

15 April 2011

**COMMENTS OF
MARQUES, the Association of European Trade Mark Owners, and
ECTA, the European Community Trade Marks Association,
ON THE WHOIS REVIEW TEAM AND ITS WORK**

About MARQUES and ECTA

ECTA is the European Communities Trade Mark Association. ECTA numbers approximately 1500 members, coming from all the Member States of the European Union and representing thousands of trademarks, with associate members from all over the world. It brings together all those persons practising professionally in the Member States of the European Community in the field of trade marks, designs and related IP matters.

MARQUES represents trade mark owners across Europe who together own more than two million domain names (a conservative estimate). These domain names are relied upon by consumers across Europe as signposts of genuine goods and services.

Comments

MARQUES and ECTA welcome the opportunity to comment on the issues raised by the WHOIS Review Team. We fully support the following statement in the Affirmation of Commitments:

"Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information".

In our view, the resource of the WHOIS is one for which any attempts to narrow its scope or effect will have a negative detrimental effect. It is a resource widely used, irrespective of the current concerns of many about its adequacy. ECTA and MARQUES strongly support the maintenance and improvement of WHOIS. We believe that any calls for the abolition of WHOIS is not only counter to the Affirmation of Commitments, but would lead, in reality, to an increase in abusive activity on the internet.

Scope of Work and Roadmap

ECTA and MARQUES believe that the WHOIS system is vital in combating internet abuse of all sorts. There is no doubt that there is much abuse on the internet in general and without an

effective WHOIS, the process for law enforcement and brand owners is more complicated and slower. It necessarily costs more and this burden is ultimately borne by consumers, whether through higher costs for states or higher costs for products.

We believe that the crucial word in the scope of the review team's work is "*effective*". The comments made about this review by [Cauce NA on 13 April 2011](#) and [Markus Hanauska on 16 March 2011](#) represent two short examples of evidence that the current WHOIS system is not effective because false information is readily accepted into the system.

The non-exhaustive list of actions would appear sensible, if part of the analysis of those actions draws conclusions about the *effectiveness* of the WHOIS system in relation to the [Affirmation of Commitments](#).

At a time when WIPO, trademark practitioners and trademark owners have repeatedly expressed concerns about the potential for abuse in the new gTLD program, it is more vital than ever that WHOIS should bolster the WHOIS system to ensure that there is, in reality, "*timely, unrestricted and public access to accurate and complete WHOIS information*".

We recognize the need to balance the privacy rights of individuals acting in a private capacity with the public nature of a WHOIS system. We believe that it is entirely possible to have a balance system by:

- Prohibiting anonymity for legal entities other than real living individuals;
- Prohibiting anonymity for real living individuals where the domain name is for use in the course of a business;
- For domains registered in the name of a real living individual, allowing anonymity, but only where there is a means of contact.

For situations where individuals or legal entities trade on the internet, it is in the interests of their customers (whether individuals or trade) to be able to identify with whom they are dealing. In some jurisdictions, such as throughout the European Union, legislation stipulates that traders must identify themselves and their contact details on websites. There is no reason that the same should not apply to domain registration in a business context. Under Article 5 of the [Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market](#) ('Directive on electronic commerce'), the Directive required Member States to implement legislation requires providers of web sites, in effect, to provide the following information to visitors to their site:

- the name of the service provider;

- the geographic address at which the service provider is established;
- the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
- where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
- where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- as concerns the regulated professions:
 - - any professional body or similar institution with which the service provider is registered,
 - - the professional title and the Member State where it has been granted,
 - - a reference to the applicable professional rules in the Member State of establishment and the means to access them;
- where the service provider undertakes an activity that is subject to VAT (sales tax), its VAT identification number

We would also make a general point about WHOIS in the context of IDNs. We believe that there is a clear need for the WHOIS records to be in standardised ASCII/English irrespective of whether the domain is ASCII/English.

Outreach Plan

We fully supported the Team's plan for openness. Given the limited opportunities for geographical outreach, the use of open access to calls, recordings and emails is vital.

Action Plan

We trust that the action plan will allow the review team time to consider the results of the public comments and take them into account. In addition, the program of work for the review team should bear a correlation to the defined scope of the work to ensure that it actually meets the objectives of the review.

MARQUES and ECTA support calls for ICANN to proactively seek out views from law enforcement agencies, consumer interest groups and brand owners and their representatives rather than merely posing questions and seeking who answers.

List of Key Definitions

Law Enforcement

This definition is very broadly drafted. Is it intended that private parties interested in enforcing civil law remedies should fall within such a definition? If it is intended to refer to law enforcement in the sense of public agencies, such as Police forces, then greater care needs to be taken in the drafting. Consideration needs to be given to the range of legitimate legal proceedings, whether criminal, civil or administrative, for which access to WHOIS data, or extended WHOIS data, should be available.

Applicable Laws

This definition is narrowly focused on questions of personal data. Whilst this is an essential consideration in looking at WHOIS, we believe that the review team must consider not only the personal data rights of a sub-set of registrants, but also the other applicable laws that apply for the broader protection of consumers and the public at large. These include laws relating to topics such as:

- Child exploitation,
- Regulation of drugs and medicines,
- Infringement of intellectual property rights,
- Fraud prevention,
- Spamming.

Given the review team's scope includes promotion of consumer trust, it must look beyond the mere individual person as the registrant of domain names (in which case they will be a consumer of domain registration and related services) but to citizens of the world as users of the internet and buyers of goods and services generally.

Producers and Maintainers of WHOIS Data

Good to see recognition of the importance of data protection concepts. Need to remember that the European data protection concepts only apply to identifiable living individuals. Businesses and non-persons do not generally have any legal rights to "privacy" and this is reinforced by the requirements in many countries for business to register their details in public registers, such as court registers or company registries.

Producers

Whilst this definition itself appears broad, we believe it is important for the review team to recognize the multiple players that may be involved in the registration of a domain and the scope for the provision of false or inaccurate data by any of them to any of the others in the process.

Maintainers

We recognise the review team's use of language derived from European data protection legislation and believe that this is helpful generally. Under data protection concepts the Data Controller is, for example, the organisation that owns/controls a WHOIS database. It will determine what information it collects and what happens to the data collected. Data Processors might be sub-contractors, for example, to the Data Controller, such as a company that provide database hosting services or an out-sourced IT company.

We recommend that the review team consider carefully how they intend to use this terminology. This language has been established in Europe for over 20 years and has well-known and established meanings in the context of data protection. Using the language in other ways will create a massive amount of unnecessary confusion. Accordingly, great care needs to be taken.

Consumer

It seems that the specific definition of "*consumer*" with respect to the WHOIS review does not exclude any person, neither naturals, individuals, organisations nor commercial entities. If this, indeed, is the intention of the review team, which is indicating by referring to a broad approach, it may be preferable to use the global definition "*All Internet users including natural persons, commercial and non-commercial entities, government and academic entities*". It seems preferable to have a global definition which can easily be understood by all "*consumers*" whether native English speakers and/or familiar with the WHOIS scenario. Otherwise, discussions on possibly excluded persons may arise. The review team will have to deal with any comments in this respect, at least by verifying the importance of any comments to the definition. Hence, time and concentration of the review team may have to be spent on discussions that can be easily avoided. Of course, this is only true if in fact, no one shall be excluded from the definition except as already excluded by the global definition "*all Internet users*".

On the other hand, in many jurisdictions the concept of "*consumer*" has well-established meanings that relate to natural persons acting other than in the course of business. For example, the [UK Unfair Contract Terms Act 1977 has in section 12](#) the definition of "*dealing as a consumer*", that essentially covers a party to a contract who neither makes the contract in the

course of a business nor holds himself out as doing so and the other party does make the contract in the course of a business.

The common dictionary definition of "*consumer*" is "*person who purchases goods and services for personal use*" and references in the Affirmation of Commitments refer to "*consumer protection*".

If the intention was to mean that "*consumer*" was "*all internet users*" then surely that language would have been used and the appropriate focus for "*consumer*" should be that which follows from its natural and ordinary meaning.

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