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AIPLA COMMENTS TO ICANN ON WHOIS PROPOSALS

These comments are submitted on behalf of the American Intellectual Property Law Association (AIPLA) to the ICANN Board and its Generic Names Supporting Organization (GNSO) on the proposed changes to accessibility to WHOIS data, following the Task Force and Working Group reports.

AIPLA is a national bar association whose more than 17,000 members are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of trademark, copyright, patent, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property.

As one of the leading organizations representing the intellectual property legal community, AIPLA is chiefly concerned with safeguarding the rights of intellectual property owners. We believe that it is critically important that ready access to WHOIS data be maintained in order to protect intellectual property owners, particularly trademark owners, who are under a constant barrage from cybersquatters, counterfeiters, unscrupulous operators of porn and gambling sites (or their “consultants” who promise to “Increase traffic to your site!”), and perpetrators of phishing scams and other fraudulent activities on the web.

1. AIPLA opposes the OPOC Proposal

AIPLA strongly opposes the OPOC Proposal for several reasons. First, and most significantly, we believe that this Proposal will greatly obstruct the ability of our members to assist intellectual property owners in protecting and enforcing their valuable rights. If adopted, the OPOC Proposal will very likely have a devastating economic impact on intellectual property owners for one chief reason: it will greatly delay the owners’ ability to identify infringers and cybersquatters and stop their unlawful activities.

In particular, trademark owners spend millions of dollars advertising and promoting their marks, and developing valuable reputations and goodwill. Cybersquatters, who are quite often rogue individuals, frequently register confusingly similar domain names in an attempt to divert consumers seeking the trademark owner’s website to their own websites, which are not created for

any legitimate or bona fide business interest. Indeed, cybersquatters typically exist for purposes of extorting money from trademark owners.

Under the current system of open access to registrant information, trademark owners and their attorneys may, in relatively short order, identify cybersquatters and institute either a UDRP proceeding or federal court action to cancel or transfer the infringing domain name. In either case, trademark owners are able to promptly stop the financial and reputation damage caused by unscrupulous infringers.

The OPOC Proposal drastically curtails this enforcement process. A system of prompt and inexpensive identification will likely be replaced by one involving delay, obstruction and uncertainty. Under this Proposal, trademark owners will be at the mercy of the OPOC, who may or may not timely provide the registrant's identification information, if at all, and who have little or no motivation to fulfill their responsibilities on a timely basis. Trademark owners, who oftentimes suffer substantial economic damage at the hands of cybersquatters and infringers due to the availability and popularity of the internet, will, under this Proposal, be required to endure indeterminable delays while the OPOC attempts to contact the registrant, who may even have provided false or inaccurate contact information. The ability to take swift legal action to stop the damage will be effectively thwarted. Indeed, AIPLA believes that the OPOC Proposal will provide a convenient cover behind which wrongdoers can easily hide.

AIPLA acknowledges that the OPOC Proposal includes measures requiring the OPOC to relay messages between the party requesting the WHOIS information and the registrant, and to reveal the registrant's unpublished contact information to the requester under certain circumstances. However, the Proposal does not appear to reflect the means by which these responsibilities are to be accomplished or appropriate sanctions against the OPOC when they are not fulfilled. Fraud or collusion between the OPOC and the registrant could be used to subterfuge enforcement efforts. Additional delays are bound to occur when the requester is left with no choice but to appeal to the registrar for assistance. Throughout all of this delay, intellectual property owners will continue to suffer damage, an effect that will eventually trickle down to consumers.

Under its partnership agreement with the U.S. government, ICANN is responsible for requiring registrars to establish and maintain an effective WHOIS system. The OPOC proposal greatly compromises the integrity of that system and is inconsistent with the principles and purposes of that agreement and the government's goal of protecting commerce.

2. *There are more moderate alternatives to protecting privacy interests.*

AIPLA recognizes the legitimate privacy concerns raised by those who support the OPOC proposal. Problems relating to the wrongful use of WHOIS data to conduct phishing schemes are real and significant. However, AIPLA believes there are other more effective ways to combat the use of WHOIS data for phishing, and some effective measures have already been implemented.

AIPLA firmly believes that privacy concerns are substantially outweighed by the extent of damage to intellectual property owners caused by cybersquatters and other IP abusers. Moreover, the proposal currently being considered is far too cumbersome and wrought with uncertainty. IP owners and law enforcement authorities should not be hamstrung in their ability to effectively police and enforce cyber-crime, cybersquatting and other abuses on the internet.

We believe that if OPOC is adopted, the GNSO should modify it by implementing proposals raised by the Working Group. These include, without limitation, continuing to publish WHOIS data for all registrants not considered to be “natural” persons, ensuring timely compliance with relay and reveal responsibilities, providing for up to two OPOCs, verification of the OPOC’s email address as a condition to registration, requiring a process for establishing the relationship between the registrant and the OPOC, allowing the requester to promptly contact the registrar to obtain WHOIS data or suspending the domain name record and locking the domain name from transfer in circumstances where the OPOC does not timely respond to a request, and implementing measures to allow legitimate interests to directly contact the registrar to obtain access to WHOIS registration information.

3. *AIPLA believes that a comprehensive study of WHOIS be commissioned in order to avoid implementation pitfalls concerning the OPOC proposal*

AIPLA believes that it is important for ICANN to conduct a comprehensive study on the issues identified by the WHOIS Working Group. A study would help ICANN to better understand the extent and nature of the problems related to restricting WHOIS data and may lead to better solutions than OPOC. As OPOC now stands, there are too many crucial implementation details that are unknown and left to the non-uniform discretion of the staff.

In this regard, AIPLA supports Motion # 2 offered by Kristina Rosette, which is set forth on page 9 of the Staff Overview of Recent GNSO WHOIS Activities dated September 13, 2007. AIPLA agrees with the issues outlined in that Motion, including the need to study the characteristics of gTLD registrants, the uses and abuses of WHOIS data, and a review and analysis of the different proxy services available today.

In sum, AIPLA believes it is important that ICANN reject the OPOC Proposal or implement Working Group proposals to alleviate its deleterious effects on IP owners and law enforcement. Every effort must be made to maintain a WHOIS system that fosters prompt and easy access to registrants’ contact information.

AIPLA greatly appreciates the opportunity to offer it views on this issue of vital importance for the trademark and copyright owners represented by our members.