

January 6, 2020

Via EMAIL/U.S. FIRST CLASS MAIL

Mr. Dave Schaeffer
Chief Executive Officer
Cogent Communications
2450 N Street NW
Washington, DC 20037

Re: Cogent's Repeated Violations of ARIN's Whois Terms of Use

Dear Mr. Schaeffer:

I am the President and CEO of the American Registry for Internet Numbers, Ltd. ("ARIN"). I am writing to advise you that ARIN has, effective today, suspended Cogent Communications' ("Cogent") use of ARIN's Whois database. ARIN has suspended Cogent's use of ARIN's Whois database because ARIN has received numerous complaints of Cogent personnel repeatedly using the database to solicit customers, in clear violation of ARIN's Whois Terms of Use ("TOU"). Despite ARIN's multiple written demands to Cogent to cease these prohibited activities, ARIN has continued to receive complaints from registrants that Cogent continues to engage in these prohibited solicitation activities. Accordingly, ARIN has suspended Cogent's access to and use of the Whois database for six months. We reserve the right to extend this suspension unless Cogent agrees in a binding manner to stop these prohibited practices.

1. ARIN's TOU prohibit solicitation activities

ARIN's TOU (Ex. 1) apply to individuals accessing the Whois database. "Use of the Whois Service" in Section A of the TOU, provides the following in pertinent part:

You are specifically prohibited from using the Whois Service (i) as part of a commercial service or product, including the solicitation and servicing of your, or your employer's, customers, even if additional data not derived from the Whois Service is incorporated or (ii) for advertising, direct marketing, marketing research or similar purposes.

The "Additional Terms" included in the TOU also provide the following in Section B.7:

These Terms automatically terminate when you fail to comply with any term or condition of them. ARIN may terminate or modify your access to Whois Service, with or without notice to you, at any time for any reason.

ARIN's Registration Services Agreement ("RSA") with Cogent also provides in Section 2(d)(i) that the holder of the number resources shall not "disrupt or interfere with the security or use of any of the Services." RSA Section 2(d)(iii) also provides that the holder of the number resources shall not "assist any third party in engaging in any activity prohibited by any Service Terms."

1. Cogent's use of the Whois database to solicit customers

ARIN has received multiple complaints that Cogent personnel have improperly solicited recent ARIN registrants and offered Cogent's services. After receiving such complaints, Mr. Michael Abejuela, ARIN's Associate General Counsel, sent cease and desist demands to Cogent personnel on multiple occasions: August 5, 2019 to Mr. David Eby (Ex. 2); August 14, 2019 to Mr. Eby (Ex. 3), and September 25, 2019 to Mr. Robert Beury, Chief Legal Officer (Ex. 4). Mr. Abejuela's communications stated, in pertinent part, the following:

This email serves as a reminder that use of ARIN's Whois database is subject to the Terms of Use for that service found at https://www.arin.net/whois_tou.html. This is written notice to immediately and permanently cease and desist from any use of ARIN's Whois data for the purpose of contacting organizations and/or points of contact for marketing purposes or any other purpose in violation of ARIN's Whois Terms of Use.

As indicated in ARIN's Terms of Use, https://www.arin.net/whois_tou.html, you are specifically prohibited from using the Whois Service (i) as part of a commercial service or product, including the solicitation and servicing of your, or your employer's, customers, even if additional data not derived from the Whois Service is incorporated or (ii) for advertising, direct marketing, marketing research or similar purposes.

In the event that you are unable to fully comply with this demand, ARIN will be forced to explore alternative means to enforce the terms of the ARIN Whois Terms of Use.

Cogent has failed to even acknowledge ARIN's demand letters, and Cogent appears to have never stopped its improper solicitation practices in violation of ARIN's TOU. For example, less than two weeks ago, ARIN received a complaint—with the subject line, "Cogent harvesting WHOIS data"—that stated the following:

We were just issued an AS. Within minutes, a Cogent sales rep called to provide us transport. The number was 703-657-7911. They are becoming ridiculous with these tactics and I wanted to report it. I am a member of the NANOG mailing list and other worldwide network operators see the same behavior from Cogent.

Additionally, a Cogent salesperson recently stated to an ARIN officer that the salesperson was trained at Cogent to engage in the following solicitation practice: (1) review the list of newly issued ASNs in a report obtained over FTP; (2) search ARIN's Whois for contact information of companies issued ASNs; and (3) reach out to the contacts listed in Whois and offer Cogent's services. These statements by a Cogent salesperson are entirely consistent with—and confirm—the prohibited activities referenced in the complaints ARIN has received from the community.

2. Cogent has repeatedly and knowingly violated ARIN's TOU

It is clear that Cogent is repeatedly and intentionally violating ARIN's TOU despite every effort ARIN has made to bring this to the attention of Cogent's chief legal officer. The TOU explicitly state that the Whois database shall not be used for "the solicitation and servicing of your, or your employer's, customers," or "advertising, direct marketing, marketing research or similar purposes." ARIN received multiple complaints from registrants that Cogent personnel have contacted them to market Cogent services and referenced their Whois database information. Additionally, a Cogent salesperson admitted that Cogent personnel are trained to, and do in fact, engage in this solicitation practice.

Cogent has blatantly disregarded ARIN's repeated requests and demands—to both its salesperson and its chief legal officer—to cease engaging in this prohibited solicitation activity. Accordingly, Cogent has knowingly continued to violate ARIN's TOU.

3. ARIN has suspended Cogent's access to and use of the Whois database

Given that (1) Cogent's conduct clearly violates ARIN's TOU (and also violates RSA Sections 2(d)(i) and (ii)), (2) ARIN has put Cogent on notice of these repeated violations, and (3) Cogent has ignored and failed to respond to three prior letters from ARIN counsel—ARIN has suspended Cogent's use of the Whois database. This suspension is effective immediately and will remain in place for six months, until June 30, 2020. ARIN believes that this is an appropriate action considering Cogent's egregious behavior.

ARIN is willing to restore Cogent's access to, and use of, the Whois database before the end of the six-month suspension period if you, as Cogent's CEO, submit to ARIN a sworn and notarized declaration that addresses the following terms: (a) admit that Cogent engaged in solicitation practices in violation of ARIN's TOU; (b) Cogent agrees to stop training its employees to engage in the prohibited solicitation activities and instead instruct its salespersons to not engage in the prohibited solicitation activities; and (c) Cogent will immediately stop the prohibited solicitation activities. A voluntary declaration and agreement to that effect will not be used by ARIN to seek monetary damages from Cogent. If we reach such an agreement, however, and ARIN receives additional complaints or uncovers new information indicating that Cogent personnel continued to violate ARIN's TOU after the date of the agreement, ARIN will be entitled to use the declaration in future enforcement and/or legal actions.

ARIN recognizes that Cogent personnel could take evasive steps to continue improperly using the Whois database in violation of the TOU, including, for example, masking their IP addresses to access the Whois database or using third parties to obtain data from the Whois database. If Cogent personnel take such evasive steps, ARIN will unilaterally extend the six-month suspension period and/or bring appropriate legal action against Cogent.

Regards,


John Curran
ARIN President & CEO

CC: Mr. Robert Beury, Esq., Cogent Chief Legal Officer
Mr. Stephen Ryan, Esq., ARIN General Counsel
Mr. Michael Abejuela, Esq., ARIN Associate General Counsel