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COMMENTS OF GENERAL ELECTRIC COMPANY REGARDING THE NPL DRAFT STUDY ON WHOIS PRIVACY & PROXY SERVICE ABUSE

General Electric Company (“GE”) appreciates the opportunity to comment on the National Physical Laboratory (“NPL”) Draft Study on Whois Privacy & Proxy Service Abuse (the “Study”), posted for public comment by ICANN on September 24, 2013.

GE finds the Study instructive, but believes it should better address several substantial issues.

The Study confirms the general statement that “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.” We find this generally unsurprising, as GE has dealt frequently with wrongdoers in this area. The Study goes on to look at the use of privacy and proxy services in the larger context of Whois record information abuse, and concludes “[w]hen domain names are registered with the intent of conducting illegal or harmful Internet activities then a range of different methods are used to avoid providing viable contact information – with a consistent outcome no matter which method is used.” That “consistent outcome” is, of course, that the identity of the domain name registrant is obscured and unavailable (or available only with significant effort and expense).

The Study also addresses the problem of “unlinkability” for registrants of multiple harmful or unlawful websites. This problematic use of privacy and proxy services are of particular concern to GE. If brand owners cannot determine that multiple infringing websites are owned by the same entity, they will need to engage in multiple UDRP proceedings against a series of domains with a common owner. This requires significant additional effort and expense compared to consolidating multiple domains into a single action. Due to lack of resources, brand owners may even need to forego certain proceedings that could have been linked with minimal additional expense had the identity of the registrant been known. While this is also unsurprising, it is useful to have this observation confirmed by a neutral observer.

While useful on the above subjects, the Study took far too limited an approach on intellectual property infringement. The Study addressed “typosquatting,” but did not fully elaborate on issues of media and software piracy, or trademark infringement. The lack of discourse on these subjects

greatly limits the usefulness of the Study in general, and raises significant questions about why they were omitted here.

Typosquatting is only one facet of the world of “cybersquatting” and other forms of trademark infringement concerning domain names. There are many other ways in which trademarks are infringed in domain names that do not qualify as, or are unrelated to, typosquatting. NPL stated that “We consider typosquatting, covered in WP4, to overlap with the trademark infringement topic and to be far more prevalent, improving the relevance to the testing of the study’s hypotheses on domain registration.” NPL fails to provide solid reasoning for its claim that typosquatting is either “far more prevalent” or an adequate analogue for other trademark infringement issues.

We believe it is unlikely that typosquatting is far more prevalent than other infringements. A basic review of domain name monitoring reports seems to indicate that, in fact, non-typosquatting infringements far outweigh typosquatting. We wish to more fully understand NPL’s basis for their assertion that typosquatting is far more prevalent, and that behavior relating to privacy and proxy service use and WHOIS obfuscation by typosquatters is similar to that of other domain name trademark infringers.

At this point, we do not believe NPL can extrapolate this limited data set to assert more general points about infringement behavior. We also have strong reservations that this methodology inappropriately downplays the nature, extent, and severity of infringement. We believe that ICANN should require a specific study of “non-typosquatting” domain name trademark infringers and their use of privacy and proxy services and other methods of obscuring WHOIS information.

We take similar issue with NPL’s belief that “the people engaged in ‘software piracy’ operate in broadly similar ways to the [unlicensed] pharmacies,” who are using multiple domains to evade spam filters when sending emails offering, e.g., “Viagra.” While it may be true that those software pirates who are sending spam emails offering pirated software are operating in a similar manner, this is only one segment of the problem. As the “Terms of Reference for the WHOIS Privacy and Proxy Abuse Studies RFP” of May 18, 2010 reveals, the “Software Piracy” mandate was meant to be aimed at “warez” sites that distribute infringing software and at “domain names used by servers that illegally distribute copyrighted software.”¹ This is a fundamentally different proposition than the one postulated (and then not addressed) by NPL in the Study.

NPL also declined to consider “Media Piracy,” (i.e., “servers that illegally share copyrighted movies and music”)² stating that “[t]he bandwidth requirements of this type of website are substantial, which in turn means that considerable monetary sums will be involved in running such operations. Hence, when attempting to locate the website operators, investigations are far more likely to consider hosting providers, rather than domain name registrants.” We believe this assertion does not play out in practice.

In the case above, the domain name registrant is almost certainly the “bad actor” and the WHOIS record is (or should be) a major pathway to discovering its whereabouts. Whether it has

¹ “Terms of Reference for the WHOIS Privacy and Proxy Abuse Studies RFP” ICANN, May 18, 2010.

² *Id.*, page 6.

significant hosting needs is beside the point. The registrant may provide its own hosting, work with an unwitting legitimate host, or work with a rogue host that specializes in hosting illegal and questionable conduct. Consistent with these differing roles, various nations have enacted laws to protect hosting providers, realizing that the actual operator of the website is almost always the primary bad actor. Regardless, the behavior of these bad actors in the privacy and proxy space (and the WHOIS space generally) should be of significant concern and should have been part of the Study.

The failure to deal with infringement issues beyond typosquatting drastically limits the usefulness and further applicability of the study and its results. GE and other brand owners have consistently asserted the danger and prevalence of all forms of trademark infringement, and we believe any Study on this subject should include a full and rigorous review of all major issues.

In sum, GE calls on ICANN to undertake a full study of privacy and proxy use and WHOIS abuse by cybersquatters, software and media pirates, and other trademark infringers. While we believe the results would be unsurprising, a proper study should be conducted to demonstrate the level of WHOIS obfuscation by bad actors, including intellectual property infringers of all types, through both the use of privacy and proxy settings and other methods.

Even with its limitations, however, the Study does provide the basis for further action by ICANN, concluding that a range of different methods of hiding contact information lead to a consistent outcome. Specifically, ICANN should undertake the following steps to prevent criminals and infringers from hiding on the internet:

1. ICANN must improve WHOIS (and any successors) so that verified, reliable identity and contact information for registrants is readily available, both to law enforcement and those whose rights are being violated; and,
2. ICANN must accredit privacy and proxy service providers and clearly state rules to restrict their roles so that they do not provide cover to criminals and infringers.

Thank you for your consideration of these comments. If you have any questions or wish to discuss any of the points raised herein, please feel free to contact me at kathryn.park@ge.com.

Sincerely yours,

A handwritten signature in black ink that reads "Kathryn Burt Park". The signature is written in a cursive, flowing style.