much work has been done over several years to define and advance these studies:

> In October 2007, the GNSO Council concluded that a comprehensive and objective understanding of key factual issues regarding the gTLD WHOIS system would benefit future GNSO policy development efforts (http://gnso.icann.org/resolutions/).

> Before defining study details, the Council solicited suggestions from the community for specific topics of study on WHOIS. Suggestions were submitted (http://forum.icann.org/lists/WHOIS-comments-2008/) and ICANN staff prepared a 'Report on Public Suggestions on Further Studies of WHOIS', dated 25-Feb-2008 (http://gnso.icann.org/issues/Whois-privacy/Whois-study-suggestion-report-25feb08.pdf).

> On 28-Mar-2008 the GNSO Council resolved to form a WHOIS Study Working Group to develop a proposed list, if any, of recommended studies for which ICANN staff would be asked to provide cost estimates to the Council (http://gnso.icann.org/meetings/minutes-gnso-27mar08.shtml).

> The WHOIS Study WG did not reach consensus regarding further studies, and on 25-Jun-2008 the GNSO Council resolved to form a new WHOIS Hypotheses working group to prepare a list of hypotheses from the 'Report on Public Suggestions on Further Studies of WHOIS' and the GAC letter on WHOIS studies (http://www.icann.org/correspondence/karlins-to-thrush-16apr08.pdf). The WG reported to the Council on 26-Aug-2008. (https://st.icann.org/Whois-hypoth-wg/index.cgi?Whois_hypotheses_wg#Whois_study_hypotheses_wg_final_report).

> On 5-Nov-2008, Council convened a group of Councilors and constituency members to draft a resolution regarding studies, if any, for which cost estimates should be obtained. The Whois Study Drafting Team further consolidated studies including those from the GAC (http://www.icann.org/correspondence/karlins-to-thrush-16apr08.pdf). The Team determined that the six studies with the highest average priority scores should be the subject of further research to determine feasibility and obtain cost estimates.

> On 04-Mar-2009, Council requested Staff to conduct research on feasibility and cost estimates for selected Whois studies and report its findings to Council. (See Motion 3, http://gnso.icann.org/resolutions/#200903).

> On 23-Mar-2010, Staff presented a report on the feasibility and cost estimates for the Whois "Misuse" and Whois "Registrant Identification" Studies, finding that each study would cost approximately $150,000 and take approximately one year to complete. (http://gnso.icann.org/issues/whois/whois-studies-report-for-gnso-23mar10-en.pdf). The Whois Registrant Identification study would gather info about how business/commercial domain registrants are identified, and correlate such identification with the use of proxy/privacy services.

The ICANN Board approved in Brussels a FY2011 budget that includes at least $400,000 for WHOIS studies (see http://www.icann.org/en/minutes/resolutions-25jun10-en.htm#8).

On 8-September-2010 the GNSO Council approved a resolution requesting staff to proceed with the Whois "Misuse" Study, which would explore the extent to which publicly displayed WHOIS data is misused, http://gnso.icann.org/resolutions/#201009.

On 5-October-2010, staff provided feasibility and cost analysis for a Whois Privacy and Proxy "Abuse" study, http://gnso.icann.org/issues/whois/gnso-whois-pp-abuse-studies-report-05oct10-en.pdf. This study would compare broad sample of domains registered with a proxy or privacy service provider that are associated with alleged harmful acts with overall frequency of proxy and privacy registrations. This study was estimated to cost $150,000 and take less than a year to complete.

On 11-February-2011, staff provided a feasibility and cost analysis for a Whois Proxy and Privacy "Relay and Reveal" study, http://gnso.icann.org/issues/whois/whois-pp-relay-reveal-studies-report-11feb11-en.pdf, which would analyze relay and reveal requests sent for Privacy and Proxy-registered domains to explore and document how they are processed. The staff analysis concluded that it was premature to conduct a full study, and recommended that a pre-study "survey" be conducted first, to determine if launching a full study is feasible to do.

2. Outreach Plan

The BC does not have any issue with the proposed Outreach Plan with the exception of the timing associated with the release of the draft report. Given that the application launch period for new gTLDs may coincide with release of the draft report, it may be difficult for members of the business community to devote the time needed for a thorough review of the work completed by the WRT.

3. Action Plan

Given the BC's request to understand the problems that have arisen as a result of restrictive, inaccurate or misused Whois, the BC recommends that the WRT incorporates the collection of examples of such data into the Action Plan. In addition, the WRT should review information already available from completed Whois studies. These results can be obtained from ICANN staff. The BC also supports the inclusion of validated studies from external sources which provide such data.

4. List of Key Definitions

The BC accepts the definitions provided by the WRT for the terms Law Enforcement, Applicable Laws, and Producers and Maintainers of Whois. Additionally, the BC supports a broad definition of the term consumer with a meaning of "all Internet users including natural persons, commercial and non-commercial entities, government and academic entities."

Constituency Support:

Rapporteur for this Discussion Draft: Elisa Cooper

Level of Support of BC Members:

This document was posted to BC members for review and comment on 7-Apr-2011.

Document updated to reflect support for a broad definition of "Consumer" and added emphasis as to why timely, unrestricted and public access of Whois is important to business users on 11-Apr-2011.

Pursuant to our section 7.2 of the BC Charter, this document is deemed approved since no substantively opposing comments were received as of 17-Apr-2011.

Attesting BC Officer: Steve DelBianco, Vice Chair for policy coordination