

Commercial Use of Domain Names: An Analysis of Multiple Jurisdictions

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I. Introduction and Background

Through a number of ICANN forums, namely the Expert Working Group on gTLD Directory Services (EWG) and the Generic Names Supporting Organization's Privacy & Proxy Service Accreditation Issues Working Group (PPSAI WG), ICANN Community stakeholders are contemplating, among other things, a question with far-reaching implications: *To what extent should WHOIS data be publicly available?* Sub-questions logically follow, including: *What are the conditions, if any, which would justify making WHOIS data private (not transparent)?* and *To what extent do any such proposed standards for transparency and privacy of WHOIS data align with national laws and policies?* These are hotly debated questions, as the resolution of these issues will impact what Internet users—including individuals, businesses, governments, researchers, and law enforcement—can learn about individual website operators, more precisely referred to as domain name registrants.

Currently, registrants are required to provide certain information, including name, address, phone number and email address, upon registration. By default, these data are made publicly available in the WHOIS record. However, any registrant may elect to make these data private¹ or use a proxy service to keep one's contact information out of the WHOIS record.² A number of recent studies have evaluated the use of privacy & proxy (p/p) services.³ Key findings include:

- A significant percentage of the domain names used to conduct illegal or harmful Internet activities are registered via privacy or proxy services to obscure the perpetrator's identity;⁴
- P/p services are used *more often than average* for domains registered for harmful or illegal Internet activities (ranges from 29.5% to 54.8%);⁵
- In some sectors, however, use of p/p services for legal and harmless activities is also above average (e.g., banks 28.2%; adult websites 44.2%);⁶ and
- There is no evidence to suggest that the usage of privacy and proxy services has changed over time.⁷

¹ "Privacy Service' is a service by which a Registered Name is registered to its beneficial user as the Registered Name Holder, but for which alternative, reliable contact information is provided by the [Privacy / Proxy] Provider for display of the Registered Name Holder's contact information in the Registration Data Service (WHOIS) or equivalent services." *2013 Registrar Accreditation Agreement: Specification on Privacy and Proxy Registrations*, ICANN, § 1.2, available at <http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.pdf>.

² "Proxy Service' is a service through which a Registered Name Holder licenses use of a Registered Name to the [Privacy / Proxy] Customer in order to provide the [Privacy / Proxy] Customer use of the domain name, and the Registered Name Holder's contact information is displayed in the Registration Data Service (WHOIS) or equivalent services rather than the [Privacy / Proxy] Customer's contact information." *Id.* § 1.3.

³ See *Definitions, Summary of Relevant Work & Reference List*, GNSO Privacy & Proxy Services Accreditation Issues PDP Working Group, available at https://community.icann.org/download/attachments/43984221/Definitions_Terms_Excerpts_%26_Reading_ListPDF.pdf?version=1&modificationDate=1385839210000&api=v2.

⁴ Richard Clayton, *A Study of Whois Privacy & Proxy Abuse*, National Physical Laboratory (Sept. 2013), available at <http://gns0.icann.org/en/issues/whois/pp-abuse-study-20sep13-en.pdf>.

⁵ *Id.*

⁶ *Id.*

⁷ *Whois Registrant Identification Study for ICANN*, National Opinion Research Center at the University of Chicago (May 2013), available at <http://gns0.icann.org/en/issues/whois/registrator-identification-summary-23may13-en.pdf>.

Accordingly, while use of p/p services may appropriately benefit some users, miscreants undeniably use p/p services to evade laws and hide from enforcement bodies (including governments and private companies).

II. Executive Summary

Should domain name registrants who sell products or services on their websites be able to conceal their identity and location in the domain name registration? This paper argues that they should not.

This paper recommends an approach that balances personal privacy and consumer protection rights. On the one hand, domain names used for non-commercial purposes (e.g., personal blogs) should, the authors believe, be permitted to utilize privacy or proxy registration. This reflects a fundamental right to privacy of domain name registrants not engaged in commerce. However, we do not believe the same right exists for registrants of websites engaged in commerce – a conclusion borne out by our research.

To elaborate, the vast majority of Internet users will never register a domain name, but instead use the Internet to view information, engage in speech, and buy goods and services. When engaging in the latter act, Internet users also become consumers who, we believe, enjoy a fundamental right to know who they are dealing with. This mirrors the policy of business transparency every country we surveyed as background for this paper. Accordingly, we argue that domain names actively used to sell goods or services should be registered transparently and accurately, and not allowed to conceal their identity or location via privacy or proxy services.

In some cases, proponents of allowing anonymous domain name registrations for commercial websites have argued the existence of a right to corporate anonymity, suggesting that in some cases, a right to commercial privacy exists in the “offline” brick-and-mortar world. But is that true? Do persons or businesses selling goods or services have a right to conceal their identity and location? This paper concludes that there is no such right. Rather, in every jurisdiction we reviewed and are aware of, entities engaged in the sale of a product or service to the public must openly register or otherwise, somehow, disclose their identity and location.

It should be non-controversial to implement this line of demarcation in the online world as well – a right to privacy for the non-commercial individual, but a right of the consumer to know who the seller of goods and services is, with a corresponding duty on the part of domain name registrants who use the domain name to sell products or services online to disclose their identity and location in the domain name registration record. After all, Internet policy must consider the rights of all Internet users, the vast majority of which may never register a domain name, but will, at some point, buy a product or service via the Internet.

The merits of this approach are supported by the data: as common sense would suggest, domain names used for illegal, harmful or fraudulent purposes are more commonly registered anonymously. Furthermore, ICANN has committed to ensuring “accountability, transparency and the interests of global Internet users” as well as “promoting...consumer trust” in its Affirmation of

Commitments.⁸ We believe that requiring domain name registrants engaged in commercial activity to provide transparent WHOIS information falls squarely in line both with ICANN’s commitment to Internet users and existing global public policy to keep businesses honest and consumers safe.

III. Objective

The purpose of this paper is to analyze the following assertion: *Requiring transparent WHOIS data for persons or entities engaged in commercial activity is generally consistent with global law and policy.* That is, our inquiry focuses on whether national or regional laws generally prohibit, require or permit commercial entities to operate anonymously in either the online or the offline world.

To conduct this analysis, we researched the laws and policies of six representative jurisdictions using online legal research tools including a review of statutes, regulations, policies and case law as appropriate. We did not analyze every nation or locality, but instead selected the following jurisdictions based on the regional diversity and evidenced interest in Internet freedom and consumer privacy:

- Australia,
- Canada,
- European Union,
- Singapore,
- South Africa, and
- United States.

We recognize there may be other jurisdictions whose laws and policies differ from those surveyed here. And while our analysis is thorough, we intentionally generalized, desiring to extrapolate for each jurisdiction the high-level rules related to transparency and/or privacy as applied to commercial and non-commercial activity. As such, there could be facts and circumstances that do not fit within the general rules articulated for each jurisdiction. This is to be expected, as there are seemingly exceptions to every rule. Our objective is thus to test whether the laws and policies of these six selected jurisdictions illustrate that requiring transparent WHOIS data for persons or entities engaged in commercial activity is *generally* consistent with international law and policy.

IV. The Importance of Transparency: Consumers Should Be Able to Determine With Whom They Are Doing Business

Renowned jurist Louis Brandeis said, “Sunlight is said to be the best of disinfectants.”⁹ Transparent information helps prevent malicious activity; for brick and mortar activities, market

⁸ AFFIRMATION OF COMMITMENTS BY THE UNITED STATES DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, (September 30, 2009), available at <http://www.icann.org/en/about/agreements/aoc/affirmation-of-commitments-30sep09-en.htm>

⁹ Louis D. Brandeis, *What Publicity Can Do, in Other People’s Money and How the Bankers Use It* (1914).

participants gain information through storefronts, physical presence, and publicly available business information; for Internet-based activities, that information comes from the WHOIS registration data. Indeed, SSAC has recognized¹⁰ that WHOIS registration data plays an important role in:

- Combatting sources of consumer fraud, spam and denial of service attacks and incidents;
- Preventing or detecting sources of security attacks;
- Supporting Uniform Domain Name Dispute Resolution Policy (UDRP) proceedings;
- Investigating legal violations (e.g., piracy, product counterfeiting and trademark violations, pornography, illegal drug sales, financial crimes);
- Facilitating commerce; and
- Validating the legitimacy of a website for commercial transactions.

The last point—*validating the legitimacy of a website for commercial transactions*—merits further explanation, as it gets to the heart of our argument for requiring transparent WHOIS information for entities engaged in commerce online.

Internet consumers should be able to determine with whom they are doing business. In the brick and mortar world, consumers have the ability to physically inspect the business, meet the proprietor or staff, and, as discussed below, review a business license and/or corporate registration information. This helps protect consumers, giving them a way to validate the legitimacy of the person or entity with which they are doing business and make an informed choice in light of engaging in a transaction. Such transparency also provides both parties a means of recourse as each party can identify and locate the other should the transaction go wrong. In the online world, consumers should have the same ability.

Of course, some businesses post their contact information on the face of their website, e.g. in the Contact Us section. However, relying on such information as a mechanism for consumer protection is insufficient for several reasons. First, not all entities engaged in commercial activity in fact disclose contact information on the website. Second, even if there is contact information on the website, unlike WHOIS data which is supposed to be validated and verified, no one is charged with checking the “About Us” contact information; the website operator could very easily lie. (Indeed, an inaccurate Whois record is typically grounds for suspension of the domain name; no such penalty exists in the Internet governance framework for falsifying or omitting “contact us” information on a website.) Consumers ought to have access to WHOIS data as another way to discern – or confirm in cases where the contact information is included on the face of the website – with whom they are doing business. Additionally, WHOIS record access systems serve as a “business directory” of sorts where consumers may search and find the records for several different commercial websites, instead of having to visit websites one by one and dig for the information, which may be inaccurate in the first place.

¹⁰ See SSAC Report on Domain Name Registration Data Validation, ICANN (March 2013), available at <http://www.icann.org/en/groups/ssac/documents/sac-058-en.pdf>.

Finally, we note that while there are legitimate uses for p/p services, it is also known that miscreants thrive in the shadows, obscuring their identity and hiding their location. Again, this is not to say that everyone who hides—in Internet terms, operates anonymously using p/p services—is a miscreant. As Dr. Richard Clayton’s 2013 study found, while criminals more often use p/p services, lawful users (e.g., banks) do too.¹¹ Nevertheless, data and law enforcement activity support the claim that criminals will try to hide more often than innocents.

V. The Use of Domain Names for Commercial and Non-Commercial Purposes

At various times, members of the ICANN Community have encouraged ICANN, p/p service providers, and the EWG to make policy that distinguishes between commercial and non-commercial activity. In short, the argument is that p/p domain name registration should only be available to registrants who are using the domain name for a non-commercial purpose and, accordingly, any domain names used for online commercial activity should be publicly registered using accurate and transparent WHOIS information.

a. Rationale

Proponents of this approach, including the authors here, believe it is good public policy for the following reasons:

1. We cannot think of a reason that justifies a website actively being used for commercial purposes—that is, one that exists for the primary purpose of facilitating the sale of a product or offering some paid service—not disclosing who operates the website, where it is located, and how to otherwise reach the website operators. Indeed, the desire to hide one’s identity and location in the commercial sphere frequently denotes fraud or other shady or illegal business activity.¹² (By way of analogy, in the offline world, a commercial entity’s identity and location can easily be identified for the simple reason that they can typically be visited in person—a deterrent against fraud and abuse.)
2. On the other hand, there may be good reasons for individuals not engaged in commercial activity to wish to conceal their home address—for example, a blog or photo website that, despite making content visible to the public, nevertheless does not want to disclose a home address.
3. Theoretically, there could also be reasons that a domain name registered by a commercial entity but that is not currently used for commercial activity—that is, a business that has registered a domain name but is not using it to facilitate sales of a product or service—should enjoy privacy protection, e.g., prior to launch of a new, not-yet-announced product or service. (Note: the authors think that these cases are infrequent, but accept that they could occur.) In any case, these remain instances in which the domain name is not being used for commercial activity, and thus, there is no financial interaction yet with a consumer. Once the commercial activity commences, however, consumers may be put at risk if the domain name registration information remains anonymous.

¹¹ See Clayton, *supra* note 4.

¹² Mary Wong, *Results of the GNSO Whois Privacy/Proxy Abuse Study*, ICANN Blog (Sept. 17, 2013), <http://blog.icann.org/2013/09/results-of-the-gns0-whois-privacyproxy-abuse-study/>.

Making privacy and proxy protected registrations unavailable for commercial entities will serve to greater protect the wider range of Internet users seeking to do business with such commercial registrants, and increase transparency and trust on the Internet. This, of course, leads to two critical questions: *How should a distinction be drawn between commercial and non-commercial websites?* and *Who should do the distinguishing?*

b. Definitions

Although detailed answers to those questions can and should be determined outside of this report, we propose the principles below not only as a preliminary guide, but also to underscore that making this distinction is feasible.

Distinguishing between Commercial and Non-Commercial Domain Name Use

General guiding principles for distinguishing between commercial and non-commercial registrations:

*A website is engaged in **commercial activity** if a primary purpose of the website's content appears, objectively and based on common sense, to be the facilitation of a commercial purpose, including but not limited to commerce, financial transactions or the promotion of or linking to such website(s).*

*Only domain name registrations whose purpose and actual use is **non-commercial** — e.g. personal use and/or does not engage in financial transactions, — may utilize privacy and proxy registrations.*

Of critical importance, this approach can only work if the registrant's status as a private individual or as a "legal person" (registered business) is not the deciding factor. (Indeed, it may ultimately be irrelevant.) Rather, the actual use of the domain name, irrespective of the registrant's corporate status or lack thereof, should be the deciding factor. After all, it is not uncommon for private individuals who sell products or services online to have no corporate registration, and it would be nonsensical to only prohibit p/p domain name registration for registered corporations, but to permit entities without a corporation, but who are selling the exact same products, to use p/p services. Conversely, as noted above, it is entirely possible that a registered corporation may register domain names but not use them for a commercial purpose — or, for any purpose at all. (For example, some domain name registrations may merely be defensive brand protection registrations, but never point to any content.)

How could this work? As a practical matter, at the time of domain name registration registrants should be asked if they intend to use the domain name for commercial or private use. The test then is whether the website's primary purpose (based on subsequent actual use) appears to be the facilitation of a commercial purpose. Registrars are already required to respond to abuse complaints and false Whois record complaints, the vast majority of which come from everyday Internet users; a notification that a domain name is used for commercial purposes would probably be easier to verify than most abuse or false Whois record complaints. As indicated above, among

the factors that could be presented to the registrant to help make this “primary purpose” determination include the extent to which the website:

- Sells or facilitates the sale of a product;
- Links to commercial websites for the apparent purpose of promoting or profiting from commercial activity it promotes, e.g., as a paid affiliate marketer (as opposed to expressing an individual opinion about the commercial website or product);
- Directly facilitates currency exchange or payment for goods or services;
- Indirectly facilitates currency exchange or payment for goods or services if the website is getting a click-through fee for directing traffic and/or a percentage of sales; and

These factors should be balanced and evaluated objectively and using common sense. For example, the mere linking to a commercial website (by, for instance, a personal blog or family photo album) should not—necessarily—trigger a commercial website designation. Rather, the analysis should evaluate what reasonably appears, objectively based on common sense, to be the primary purpose of the website. For example, there is a common sense distinction between a personal blog that happens to contain an occasional link to a commercial website, and a professional affiliate marketer who sets up dozens of Wordpress websites with the sole purpose of linking to websites selling products for which the Wordpress website operator receives a commission. In this context, the registrant’s subjective intent at the time of registration should be relevant—that is, registrants will be asked to voluntarily disclose their intent at the time of registration via an opt-in system (e.g. p/p service providers ask if the domain name will be used for commercial activity. If the registrant checks “yes,” the p/p services become unavailable; if “no,” the registrant may proceed to use p/p services). However, registrant who subsequently claims a lack of intent to utilize the domain name for commercial purposes, while nevertheless using its websites to facilitate commercial activity, should not defeat a common-sense, objective analysis.

As a practical matter, we do not think that registrars should be bound to proactively and continually monitor all domain names registered with their company to identify those used for commercial purposes but using p/p service providers. The most common-sense approach is a reactive one, much like the approach that many registrars take regarding falsified Whois records: that is, if a credible complaint is received by the registrar or the p/p service provider regarding the commercial use of a domain name registered with p/p services, the registrar or p/p service provider can easily review the website and determine if the use is, indeed, commercial in nature. If so, the customer can be notified and, if the situation is not rectified, p/p services suspended. The burden on the registrar in this case is arguably far lower as compared to other types of terms of service violations, such as those involving spamming, phishing, or falsified Whois records: determining whether a website is selling or not selling a good or service will typically be easy and fast to resolve.

VI. Privacy for Commercial and Non-Commercial Actors Online

To test the hypothesis that *requiring transparent WHOIS data for commercial activity is consistent with international law and policy*, we researched the laws and policies of six representative jurisdictions. In each jurisdiction, we compared the business registration requirements—which, among other things, involve public disclosure of business information (e.g.,

name, contact details, registered office address, and key dates)—to the transparency obligations and privacy rights applicable to individuals, those not engaged in commercial activity.

In summary, we found that all six jurisdictions we studied:

- Treat commercial activity differently than non-commercial activity;
- Apply the same rules to Internet-only businesses operating in their jurisdictions as to those with brick and mortar presences;
- Require entities of various forms to register with the applicable federal, state and/or local authorities;
- Require disclosure of business information similar to the elements of a WHOIS record;
- Make business information publicly available;
- Offer online databases of certain business information that interested parties may access for free; and
- Have laws or policies to protect an individual’s data privacy.

The bottom-line: Our research demonstrated that the hypothesized statement is true: Requiring transparent WHOIS data for domain names used to facilitate commercial activity—as distinguished from non-commercial activity—is consistent with international law and policy. Simply put, in the offline world, there is no right for commercial entities to hide their identity. The same should be true in the online world.

a. Survey of Laws and Practices in Select Jurisdictions

In alphabetical order, we found:

Australia

COMMERCIAL ACTIVITIES IN AUSTRALIA

- i. **Registration Generally:** Australian law requires entities¹³ engaged in business¹⁴ in Australia to register the business name with the Australian Securities and Investments Commission (“ASIC”).¹⁵ “The purpose of the Business Names Register [operated by ASIC] is to enable those who engage or propose to engage with a business carried on under a business name

¹³ “Entity means any of the following: (a) an individual; (b) a body corporate; (c) a corporation sole; (d) a body politic; (e) a partnership; (f) any other unincorporated association or body of persons; (g) a trust; (h) a superannuation fund.” Business Names Registration Act of 2011 [Australia], s. 5(1), available at <http://www.comlaw.gov.au/Details/C2011A00126>.

¹⁴ “(1) Business means an activity, or series of activities, done: (a) in the form of a profession, a trade, employment, a vocation or a calling; or (b) in the form of an adventure or concern in the nature of trade; or (c) on a regular or continuous basis, in the form of a lease, license or other grant of an interest in property. (2) Business does not include an activity, or a series of activities, done in circumstances in which an entity doing that activity or series of activities in, or in connection with, Australia would not be entitled to an ABN.” *Id.* at s. 4.

¹⁵ See *id.* at pts. 2-3.

to identify the entity carrying on the business and how the entity may be contacted.”¹⁶

In addition to the requirement that businesses register their *name* (and other contact information as required) with ASIC, entities that operate as either a proprietary or public company¹⁷ are also required to register the business *itself* with ASIC.¹⁸ Not-for-profit organizations may apply to the Commissioner of the Australian Charities and Not-for-Profit Commission for registration, and the Commissioner must publish the Register of not-for-profits on the Internet.¹⁹

- ii. **Transparency of Registration Information:** Information on organizations and business names is available to the public via the ASIC Register²⁰:

<https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx>.

This online database provides information on companies, names, registered bodies, foreign companies, associations, professionals, and non-registered entities. Data available on each entity includes: name, registration number and date, status (e.g., active, terminated), registered address and principal place of business, and the names of business representatives.

- iii. **Internet-Only Businesses:** Australian law does not distinguish between Internet-only and brick & mortar entities. For example, the guidelines to the Australian Privacy Principles (“APPs”) note that APPs applies to any entities “carrying on business in Australia,” even where the bulk of their business is conducted outside Australia, or where the entity does not have a place of business in Australia, provided there is some activity in Australia that forms part of the entity’s business.²¹ Accordingly, any entity—including a website—which carries on business in Australia, is subject to Australia’s business registration requirements. As such, Internet-only businesses carrying on in Australia cannot operate privately.

NON-COMMERCIAL ACTIVITIES IN AUSTRALIA

- i. **Non-Commercial Activities Generally:** Non-commercial activities (e.g., meetings, speech, educational and volunteer activities, etc.) are not subject to registration requirements in Australia. The activities of organizations and individuals that are not primarily intended to

¹⁶ *Id.* at s. 22(2).

¹⁷ See Corporations Act 2001 [Australia], s. 45A & pt. 2A.1, available at <http://www.comlaw.gov.au/Details/C2013C00605>.

¹⁸ See *id.* at s. 5H & ch. 2A.

¹⁹ See Australian Charities and Not-for-Profits Commission Act 2012, ss. 25-5, 40-5, available at <http://www.comlaw.gov.au/Details/C2014C00015>.

²⁰ See A New Tax System (Australian Business Number) Act 1999, ss. 24-26, available at <http://www.comlaw.gov.au/Details/C2013C00222>.

²¹ *Australian Privacy Principles Guidelines*, Office of the Australian Information Commissioner, paras. B.13-14, available at http://www.oaic.gov.au/images/documents/privacy/applying-privacy-law/app-guidelines/APP_guidelines_complete_version_1_March_2014.pdf. But note, merely having a website that is visible in Australia is not sufficient to establish that the website operator is “carrying on business” in Australia. *Id.* at para. B.15.

facilitate the sale of a product, offering, or service may be carried on in private.

- ii. **Transparency / Privacy of Non-Commercial Information Online:** As stated above, commercial activity—whether offline or online—cannot be engaged in anonymously; rather, business registration rules apply. In contrast, non-commercial activity may be pursued privately. Organizations and individuals *not* carrying on business in Australia (e.g., those hosting meetings, operating blogs, commenting in chat forums, and using social media sites) are *not* required to register with authorities. These activities may be conducted anonymously or users may elect to share certain information, as they feel comfortable. Indeed, on February 21, 2014, the Office of the Australian Information Commissioner released APPs guidelines that, among other things, explain the importance of individuals’ ability to remain anonymous and/or use pseudonyms.²²

Canada

COMMERCIAL ACTIVITIES IN CANADA

- i. **Registration Generally:** Canada law requires all persons who conduct business within a Canadian province or territory to register with the appropriate authorities. Due to the nation’s federalist structure, each province and territory operates its own corporate registry.²³ Persons carrying on business activities within a province or territory’s borders are required to register their business name with that locality.²⁴ This requirement applies to formal legal entities like business and not-for-profit corporations, as well as for sole proprietorships and general partnerships.²⁵

The laws of Ontario and British Columbia, for example, are illustrative of this. Ontario’s Business Names Act forbids any corporation,²⁶ individual,²⁷ or partnership²⁸ from carrying

²² See *id.* at ch. 2.

²³ See *Provincial Registrars*, Corporations Canada, <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01134.html>.

²⁴ See *Registering Your Business*, Canada Business, Network, <http://www.canadabusiness.ca/eng/page/2730/>.

²⁵ In Québec, for example, “[t]he following are required to be registered: (1) natural persons who operate a sole proprietorship, whether or not a commercial enterprise, in Québec under a name that does not include their surname and given name; (2) general or limited partnerships constituted in Québec; (3) partnerships not constituted in Québec if they carry on an activity in Québec, which includes the operation of an enterprise, or possess an immovable real right, other than a prior claim or hypothec, in Québec; (4) legal persons established for a private interest and constituted in Québec; (5) legal persons established for a private interest not constituted in Québec, or legal persons constituted in Québec and continued under the laws of a jurisdiction other than Québec, if they are domiciled in Québec, carry on an activity in Québec, which includes the operation of an enterprise, or possess an immovable real right, other than a prior claim or hypothec, in Québec; (6) legal persons established for a private interest described in subparagraph 4 or 5 and resulting from an amalgamation other than a short-form amalgamation within the meaning of the Business Corporations Act (2009, chapter 52); and (7) mixed enterprise companies established under the Act respecting mixed enterprise companies in the municipal sector.” An Act Respecting the Legal Publicity of Enterprises [Québec], R.S.Q. 2012, c. 7, s. 21, available at <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2010C7A.PDF>.

²⁶ See Business Names Act [Ontario], R.S.O. 1990, c. B.17, s. 2(1), available at https://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90b17_e.htm.

²⁷ See *id.* at s. 2(2).

on business²⁹ within the province unless its operating name has been registered with the proper authority. In the cases of individuals and general partnerships, the registration requirement is lifted only where the business name is the exact name of its operator(s).³⁰ Under either scenario then, the Act's goal of transparency is satisfied, as members of the public are made fully aware of the person(s) with whom they deal. Similarly, British Columbia law requires that any person (i.e., sole proprietor) "engaged in business³¹ for trading,³² manufacturing or mining purposes" under a name "other than his or her own name or who in his or her business name uses his or her own name with the addition of 'and Company' or some other word or phrase indicating a plurality of members in the business," must register the business name within three months of its first use.³³ In essence then, any individual who sells goods must either register with the appropriate authority or operate exclusively under his or her own name.³⁴ In the case of a general partnership, British Columbia charges all persons "associated in partnership for trading, manufacturing or mining purposes" with the responsibility of registering the partnership, regardless of its operating name.³⁵

A business choosing to formally incorporate in Canada may do so either provincially under the laws of an individual province or territory, or federally under the Canada Business Corporations Act ("CBCA").³⁶ Federal incorporation, however, does not exempt a corporation from the provincial registration requirements of the jurisdiction(s) in which it operates.³⁷ This fits with the goal of corporate registration, which is to collect "information pertaining to enterprises and persons doing business" that "is essential for individuals, business partners and government agencies who have dealings with these enterprises."³⁸

ii. Transparency of Registration Information: Information on organizations and business names is available through each of the provincial and territorial registries, and all but one

²⁸ See *id.* at s. 2(3)-(3.3).

²⁹ "[B]usiness' includes every trade, occupation, profession, service or venture carried on with a view to profit . . ." *Id.* at s. 1.

³⁰ See *id.* at s. 2(2), (4).

³¹ "[B]usiness' includes every trade, occupation or profession." Partnership Act [B.C.], R.S.B.C. 1996, c. 348, s. 1, available at http://www.bclaws.ca/civix/document/id/complete/statreg/96348_01.

³² For well over a century, BC courts have recognized that "trading" under the Partnership Act means "buying and selling." See, e.g., *Paisley v. Nelmes*, B.C. County Court (1905) ("It is almost unnecessary to point out that trade has the technical meaning of buying and selling . . ."), available at <http://books.google.com/books?id=q9FRAQAIAAJ&pg=PA413>.

³³ Partnership Act [B.C.], s. 88(1).

³⁴ Note that—as with Ontario's law—the Act's purpose is satisfied in either case. If one elects to sell goods under her own name, the need for registration is obviated as there is no risk of her deceiving the public as to her true identity.

³⁵ Partnership Act [B.C.], s. 81(1).

³⁶ See *Corporation, Partnership, or Sole Proprietorship?*, Canada Business Network, <http://www.canadabusiness.ca/eng/page/2853/>.

³⁷ See, e.g., *Newfoundland and Labrador Extra-Provincial Registration*, Service NL, http://www.servicenl.gov.nl.ca/registries/companies/corp_art_inc.html ("An extra-provincial company is a body corporate that is not incorporated in Newfoundland and Labrador. For example, a federal company is, by definition, an extra-provincial company. An extra-provincial company is required to register in Newfoundland if it is carrying on an undertaking/ business activity . . .").

³⁸ *Register an Enterprise*, Québec Registraire des entreprises, <http://www.registreentreprises.gouv.qc.ca/en/demarrer/immatriculer/default.aspx>.

of the jurisdictions makes the information available through the Internet.³⁹ Depending on the province, business registration information may be available for free or for a nominal charge.⁴⁰ For example, Québec offers free online searches through its Enterprise Register⁴¹: http://www.registreentreprises.gouv.qc.ca/en/a_propos/registre/contenu.aspx.

A free search of this database offers the following information: current and past names, foreign names, enterprise number, legal form, registration and renewal dates, current status, home and service addresses, and titles and address of company directors and officers.

Additionally, one can search for federally incorporated businesses through Canada's own Corporations Canada site:

<https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpSrch.html>.

This site provides basic information about those corporations that were incorporated under the CBCA and other federal laws.⁴²

- iii. **Internet-Only Businesses:** For purposes of registration, Canada does not distinguish between Internet-only and brick & mortar businesses. In Québec, for example, a person who "performs *any act for profit*" in the province "is presumed to be carrying on an activity or operating an enterprise in Québec."⁴³ There is no exception provided for those who sell only through the Internet.

NON-COMMERCIAL ACTIVITIES IN CANADA

- i. **Non-Commercial Activities Generally:** Non-commercial activities of individuals are not subject to registration in Canada. Individuals and entities are free to associate and practice activities in private (without transparency) that are not directed toward making a profit.⁴⁴
- ii. **Transparency / Privacy of Non-Commercial Information Online:** Canada has no registration or transparency requirements for personal or non-commercial activity online. Put another way, persons and entities that are not engaged in commercial activity online may conduct their affairs anonymously.

³⁹ The Yukon Territory does not provide internet access to its registry. See *Corporate Affairs*, Yukon Department of Community Services, <http://www.community.gov.yk.ca/corp/index.html>. Some other jurisdictions do require registration and approval before a search account will be provided.

⁴⁰ Québec, for example, allows searches free of charge. New Brunswick, on the other hand, charges \$3 per transaction for use of its business information database. See *Corporate Registry*, Service New Brunswick, <http://www.snb.ca/e/6000/6600e.asp>.

⁴¹ See *An Act Respecting the Legal Publicity of Enterprises* [Québec], ss. 98-99.

⁴² See *Corporate Profile*, Corporations Canada, <https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/bs/ocp-wz.html>.

⁴³ *An Act Respecting the Legal Publicity of Enterprises* [Québec], s. 25 (emphasis added).

⁴⁴ Note that under Québec law, an individual operating a sole proprietorship must register it if utilizing a trade name, regardless of commerciality. See *An Act Respecting the Legal Publicity of Enterprises* [Québec], s. 21(1). But one who does not utilize a trade name remains free from any registration requirements. In other words, a person who speaks or acts in her own personal capacity need not be concerned.

Indeed, Canada law provides robust data privacy protections for individuals. For example, under the Personal Information Protection and Electronic Documents Act (“PIPEDA”)⁴⁵ and similar provincial laws, individuals have the right to know and control how organizations engaged in commercial activities⁴⁶ collect and use their personal information,⁴⁷ and businesses are required to safeguard such information.⁴⁸ Individuals may waive these rights.⁴⁹ Notably, the law protects the privacy of individuals—i.e., natural persons—who are not engaged in commerce; PIPEDA does not grant similar rights to commercial activities, whether conducted by a person (i.e., sole proprietorship), business, or other entity.

The European Union

COMMERCIAL ACTIVITIES IN THE EUROPEAN UNION

- i. **Registration Generally:** Businesses in the European Union (“EU”) are regulated both at the national “Member State” level and on the continental scale. The laws issued at the Community level regulate undertakings⁵⁰ engaged in economic activity,⁵¹ and are generally directed at competition issues, particularly with respect to State Aid rules. The majority of regulation dealing with registration requirements, therefore, comes from within the individual Member States. These national laws require businesses engaged in economic activity to register with the appropriate authorities.

EU law allows for companies to incorporate under the laws of their home Member States. National laws vary, but Member States are generally similar in the types of business forms

⁴⁵ Personal Information Protection and Electronic Documents Act (“PIPEDA”) [Canada], S.C. 2000, c. 5, available at <http://laws-lois.justice.gc.ca/PDF/P-8.6.pdf>.

⁴⁶ An “‘organization’ includes an association, a partnership, a person and a trade union.” *Id.* at s. 2(1). “[C]ommercial activity’ means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.” *Id.*

⁴⁷ “[P]ersonal information’ means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.” *Id.*

⁴⁸ See *Your Guide to PIPEDA*, Office of the Privacy Commissioner of Canada, available at https://www.priv.gc.ca/information/02_05_d_08_e.pdf.

⁴⁹ See PIPEDA, Schedule 1, cl. 4.3.

⁵⁰ The term “undertaking” generally appears in legal texts addressing antitrust issues, particularly with respect to State Aid rules. The European Court of Justice (“ECJ”) “has consistently defined undertakings as *entities engaged in an economic activity, regardless of their legal status and the way in which they are financed*. The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities.” Communication from the Commission on the Application of the European Union State Aid Rules to Compensation Granted for the Provision of Services of General Economic Interest (2012/C 8/02), para. 9 (emphasis added) (citation omitted), available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111(02)). In other legal texts, the term “enterprise” is used, and is defined almost identically. See Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small and Medium-Sized Enterprises, Annex, Art. 1 (“An enterprise is considered to be *any entity engaged in an economic activity, irrespective of its legal form*. This includes in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity.” (emphasis added)), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003H0361>.

⁵¹ “Economic activity” is not statutorily defined on the EU continental scale. However, the ECJ “has consistently held that *any activity consisting in offering goods and services on a market* is an economic activity.” Communication 2012/C 8/02, para. 11 (emphasis added).

they offer. The EU, by issuing Directives, attempts to harmonize company law by setting broad standards to be met.⁵² Additionally, the EU has made available corporate forms that are attractive for businesses who practice throughout the European Union. The European Company (“SE”), in particular, offers the unique advantage of being treated in every Member State as though it were a public company created under that nation’s laws.⁵³

The EU demands substantial disclosures from corporate entities, including “compulsory disclosure” of at least twelve items.⁵⁴ To comply with the EU’s issued standards, Member States must promulgate conforming legislation which regulates companies operating within their borders.⁵⁵ Even for the unique SE-type companies, like any other corporate form, information is widely available through required disclosures.

Non-corporate businesses forms in the EU must also register with the appropriate registrar authorities. Estonia, for instance, requires that any undertaking⁵⁶ be entered in the commercial register prior to commencing business activities.⁵⁷ Where the undertaking is a sole proprietorship, the commercial register must include the business name, its registered office and address, the beginning and ending dates of its financial year, as well as the name and personal identification code of the actual proprietor.⁵⁸ The person must also specify the business’s planned principal activity,⁵⁹ and must disclose his or her contact information,

⁵² See, e.g., Directive 2009/101/EC of the European Parliament and of the Council, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0101>.

⁵³ See Council Regulation 2157/2001/EC, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R2157>.

⁵⁴ “Member States shall take the measures required to ensure compulsory disclosure by companies as referred to in Article 1 of at least the following documents and particulars: (a) the instrument of constitution, and the statutes if they are contained in a separate instrument; (b) any amendments to the instruments mentioned in point (a), including any extension of the duration of the company; (c) after every amendment of the instrument of constitution or of the statutes, the complete text of the instrument or statutes as amended to date; (d) the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body: (i) are authorised to represent the company in dealings with third parties and in legal proceedings; it must be apparent from the disclosure whether the persons authorised to represent the company may do so alone or must act jointly; (ii) take part in the administration, supervision or control of the company; (e) at least once a year, the amount of the capital subscribed, where the instrument of constitution or the statutes mention an authorized capital, unless any increase in the capital subscribed necessitates an amendment of the statutes; (f) the accounting documents for each financial year which are required to be published in accordance with Council Directives 78/660/EEC [6], 83/349/EEC [7], 86/635/EEC [8] and 91/674/EEC [9]; (g) any change of the registered office of the company; (h) the winding-up of the company; (i) any declaration of nullity of the company by the courts; (j) the appointment of liquidators, particulars concerning them, and their respective powers, unless such powers are expressly and exclusively derived from law or from the statutes of the company; (k) the termination of the liquidation and, in Member States where striking off the register entails legal consequences, the fact of any such striking off.” Directive 2009/101/EC, Art. 2.

⁵⁵ See, e.g., Companies Act 2006 [U.K.], available at <http://www.legislation.gov.uk/ukpga/2006/46>. For an explanation of the provisions enacted by the United Kingdom to conform to the relevant EU company law Directives in force at that time, see Companies Act 2006: Explanatory Notes, paras. 1383-84, 1386, 1393, 1396-98, 1417-18, 1742-46, available at http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpgaen_20060046_en.pdf.

⁵⁶ “An undertaking is a natural person who offers goods or services for charge in his or her own name where the sale of goods or provision of services is his or her permanent activity, or a company provided by law.” Commercial Code [Estonia], § 1, available at <https://www.riigiteataja.ee/en/eli/505032014005/consolide>. “A company is a general partnership, limited partnership, private limited company, public limited company or commercial association.” *Id.* § 2(1).

⁵⁷ See *id.* §§ 2(2), 3(2).

⁵⁸ *Id.* § 75(2).

⁵⁹ *Id.* § 4(5).

such as telephone and fax numbers, email addresses, and website URLs.⁶⁰ Furthermore, Estonia requires all persons engaged in certain areas of economic activity to obtain an activity license by registering separately with the Register of Economic Activities (“REA”).⁶¹ Under the Trading Act, for example, any person wishing to sell goods or services as a trader⁶² must submit a registration to the municipality in which it seeks to do business.⁶³ Only upon approval and being fully registered with the REA may the undertaking engage in trading activity.⁶⁴

- ii. **Transparency of Registration Information:** Under Directive 2009/101/EC and its predecessors, each EU Member State is directed to create a central database for companies registered therein, and to make them accessible to the public.⁶⁵ Users of these Member State databases may request information by either paper or electronic means, and the registries are not permitted to charge more for the service than the administrative cost.⁶⁶

An example of such a registry is WebCheck, which is run by the United Kingdom’s Companies House:

<http://wck2.companieshouse.gov.uk//wckframe?name=accessCompanyInfo>.

Data available through a free WebCheck search includes company name, registration number, date of incorporation, account due dates, and contact information for the registered office.⁶⁷

Other Member States operate similar search databases.⁶⁸ Estonia allows online searches of both its abovementioned Commercial Register⁶⁹ and REA.⁷⁰ The Commercial Register

⁶⁰ *Id.* § 75(1).

⁶¹ See News, Estonia Register of Economic Activities, <http://mtr.mkm.ee/default.aspx?s=akuus>. The registration requirements for various activities are codified across 29 individual laws—1 containing general provisions, and 28 addressing specific areas of activity. See Areas of Activity, Estonia Register of Economic Activities, http://mtr.mkm.ee/failid/Info/Tegevusalad_eng.rtf.

⁶² “[T]rader’ means a person or body which, within the framework of the economic or professional activities thereof, offers and sells goods or offers and provides services.” Trading Act [Estonia], § 2, available at <https://www.riigiteataja.ee/en/eli/518112013007/consolide>.

⁶³ *Id.* § 13(1). A registration must be submitted for each place of business that the undertaking will operate. See *Applying for a Registration for a Company Engaged in Trading*, Estonia State Portal, https://www.eesti.ee/eng/topics/business/load_ja_registreeringud_1/kaubandus/jaekaubandus_toitlustamine_hulgikaubandus_te_enindus_kaubanduse_korraldamine.

⁶⁴ See *id.* §§ 4(1), 12(1).

⁶⁵ See Directive 2009/101/EC, Arts. 3(1), 3(4). This is the latest codified iteration in a long line of Directives and amendments dating back to 1968. See First Council Directive 68/151/EEC, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31968L0151>; Directive 2003/58/EC of the European Parliament and of the Council, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0058>.

⁶⁶ Directive 2009/101/EC, Art. 3(4).

⁶⁷ Additional documents, including disclosures with the names of officers, are available for the nominal fee of £1.

⁶⁸ A non-comprehensive list of search registries for all European nations has been compiled here: <http://www.rba.co.uk/sources/registers.htm#Europe>.

⁶⁹ *e-Business Register*, Estonia Centre of Registers and Information Systems, <https://ariregister.rik.ee/index.py?lang=eng>.

⁷⁰ *Registration Search*, Estonia Register of Economic Activities, <http://mtr.mkm.ee/default.aspx?s=otsireg>.

provides basic corporate information for free.⁷¹ REA searches are entirely free⁷² and provide detailed information about the business, including telephone and email contacts.

- iii. **Internet-Only Businesses:** For purposes of business registration, EU law does not distinguish between Internet-only and brick & mortar businesses.

In the EU, individual privacy rights are highly valued, and citizens have long held great concerns over data protection issues. These deep beliefs resulted in the passing of the Data Protection Directive,⁷³ a law designed to protect individuals from the digital processing of their personal data. The Directive's provisions encompass any operation (such as collection, storage, or sharing) that is performed on "information relating to an identified or identifiable *natural person*."⁷⁴

Due to its specification of "national person[s]," the EU's Directive—unlike the new South African legislation ("POPI") discussed below⁷⁵—is not meant to offer protection to legal entities. Business entities engaged in commercial activity, therefore, do not enjoy the same data protection rights as individuals. This distinction is also found in the corresponding Member State laws. For example, Germany's Federal Data Protection Act ("FDPA")⁷⁶—which implements the Directive—defines "personal data" as "any information concerning the personal or material circumstances of an identified or identifiable *natural person*."⁷⁷ On the whole, "German data protection law generally applies only to personal data concerning an individual."⁷⁸

Moreover, businesses in the EU are not exempted from registration requirements simply because they operate through the Internet. Business registration and licensing requirements are a function of the industry and location in which the business operates, not how it communicates with customers. To illustrate this, one need only look to the aforementioned Trading Act of Estonia. The law takes care to specify that one engaged exclusively in e-trade⁷⁹ must nonetheless register with the REA.⁸⁰ Moreover, it requires

⁷¹ More extensive corporate documents are available for €1 or €2. *Service Fee Rates*, Estonia Centre of Registers and Information Systems, <http://www.rik.ee/en/e-business-registry/service-fee-rates>.

⁷² See General Part of the Economic Activities Code Act [Estonia], § 51(2), available at <https://www.riigiteataja.ee/en/eli/530102013062/consolide>.

⁷³ See Directive 95/46/EC of the European Parliament and of the Council, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046>.

⁷⁴ *Id.* at Art. 2(a) (emphasis added).

⁷⁵ See discussion *infra* Part VI.a.v.

⁷⁶ Federal Data Protection Act (*Bundesdatenschutzgesetz*) [Germany], available at http://www.bfdi.bund.de/EN/DataProtectionActs/Artikel/BDSG_idFv01092009.pdf?__blob=publicationFile.

⁷⁷ *Id.* § 3(1) (emphasis added).

⁷⁸ Marc Hilber, *Definition of Personal Data*, in *Business Laws of Germany* § 15:5 (Thomas Wegerich ed., 2012).

⁷⁹ "[E]-trade' means the offer for sale or sale of goods or services on the Internet without the parties being simultaneously physically present." Trading Act [Estonia], § 2.

⁸⁰ *Id.* § 13(2) ("In order to sell goods or services . . . by way of e-trade . . . , a registration application shall be submitted to the rural municipality or city government of the seat of the applicant.").

that an online business—in addition to fulfilling the general registration requirements—“disclose, upon sale of goods or services by way of e-trade on the Internet, the business name or name, address of the seat and contact details of the trader.”⁸¹ Accordingly, the law offers no special protections to those engaged in online commercial activity.

NON-COMMERCIAL ACTIVITIES IN THE EUROPEAN UNION

- i. **Non-Commercial Activities Generally:** The EU allows great freedom to non-commercial activities. There are no registration or disclosure requirements for private, non-commercial activity.
- ii. **Transparency / Privacy of Non-Commercial Information Online:** As discussed above, personal data protection is an important and fiercely guarded right in the EU, one that is enshrined in the Data Protection Directive⁸² and its corresponding Member State laws. The Directive prohibits any unauthorized operation (such as collection, storage, or sharing) that is performed on “information relating to an identified or identifiable natural person.”⁸³ Under these protections, non-commercial users are free to remain anonymous and private over the Internet.

Singapore

COMMERCIAL ACTIVITY IN SINGAPORE

- i. **Registration Generally:** Singapore law requires all persons carrying on business in Singapore to register with the appropriate registrar authority. This includes persons operating a business,⁸⁴ company,⁸⁵ society⁸⁶ (collectively herein called commercial entities)

⁸¹ *Id.* § 4(1), para. 11.

⁸² See Directive 95/46/EC.

⁸³ *Id.* at Art. 2(a).

⁸⁴ “Business’ includes every form of trade, commerce, craftsmanship, calling, profession and any activity carried on for the purposes of gain but does not include any office, employment or occupation, or any of the businesses specified in [the First Schedule](#)” Business Registration Act [Singapore], § 2(1), available at <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%2258ab8295-57df-42f5-9bdf-774553f0d9bd%22%20Status%3Ainforce%20Depth%3A0;rec=0;whole=yes>.

⁸⁵ “Company’ means a company incorporated pursuant to this Act or pursuant to any corresponding previous written law” Companies Act [Singapore], § 4(1), available at <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3Ac3063e4b-61ed-4faf-8014-fabd5b998ed7%20Depth%3A0%20Status%3Ainforce;rec=0;whole=yes>. The Act refers to public and private companies that may be limited by shares, limited by guarantee, or unlimited. See *id.* §§ 17-18.

⁸⁶ “Society’ includes any club, company, partnership or association of 10 or more persons, whatever its nature or object, but does not include — (a) any company registered under any written law relating to companies for the time being in force in Singapore; (b) any company or association constituted under any written law; (ba) any limited liability partnership registered under the Limited Liability Partnerships Act 2005; (c) any trade union registered or required to be registered under any written law relating to trade unions for the time being in force in Singapore; (d) any co-operative society registered as such under any written law; (e) any mutual benefit organisation registered as such under any written law relating to mutual benefit organisations for the time being in force in Singapore; (f) any company, association or partnership, consisting of not more than 20 persons, formed for the sole

and professionals requiring a license.⁸⁷ Registration is required for individuals and entities, including various types of corporations, limited liability entities, partnerships, and sole proprietorships. “Any activity that is carried out on a continual basis for the purpose of gain, including an online business, e.g. [sic] blogshop, is required to be registered with ACRA [the Accounting and Corporate Regulatory Authority].”⁸⁸

ii. **Transparency of Registration Information:** Commercial entity registrations are required to be available to the public.⁸⁹ Similar to transparent WHOIS records for websites, anyone can access these registrations through a web search:

- For businesses and companies:
<https://www.psi.gov.sg/NASApp/tmf/TMFServlet?app=RCB-BIZFILE-LOGIN-1B>.
- For societies: <https://app.ros.gov.sg/ui/Index/AdvancedSocietySearch.aspx>.

For free anyone may find the entity’s name, address, and (for Businesses and Companies) a list of documents filed with the registrar.⁹⁰

iii. **Internet-Only Businesses:** For purposes of registration, Singapore does not distinguish between Internet-only and brick & mortar entities. Any activity that is carried out for the purpose of gain, *including an online business*,⁹¹ is required to be registered with appropriate authorities and its registration information made publicly available. Accordingly, Singapore provides no right of privacy to individuals and entities carrying on business there.

NON-COMMERCIAL ACTIVITIES IN SINGAPORE

i. **Non-Commercial Activities Generally:** Non-commercial activities are not subject to registration requirements in Singapore. The activities of organizations and individuals that are not primarily intended to facilitate the sale of a product, offering, or service may be carried on in private.

purpose of carrying on any lawful business that has for its object the acquisition of gain by the company, association or partnership, or the individual members thereof; (fa) any class, society or association of foreign insurers carrying on insurance business in Singapore under any foreign insurer scheme established under [Part IIA of the Insurance Act \(Cap. 142\)](#); or (g) any school or management committee of a school constituted under any law regulating schools for the time being in force in Singapore.”

Societies Act [Singapore], § 2, available at

<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%22d6e38654-0cee-4c7e-bfde-18b1bad85bf8%22%20Status%3Ainforce%20Depth%3A0;rec=0;whole=yes>.

⁸⁷ See Business Registration Act [Singapore], §§ 5-6; Companies Act [Singapore], § 19; Societies Act [Singapore], § 4.

⁸⁸ *Who Needs to Register*, Singapore Accounting and Corporate Regulatory Authority, http://www.acra.gov.sg/SoleProprietorship_Partnership/Starting_SoleProprietorship/Who+Needs+to+Register.htm.

⁸⁹ See Business Registration Act [Singapore], § 18(1); Companies Act [Singapore], § 12(2); Societies Act [Singapore], §§ 5, 8(1).

⁹⁰ See *Bizfile: Entity Search*, Singapore Accounting and Corporate Regulatory Authority, <https://www.psi.gov.sg/NASApp/tmf/TMFServlet?action=PROCESS&gotoPage=CompanySearch&page=CompanyProductPage&NAV=1003>. See also *Society FAQs: Registration*, Singapore Ministry of Home Affairs, http://www.ifaq.gov.sg/mha/apps/fcd_faqmain.aspx#FAQ_4423.

⁹¹ See *Who Needs to Register*, Singapore Accounting and Corporate Regulatory Authority, http://www.acra.gov.sg/SoleProprietorship_Partnership/Starting_SoleProprietorship/Who+Needs+to+Register.htm.

- ii. **Transparency / Privacy of Non-Commercial Information Online:** As true in other jurisdictions, in contrast to commercial activity, non-commercial online activity may be conducted in private. Organizations and individuals not carrying on business are not required to register with authorities.

Similar to data privacy laws in other jurisdictions, Singapore's Personal Data Protection Act ("PDPA") recognizes "both the rights of individuals to protect their personal data, including rights of access and correction, and the needs of organisations to collect, use or disclose personal data for legitimate and reasonable purposes."⁹² The PDPA does not apply to business contact information, including an individual's name, position title, and business contact information.⁹³

South Africa

COMMERCIAL ACTIVITIES IN SOUTH AFRICA

- i. **Registration Generally:** South African law requires that all companies⁹⁴ conducting profit⁹⁵ or non-profit⁹⁶ activities within its borders be registered and/or incorporated with the Companies and Intellectual Property Commission ("CIPC").⁹⁷ This goes for foreign companies as well, who despite being incorporated abroad, "must register with the Commission within 20 business days" after first beginning to conduct business⁹⁸ in the country.⁹⁹ Every incorporated entity that conducts business in South Africa is therefore centrally registered.

⁹² *Personal Data Protection Act: Overview*, Singapore Personal Data Protection Commission, <http://www.pdpc.gov.sg/personal-data-protection-act/overview#sthash.5v6H0i3t.dpuf>.

⁹³ See Personal Data Protection Act 2012 [Singapore], § 4(5), available at <http://statutes.agc.gov.sg/aol/search/display/view.w3p;orderBy=relevance;query=DocId%3Aec630811-4e43-4187-ae03-706c8b507008%20Depth%3A0%20Status%3Ainforce;rec=0;whole=yes>.

⁹⁴ "Two types of companies may be formed and incorporated under this Act, namely profit companies and non-profit companies." Companies Act, 2008 [South Africa], § 8(1), available at http://www.cipc.co.za/Companies_files/CompaniesAct71_2008.pdf.

⁹⁵ A profit company is one of: (a) a state-owned company; (b) a private company; (c) a personal liability company; or (d) a public company. *Id.* § 2.

⁹⁶ A non-profit company means one that is "incorporated for a public benefit or other object as required" and "the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted." *Id.*

⁹⁷ See *id.* § 8(3)(a) ("No association of persons formed after 31 December 1939 for the purpose of carrying on any business that has for its object the acquisition of gain by the association or its individual members is or may be a company or other form of body corporate unless it . . . is registered as a company under this Act . . .").

⁹⁸ A foreign company is deemed to have "conduct[ed] business or non-profit activities . . . within the Republic" when it engages in any one or more of the following: "(a) Holding a meeting or meetings of the shareholders or board of the foreign company, or otherwise conducting the internal affairs of the company; (b) establishing or maintaining any bank or other financial accounts; (c) establishing or maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities; (d) creating or acquiring any debts, mortgages or security interests in any property; (e) securing or collecting any debt, or enforcing any mortgage or security interest; (f) acquiring any interest in any property; [or] (g) entering into contracts of employment." Companies Act, 2008, § 23(2). Upon doing so, the company takes on the additional role of an "external company." *Id.* § 2.

⁹⁹ *Id.* § 23(1).

South Africa's national law also requires registration for many less formal commercial actors. Under the Businesses Act, municipalities are empowered to target even sole proprietors engaged in¹⁰⁰: “[s]ale or supply of meals or perishable foodstuffs”;¹⁰¹ “[p]rovision of certain types of health facilities or entertainment”;¹⁰² and “[h]awking in meals of perishable foodstuffs.”¹⁰³

- ii. **Transparency of Registration Information:** Information on organizations and businesses is provided through CIPC, which was directly charged to “make the information in those registers efficiently and effectively available to the public”¹⁰⁴:
<http://www.cipro.gov.za/2/home/>.

Information available free through the CIPC's online name search function includes company name, registration number and date, status, registered address, postal address, business description, and registration history.¹⁰⁵

- iii. **Internet-Only Businesses:** For purposes of registration, South Africa makes no distinction between Internet-only and brick & mortar businesses. If a person chooses to incorporate, the person must register with CIPC irrespective of whether its business will be done online. On the other hand, the sole proprietor of an Internet-only business will not have any more or less obligation to register with authorities than would a brick & mortar entity in the same field.¹⁰⁶

The right to communicate privately is highly important to the South African people, so much so that the idea is enshrined in their Constitution.¹⁰⁷ In addressing that document, it should also be noted that South Africa's Bill of Rights explicitly grants its protections to both natural *and* juristic persons.¹⁰⁸ With this backdrop in place, South Africa enacted the

¹⁰⁰ See Businesses Act, 1991 [South Africa], § 2(3) & Schedule 1, Items 1-3, available at http://www.ehrn.co.za/download/act_business.pdf.

¹⁰¹ *Id.* at Schedule 1, Item 1.

¹⁰² *Id.* at Schedule 1, Item 2. This is further defined as the operation of any business by: “(a) providing turkish baths, saunas or other health baths; (b) providing massage or infra-red treatment; (c) making the services of an escort, whether male or female, available to any other person; (d) keeping three or more mechanical, electronic or electrical contrivances, instruments, apparatus or devices which are designed or used for the purpose of the playing of any game or for the purpose of recreation or valuable consideration either by the insertion of a coin, token coin or disc therein or in an appliance attached thereto or in any other manner; (e) keeping three or more snooker or billiard tables; (f) keeping or conducting a night club or discothèque; (g) keeping or conducting a cinema or theatre; (h) conducting adult premises referred to in section 24 of the Films and Publications Act, 1996.” *Id.*

¹⁰³ *Id.* at Schedule 1, Item 3. “Hawking” is essentially street-vending, defined in the Act as selling food and meals which are “conveyed from place to place” and/or sold “from a movable structure or stationary vehicle.” *Id.* at Schedule 1, Item 3(1).

¹⁰⁴ Companies Act, 2008 [South Africa], § 187(4)(c).

¹⁰⁵ See *Name Search*, Companies and Intellectual Property Commission, <http://www.cipro.gov.za/2/home/>.

¹⁰⁶ Note that there simply isn't an Internet-only analogue for “hawking” or “conducting a . . . discothèque.”

¹⁰⁷ See Constitution of the Republic of South Africa, 1996, § 14(d) (“Everyone has the right to privacy, which includes the right not to have . . . the privacy of their communications infringed.”), available at <http://www.justice.gov.za/legislation/acts/1996-108.pdf>.

¹⁰⁸ See *id.* § 8(2)-(4). “A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.” *Id.* § 8(4). The qualifying language at the end of the sentence is taken to mean that certain rights (e.g., human dignity) could clearly never impute to a juristic person.

Protection of Personal Information Act (“POPI”)¹⁰⁹ on November 26, 2013. POPI is a data protection law that defines “personal information” to mean “information relating to an identifiable, living, natural person, and *where it is applicable, an identifiable, existing juristic person.*”¹¹⁰ The Act has yet to commence and its enforcement mechanism won’t take effect until one year after commencement (at a minimum),¹¹¹ so it will be a while before any conclusions can be drawn. But such a unique law bears watching closely, as it creates some reason to wonder whether it will be interpreted to provide privacy rights to commercial entities.

NON-COMMERCIAL ACTIVITIES IN SOUTH AFRICA

- i. **Non-Commercial Activities Generally:** South Africa does not place registration or transparency requirements on non-commercial activities. Individuals and groups are free to exercise the robust constitutional liberties established by the nation’s Bill of Rights.
- ii. **Transparency / Privacy of Non-Commercial Information Online:** South Africa does not require non-commercial Internet users to register or operate with transparency. As mentioned above, communications privacy is a constitutional right cherished by the people, a right that could foreseeably grow as POPI comes into effect. Thus, there is no reason to believe that non-commercial, private Internet use will be subject to transparency requirements in the near future.

United States of America

COMMERCIAL ACTIVITIES IN THE UNITED STATES

- i. **Registration Generally:** United States (“U.S.”) law requires entities engaged in business to register with the appropriate registrar authorities. Under the American federalist system, businesses are generally governed by the states. Formal legal entities (such as corporations, LLCs, LPs) are created by filing incorporation documents with their state’s Secretary of State¹¹² or analogous office.¹¹³ Corporations choosing to trade their shares publicly must also register as securities at the federal level with the U.S. Securities and Exchange Commission (“SEC”).¹¹⁴

Sole proprietorships and general partnerships, while less formal business structures, are still subject to registration requirements at the state and local levels. In Minnesota, for

¹⁰⁹ Protection of Personal Information Act, 2013 [South Africa], *available at* <http://www.gov.za/documents/download.php?f=204368>.

¹¹⁰ *Id.* § 1 (emphasis added).

¹¹¹ *See id.* § 114(1)-(2).

¹¹² *See, e.g., Corporations*, Washington Office of the Secretary of State, <http://www.sos.wa.gov/corps/>.

¹¹³ *See, e.g., Businesses*, Maryland State Department of Assessments and Taxation, <http://www.dat.state.md.us/sdatweb/charter.html>.

¹¹⁴ *See generally The Investor’s Advocate*, SEC.gov, <http://www.sec.gov/about/whatwedo.shtml#laws>.

example, any “person”¹¹⁵ who conducts commercial business within its borders under a moniker other than its own full legal name must file a certificate with the Office of the Secretary of State.¹¹⁶ Washington has a similar law,¹¹⁷ as do other states.

Many states and municipalities also regulate through the dispensing of business licenses. In Maryland, for example, a trader’s license authorizes the holder to offer goods for sale in any part of the state.¹¹⁸ In exchange for being granted a license, the applicant must pay a fee and register the business with the state’s registrar.¹¹⁹ Thus, one way or another, one who chooses to engage in commercial activities must generally register its business.

- ii. **Transparency of Registration Information:** Information regarding commercial registrations are made available to the public through each state registrar’s website.¹²⁰ For example, the corporations search function offered by the Office of the Secretary of State of Washington yields the following data: company name, tax ID number, filing dates, registered agent address, and the names and addresses of company directors.¹²¹

Furthermore, the SEC’s EDGAR system allows public searches of corporate disclosures for all publicly traded securities: <http://www.sec.gov/edgar/searchedgar/webusers.htm>.

- iii. **Internet-Only Businesses:** For purposes of registration in the United States, there is no distinction made between Internet-only and brick & mortar businesses. A formal business structure will have to be registered and incorporated, regardless of whether it transacts business over the Internet. Likewise, a sole proprietor or partnership that would require a license in the real world will still need one to operate online. For instance, the licensing authority for Sacramento County, California makes clear that “[e]ven if your business has no physical presence and exists solely as an Internet storefront, all regulations that apply to

¹¹⁵ “Person” means one or more natural persons; a limited liability company, whether domestic or foreign; a registered limited liability partnership, whether domestic or foreign; a partnership; a limited partnership; a corporation, including a foreign, domestic, or nonprofit corporation; a trust; or any other business organization.” Minn. Stat. § 333.001, subd. 2, *available at* <https://www.revisor.mn.gov/statutes/?id=333.001>.

¹¹⁶ Minn. Stat. § 333.01, subd. 1, *available at* <https://www.revisor.mn.gov/statutes/?id=333.01>.

¹¹⁷ See Wash. Rev. Code § 19.80.010 (“Each person or persons who carries on, conducts, or transacts business in this state under any trade name must register that trade name with the department as provided in this section.”), *available at* <http://apps.leg.wa.gov/rcw/default.aspx?cite=19.80.010>.

¹¹⁸ Md. Code Ann., Bus. Reg. § 17-1811, *available at* <http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gbr§ion=17-1811&ext=html&session=2014RS&tab=subject5>. Growers and manufacturers are statutorily exempted from the need for a license. Md. Code Ann., Bus. Reg. § 17-1804(c)(1), *available at* <http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gbr§ion=17-1804&ext=html&session=2014RS&tab=subject5>.

¹¹⁹ “[Y]ou may not offer for sale, sell or otherwise dispose of any goods within Maryland, without first obtaining a trader’s license from the Clerk of the Circuit Court and opening a sales tax account. Business entities must register and qualify with the Maryland Department of Assessments and Taxation.” *Traders License*, Comptroller of Maryland, http://taxes.marylandtaxes.com/Business_Taxes/General_Information/Business_Licenses/Types_of_Business_Licenses/Traders_License.shtml.

¹²⁰ An extensive list of search registries is available through the Rutgers University library: <http://libguides.rutgers.edu/content.php?pid=136604&sid=1171890>.

¹²¹ See *Corporations Search*, Washington Office of the Secretary of State, http://www.sos.wa.gov/corps/corps_search.aspx.

offline businesses also apply to your business. You will need a General Business License.”¹²²

The reverse is true as well. In the rare instances that an entity is exempted from registration under the laws of its jurisdiction, operating an Internet-only business will not subject it to unique online registration requirements.¹²³

NON-COMMERCIAL ACTIVITIES IN THE UNITED STATES

- i. **Non-Commercial Activities Generally:** U.S. law treats commercial speech (which includes activities and other forms of expression) differently than non-commercial speech. Non-commercial speech is entitled to full protection by the First Amendment of the U.S. Constitution, while commercial speech may be reasonably restricted.¹²⁴ Accordingly, non-commercial speech enjoys substantial freedom from registration and transparency requirements in the United States.
- ii. **Transparency / Privacy of Non-Commercial Information Online:** The United States does not subject non-commercial Internet users to registration or transparency requirements. The Supreme Court held almost two decades ago that full First Amendment protections apply to speech and expression on the Internet.¹²⁵ There is, therefore, no basis for treating non-commercial activities online differently from those offline.

b. Implications

- i. **WHOIS REGISTRATION DATA ALLOWS INTERNET CONSUMERS TO DETERMINE WITH WHOM THEY ARE DEALING**

Transparency is fundamental to fair dealing. Jurisdictions have long recognized this basic principle and structured their commercial laws to ensure transactions can proceed smoothly. When a consumer enters a brick and mortar retail store, she can easily deduce the retailer’s identity and evaluate its trustworthiness. The law provides public registration and licensing information through which a customer can verify its operating status. If the transaction proceeds and the purchased item is defective, the buyer can easily return to the retailer’s known location and seek redress, or pursue direct legal action. Similarly, an investor looking to invest in a commercial entity has numerous avenues through which to review the business’s registration and financial information.

¹²² *Business License FAQ*, Sacramento County Finance, <http://www.finance.saccounty.net/Tax/Pages/BusLicFAQ.aspx#DoIneed>.

¹²³ For example, Oklahoma does not issue general business licenses. Thus, its Department of Commerce makes clear that the business at issue will only require licensure if it deals in regulated areas of trade, as would be the case for a storefront business: “Currently, no state license is required to sell over the Internet. However, occupational licenses or other regulatory actions are based on what you sell, not how you sell it. For example, no occupational license is needed to sell clothing or household cleaning supplies over the Internet (although a Sales Tax Permit may be required). However, regardless of whether they are sold over the Internet, an occupational auto dealer’s license is required to sell new and used cars to the public.” *State Business Registration System*, Oklahoma Department of Commerce, <http://www.okcommerce.gov/sbrs/faq>.

¹²⁴ See *Ohralik v. Ohio State Bar Association*, 436 U.S. 477 (1978).

¹²⁵ See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

The Internet distorts this framework. The online consumer has no opportunity for face-to-face dealing. Nor can she know that the business will respond once something goes wrong with the purchase. WHOIS registration data provides Internet consumers a way to check out the entity with whom they seek to do business (i.e. provide payment to). As discussed above, relying solely on information disclosed on the public face of the website (e.g. in the About Us section) is insufficient. To deprive consumers of access to WHOIS registration data would be to leave those who wish to see such information in the dark.

There is no reason why Internet businesses should be insulated from disclosure requirements any more than their brick and mortar counterparts. When a storefront business wishes to engage in commerce, the law demands a reasonable quid pro quo—that in exchange for the right to conduct its activities there, it must disclose its information through entity registration and/or licensure procedures. Internet businesses should be viewed no differently. Those engaging in commercial activity over the Internet are availing themselves of the public Internet infrastructure, thus it is entirely reasonable to expect disclosure in return.

As detailed in the sections above, some jurisdictions exempt from registration those sole proprietors and general partnerships that choose to operate exclusively under their own names. This is justified because in such cases the business is engaging in fully transparent dealing on the direct behalf of its owner(s). An analogous example on the Internet might be a sole proprietor offering her own named consulting services to a client. If the consultant is entirely upfront about her identity and willfully discloses her contact information, many of the consumer protection concerns are addressed. However, such transparency is avoided by use of p/p services. Where commercial dealing is concerned, p/p services are not appropriate, just as their analogues would not be acceptable in the physical world.

ii. IMPLEMENTATION OF A SYSTEM USING THE COMMERCIAL / NON-COMMERCIAL DISTINCTION

As applied, we recognize that making distinctions based on commercial / non-commercial activities will require a system for reviewing and identifying websites that are inappropriately utilizing privacy / proxy protection. The details of such a system can be developed at a later date but a process could include components similar to those currently (and prospectively) involved in WHOIS verification, including:

- At the time of registration and re-registration of a domain name, the registrant will be asked whether the primary purpose of the website is for commercial activity.
- Only if “no” will privacy/proxy registration be available, though the registrant is not obligated to use p/p services.

One possible objection to this structure may be that it is too complex and unwieldy to enforce. We disagree. Certainly, it is true that this would involve a new process, but models and analogues exist. Enforcement could operate similar to the current ICANN inaccurate reporting mechanism, and some companies already have chosen to adopt a similar approach. For example, Nominet, the registry for .UK, employs a similar commercial vs. non-commercial distinction.¹²⁶ Furthermore,

¹²⁶ See *Registrant Types*, Nominet, <http://registrars.nominet.org.uk/registration-and-domain-management/field-definitions-and-registrant-types#Registrant%20types>.

Key-Systems, a European registrar, also distinguishes between commercial and non-commercial activity in determining who is eligible for p/p services.¹²⁷

In response to expected critiques, it is important to note that some business entities might still be able to engage in non-commercial activity privately. For instance, concerns have been raised that a movie studio might hesitate to purchase a domain name corresponding to its upcoming release for fear of divulging its trademark-protected name. But this objection fails to consider that prior to the movie's release, even if it displays a trailer, the domain name cannot be said to be used for commercial purposes. Even though its purpose is to provide information about a commercial product, without actually selling something on the website or another website it directs users to, the use is merely informational. Only if it is actually selling something on the website itself (e.g., movie tickets), or directing users to a third-party payment page for that purpose would the use of the domain name truly be considered commercial, as opposed to informational.

The example above underscores an important distinction: the question should not be whether a registrant *is* a commercial entity, but rather whether they are using the domain name for commercial purposes, irrespective of whether the registrant is registered as a legal person or is simply an individual. Indeed, in many cases, bad commercial actors on the Internet are not registered as a corporation, and may simply be acting as affiliate marketers without any corporate registration. This distinction also permits corporate entities to register domain names anonymously, until such time as the domain names are used to sell a product or a service, and consumers may have a need to verify the identify of the person or company responsible for the domain name.

VII. Conclusion

Though private persons and commercial actors share the same Internet, they have very different needs. Individuals engaging in non-commercial activities online should be able to maintain their privacy. But when it comes to commercial activity, the Internet's landscape is too treacherous to leave consumers without a verification tool. WHOIS registration information is a powerful tool for consumers' to use to protect themselves when doing business online. Even if consumers do not directly query registration data, they still likely benefit from its accessibility because other upstream government entities and corporations use the information to the users benefit.

Moreover, Internet policy should not solely consider the needs of domain name registrants, which after all, constitute a fraction of Internet users. Rather, Internet policy must consider the rights of all Internet users, the vast majority of which may never register a domain name, but will, at some point, buy a product or service via the Internet. These Internet users have the right to know who they are dealing with, just as they do when buying a product or a service offline. Some proponents of offering p/p services for domain names used to sell products or services online have

¹²⁷ See E-mail from Volker Greimann, Chief Legal Officer, Key-Systems, to Libby Baney, President, FWD Strategies Intl. (Mar. 5, 2014, 17:29 UTC) (Key-Systems does "not hold advertizements [*sic*] or blogs, forums, news sites, parking sites, etc. as commercial use, only the actual provision of goods and services, i.e. an online shop or a service portal, i.e. registered businesses."), *available at* <http://mm.icann.org/pipermail/gnso-ppsai-pdp-wg/2014-March/000501.html>.

argued or implied that in some jurisdictions, businesses have the right to conceal their entity and location. As we show in this document, that contention is false.

When we began the research for this paper, we sought to analyze the following assertion: *Requiring transparent WHOIS data for persons or entities engaged in commercial activity is generally consistent with global law and policy.* As provided above, our research indicates that the assertion is true. Each of the six sampled jurisdictions requires that brick and mortar businesses register with their local, state, and/or national authorities. In each jurisdiction, this business data is then made available to the public. The reason is clear—to allow for transparency in dealing. To require anything less of commercial actors online would not only contradict these basic foundations of commerce, but would leave vulnerable the millions of consumers who traverse the Internet each day. Likewise, it would disregard the numerous statements made by law enforcement agencies and businesses through the years detailing the values of accessible WHOIS data.

We understand and respect the privacy concerns held by other stakeholders, and do not wish to infringe on the ability of individuals to use and publish non-commercial information and speech on the Internet anonymously. We simply seek to emphasize the distinction between those who act for profit online and those whose use is truly personal. After all, consumers have rights too, including the right to know whom they are doing business with. A transparent and accurate domain name registration is the best, and often the only, way to establish that information. By drawing a distinction between commercial and non-commercial entities, we can protect freedom of speech while also protecting consumers and making the Internet a better, safer place to do business.

VIII. About the Authors

Primary Author: FWD Strategies International, LLC (“FWD”) is a consulting firm based in Washington, DC with global reach. FWD professionals are lawyers by training and advocates by nature. Led by Libby Baney, FWD works with clients and on projects that impact patients and consumers as they interact with the Internet. More about FWD is available at www.fwdstrategies.com.

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