



June 22, 2006

Dear Drs. Vint Cerf and Paul Twomey,

Re: ICANN's WHOIS Database Policy

We write regarding ICANN's WHOIS database policy and its implications for the privacy of domain name registrants. We understand that ICANN's GNSO has been examining this issue for some time and has made recommendations for a policy change in order to accommodate the important and legitimate privacy interests at play. We also understand that some ICANN members are opposed to such changes. It is critical, from the perspective of internet users and the overall public interest, that ICANN's WHOIS database policy appropriately balances accountability and privacy concerns. The current policy does not.

The Canadian Internet Policy and Public Interest Clinic (CIPPIC) is a legal clinic that educates and advocates on public interest matters involving the intersection of law and technology, in areas such as consumer protection in e-commerce, free speech, and data protection.¹ Previously, CIPPIC has made submissions to the GNSO's WHOIS Task Force and the Canadian Internet Registration Authority (CIRA) recommending that transparency and accountability interests be balanced against the privacy interests of domain name holders.²

We believe that WHOIS databases can and should serve both privacy and accountability interests; that one goal should not, and need not, be sacrificed for the other. Domain name registrants can and should be held accountable through means other than full public disclosure of their identities and contact information. In our view, the benefits of completely open WHOIS databases are outweighed by the costs of this approach in terms of privacy invasions, other abuses of published personal information, and the consequent incentive for registrants to provide inaccurate data in order to protect their privacy.

Legislative Compliance

Around the world, privacy is increasingly being recognized not just as a political and consumer right but also as a human right. Many countries including the EU, Australia,

¹ More information about the Canadian Internet Policy and Public Interest Clinic (CIPPIC) including our mission statement, our current project and cases, and the law and technology program at the University of Ottawa is available online at: www.cippic.ca.

² For more information about our previous submissions, go to: <http://www.cippic.ca/en/projects-cases/privacy/other-privacy-projects/>.

Japan, Canada, and New Zealand have data protection regimes regulating the disclosure of personal information both within the public and private sectors.³

While ICANN has authority over the development of WHOIS policies for gTLDs, several country-code top-level domains (ccTLDs) have been incorporating national privacy laws into their WHOIS policies. For example, CIRA has recently entrenched privacy protection measures into its WHOIS database. CIRA's adoption of a new WHOIS policy for the .CA domain was driven by (1) the necessity of complying with Canadian privacy laws, (2) the principled perspective that privacy is a human right, and (3) important practical considerations such as limiting spam, hindering harassment and promoting accurate disclosure of personal information.

CIRA is not alone. Nominet and Australian Domain Administration (auDA) have incorporated privacy protections into the WHOIS databases for .UK and .AU, respectively.

Indeed, the automatic and mandatory publication of individual registrant contact information via the online WHOIS database may violate Canadian privacy law. The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) -- requires that an individual be supplied with a service even he or she refuses to consent to the disclosure of personal information, as long as the disclosure is not essential to the transaction. It could be argued that disclosure of registrant contact information is not essential to the registering of a domain name. If a Registrant requests that his or her information not be disclosed through the WHOIS directory, the Registrar thus faces a quandary: it will be violating its agreement with ICANN if it complies with the request, but it may be violating Canadian law if it does not. ICANN should not be forcing Registrars into this difficult position.

Privacy is Good Policy

Beyond complying with applicable national laws, there are important public policy reasons to protect privacy interests. Human rights activists and others engaged in critical social justice work around the world often need to protect their identities. The internet has been a great boon to such activists, but has also exposed them to persecution and harassment. While these individuals and organizations should be accountable for their online activities, they should not be forced to jeopardize their activities – indeed their lives – by having their personal information openly published via a WHOIS database.

³ For a comprehensive international survey of countries and their privacy laws, go to Privacy International's Country and Organization Database at: <http://www.privacyinternational.org/index.html>.

Accountability and Privacy are not mutually exclusive

Full public disclosure of personal information is not the only way to ensure accountability of domain name registrants. Those seeking to hold internet service subscribers accountable for illegal activities are able to do so through a variety of mechanisms, depending on the jurisdiction, even though ISP subscriber information is not made public. In Canada, law enforcement agencies can obtain subscriber information upon request or with a warrant, and private plaintiffs can obtain court orders for the disclosure of subscriber information. This "due process" mechanism protects the legitimate privacy interests of internet users while ensuring that they can be held accountable for their unlawful activities. Similarly, accountability of domain name registrants can be achieved without the wholesale denial of their privacy.

Indeed, the current policy favouring openness over privacy may be counter-productive, as it discourages vulnerable Registrants from inputting accurate and truthful information. To overcome this hurdle, the WHOIS database should protect personal information from potential abusers. Such a change will encourage Registrants to provide truthful information rather than concoct false information and should thus lead to greater accuracy of contact information found in the WHOIS database.

CIRA has carefully examined this issue over the past couple of years. It published a proposed new WHOIS policy which sought to balance accountability and privacy goals, and obtained input from a variety of stakeholders on the proposed policy. We understand that CIRA has developed a new WHOIS policy based on this consultation, and will be releasing and implementing it shortly. We strongly support CIRA's proposed policy, and believe that it provides an excellent model for ICANN and other domain name registries to follow.

If possible, we would like to participate in the GAC/GNSO meeting in Marrakesh on Monday June 26th by teleconference. Please contact me at the address below if such participation is possible.

Sincerely,

original signed

Philippa Lawson
Executive Director, CIPPIC

original signed

Ambrese Montagu
Law Intern, CIPPIC

cc: Bill Graham, Industry Canada,
Bruce Tonkin, GNSO Chairman.