International Trademark Association

Etienne Sanz de Acedo
Chief Executive Officer

655 Third Avenue, 10th Floor, New York, NY 10017-5646, USA
t: +1-212-642-1776 | f: +1-212-768-7796
inta.org | esanzdeacedo@inta.org

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Mr. Lars Hoffmann
Policy Manager
ICANN
6 Rond Point Schuman, Bt. 1
Brussels B-1040 Belgium

Dear Mr. Hoffman:

INTA is pleased to submit the attached comments on the Recommendations of ICANN's GNSO Working Group in regard to the Translation and Transliteration of Contact Information Policy Development Process.

INTA thanks the group for their hard work and supports most of the recommendations. However, INTA supports a mandatory requirement for translation and transliteration of WHOIS contact data into a common language and alphabet for domain names that are used to advertise or sell goods and services. Such a requirement is necessary in order to ensure transparency and accountability within the domain name system. Without the proper tools to identify unauthorized sales of goods and services online, the door is left wide open for harm to consumers from fraud and potentially dangerous counterfeit goods. Brand owners have a duty to protect their brands from such misuse which, ultimately, protects the consumer.

If you have any questions or concerns about our submission, please contact Lori Schulman, Senior Director, Internet Policy at lschulman@inta.org.

Sincerely,

Etienne Sanz de Acedo

INTA Comments on Translation and Transliteration of WHOIS Contact Data

The International Trademark Association (INTA) submits the following comments on the Recommendations of ICAAN's GNSO Working Group in regard to the Translation and Transliteration of Contact Information Policy Development Process (hereinafter "ICANN Recommendations").

INTA submits that minimum standards of transparency and accountability in global electronic commerce require WHOIS contact data to be translated or transliterated, as appropriate,[1] into a common language, in respect to all domain names used for the advertising or sale of goods and services. Failure to require such translation and transliteration, INTA believes, will undermine the stability and security of the Internet by introducing a conflict between ICANN's disclosure requirement and national laws that require disclosure of the origin and source of goods and services advertised and sold in commerce.

Non-Commercial Domain Names. INTA takes no position on the disclosure of the origin and source, or by implication any position on the translation or transliteration of information about the origin and source, of domain names not used for the advertising or sale of any good or service. While the disclosure of WHOIS contact data for non-commercial domain names may be necessary for purposes of consumer protection and law enforcement, INTA's interest in the disclosure of WHOIS contact data is limited to domain names used "in commerce," *i.e.*, those associated with websites used for the advertising and sale of goods and services. If there is no "use in commerce," as defined, for example, in Section 45 of the Federal Trademark Act of 1946, as amended (the "Lanham Act"), 15 U.S.C. § 1127, then INTA's interest as a commercial trade association is not implicated.

If, however, a website is used for the advertising or sale of goods or services, then the origin and source of those goods and services – in the case of advertising, not merely the goods and services advertised but source of the advertising itself – are required to be disclosed under fictitious trade and consumer protection statutes in the United States, the European Community, and many other countries.

Opponents of disclosure requirements in Internet domain name registration, including but not limited to the requirement for translation and transliteration of WHOIS contact data, argue that such requirements infringe the right to privacy and free speech.

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[1] The word "transformation" has been used by some commentators to include the translation "and/or" transliteration of contact data as appropriate. INTA will adhere to the dual nomenclature to avoid possible confusion of terminology. When referring to names, proper nouns and addresses, translation and transliteration are largely but not necessarily synonymous. The object in either case is to render the data readable and understandable in a common language.

However, there is no "privacy" interest in concealment of the origin and source of the advertising or sale of goods and services. There is no tradition of anonymous commerce in the United States, European Countries or any other jurisdiction to the best of our knowledge. The business and fictitious trade name laws all fifty states in the United States, for example, require vendors of goods and services to designate themselves or an agent for service of process in actions arising from the advertising or sale of goods and services.[2] The conduct of schemes to defraud via mail, wire, radio or television using a fictitious name to conceal one's identity is an indictable offense in the United States.[3]

The ability to identify a person or entity legally responsible for the origin and source of goods and services is a universal requirement in corporation, fictitious name, unfair competition, and consumer protection laws in the United States and around the world. This principle is by definition dispositive on the question of translation and transliteration.

Advocates for the concealment of information about the origin and source of goods and services advertised and sold on the Internet speak of the right to privacy and free speech. Certainly, the right to speak freely includes the right to speak anonymously.[4]

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[2] *E.g.,* Nev. Rev. Stat. Ann. §§ 602.010, 602.020; Conn. Gen. Stat. § 35-1(a). The purpose of these laws is "to inform the public of the true identity of those with whom they conduct business." *Brad Assocs. v. Nevada Fed. Fin. Corp.,* 109 Nev. 145, 848 P.2d 1064, 1066 (1993).

[3] *See, e.g., United States v. Frank,* 494 F.2d 145 (2d Cir. 1974); *United States v. Brockway,* Nos. 90-50064, 1991 U.S. App. LEXIS 8842 (9th Cir., May 3, 1991) (unpublished). The federal fictitious name statute provides, "Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device [to defraud] or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1342. *See also* 18 U.S.C. § 1343 ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.").

[4] For example, the First Amendment to the U.S. Constitution places anonymous speech on the Internet on the same footing as other speech. There is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech. *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 870 (1997). "Although the Internet is the latest platform for anonymous speech, online speech stands on the same footing as other speech." *In re Anonymous Online Speakers*, 611 F.3d 653, 657 (9th Cir. 2010). As with other forms of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without "fear of economic or official retaliation ... [or] concern about social ostracism." *McIntyre,* 514 U.S. at 341-42.

The right of anonymity, however, does not extend to commercial speech. *See. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton,* 536 U.S. 150 (2002);[5] *Buckley v. Am. Constitutional Law Found.,* 525 U.S. 182 (1999).[6] Commercial speech, *i.e., "*speech which does no more than propose a commercial transaction," is not entitled to the same protection.[7] In the United States, for example, the Constitution "accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 64-65 (1983).

There is no principle of law in the United States, European Countries, or any other jurisdiction of which we are aware, that would allow for the exploitation of anonymity on the Internet to evade the ordinary transparency and accountability that would attach in any brick-and-mortar environment relating to the advertising and sale of goods and services. As such, INTA submits that the mandatory disclosure of contact data, including but not limited to the translation and transliteration of such data, is fundamental to traditional notions of transparency and accountability in the advertising and sale of goods and services. Based on this framework, INTA comments as follows on the recommendations of the GNSO Working Group:

ICANN Recommendation #1

"The Working Group recommends that it is not desirable to make transformation of contact information mandatory. Any parties requiring transformation are free to do so on an ad hoc basis outside Whois or any replacement system, such as the Registration

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[5] In *Watchtower,* religious organizations brought an action against a village, seeking to enjoin the enforcement of an ordinance requiring individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand. The Supreme Court held that the ordinance violated the First Amendment protection for "religious proselytizing, . . .anonymous political speech and the distribution of handbills." 536 U.S. at 153.

[6] In *Buckley*, the Supreme Court struck down a Colorado statute requiring that initiative-petition circulators wear identification badges bearing the circulator's name. The plaintiffs alleged that the name badge requirement discouraged potential circulators because of fear of harassment. Colorado argued that the badge requirement was necessary in order to enable the public to identify, and for the state to apprehend, any petition circulators who were engaging in misconduct. *Id.* at 198. The Court found that the state's asserted justification for the statute was not a sufficient basis to discourage citizens from participating in the petition circulation process. "The injury to speech is heightened for the petition circulator because the badge requirement compels personal identification at the precise moment when the circulator's interest in anonymity is greatest [*i.e.,* at the moment they deliver their political message]." *Id.* at 199. The Court concluded that the badge requirement "discourage[d] participation in the petition circulation process by forcing name identification without sufficient cause." *Id.* at 200.

[7] *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 339 (1986)(quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976)). The Supreme Court has "consistently distinguished between the constitutional protection allowed commercial as opposed to noncommercial speech." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 504 (1981).

Data Access Protocol (RDAP). If not undertaken voluntarily by registrar/registry (see Recommendation #5), the burden of transformation lies with the requesting party."

INTA Comment. INTA disagrees with the ICANN Working Group's recommendation for the reasons stated above. In respect to domain names associated with websites used for the advertising and sale of goods and services, the mandatory translation and transliteration of WHOIS contact data into a common language and alphabet is essential to the preservation of transparency and accountability in global Internet commerce.

While the requirement for translation and transliteration into a common language will involve a nominal cost, it is a cost of doing business that falls quite properly upon the party engaged in such business. This minor burden could be further minimized by allowing for translation and transliteration of WHOIS data for "country code" domains into the language in which goods or services are advertised or sold on a particular website. Certainly the owner and operator of a website in a particular language cannot complain of the need to disclose the origin and source of the goods and services advertised and sold on that website.

INTA notes the position of ICANN's Intellectual Property Constituency (IPC) that the transliteration of all gTLD contact data into a single script is necessary to the maintenance of a comprehensive, transparent and accessible database. INTA agrees with this position but would extend the basic disclosure requirements, including but not limited to the translation and transliteration of WHOIS contact data, to *all* domain names used for the advertising or sale of goods and services, including those in the "country code" domains, although in respect to "country code" domain names the translation and transliteration into the language of the particular website would suffice for purposes of minimum disclosure without imposing any meaningful burden on the domain name registrant.

ICANN Recommendation #2

"Whilst noting that a Whois replacement system should be capable of receiving input in the form of non-ASCII script contact information, the Working Group recommends its data fields be stored and displayed in a way that allows for easy identification of what the different data entries represent and what language(s)/script(s) have been used by the registered name holder."

INTA Comment. INTA supports this recommendation. Having the data presented in selectable text allows the user to select the text and perform a translation himself or herself, or use the text as a query in search engines, and therefore should be considered essential.

ICANN Recommendation #3

"The Working Group recommends that the language(s) and script(s) supported for registrants to submit their contact information data may be chosen in accordance with gTLD-provider business models".

INTA Comment. INTA supports this recommendation.

ICANN Recommendation #4

"The Working Group recommends that, regardless of the language(s)/script(s) used, it is assured that the data fields are consistent to standards in the Registrar Accreditation Agreement (RAA), relevant L Policy, Additional Whois Information Policy (AWIP) and any other applicable polices. Entered contact information data are validated, in accordance with the aforementioned Policies and Agreements and the language/script used must be easily identifiable".

INTA Comment. INTA supports this recommendation.

ICANN Recommendation #5

"The Working Group recommends that if the transformation of contact information is performed, and if the Whois replacement system is capable of displaying more than one data set per registered name holder entry, these data should be presented as additional fields (in addition to the authoritative local script fields provided by the registrant) and that these fields be marked as transformed and their source(s) indicated".

INTA Comment. INTA supports this recommendation.

ICANN Recommendation #6

"The Working Group recommends that any Whois replacement system, for example RDAP, remains flexible so that contact information in new scripts/languages can be added and expand its linguistic/script capacity for receiving, storing and displaying contact information data".

INTA Comment. INTA supports this recommendation.

ICANN Recommendation #7

"The Working Group recommends that these recommendations are coordinated with other Whois modifications where necessary and are implemented and/or applied as soon as a Whois replacement system that can receive, store and display non-ASCII characters, becomes operational".

INTA Comment: INTA supports this recommendation.

About INTA and the Internet Committee

INTA is a 136 year-old global not-for-profit association with more than 5,700 member organizations from over 190 countries. One of INTA's goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last decade, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA's Internet Committee is a group of over 200 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.