



**International Trademark Association**  
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*Via Electronic Mail*

October 30, 2007

**Comments of the Whois Subcommittee of the International Trademark Association  
on  
Proposed Whois Changes Before the GNSO Council**

**SUMMARY**

The International Trademark Association's Whois Subcommittee supports access to domain ownership information for law enforcement, intellectual property owners, and consumers. We believe that both Motion 1 and Motion 3 before the GNSO Council should be rejected because they greatly curtail legitimate access to the Whois database, resulting in: a) increased fraud and identity theft; b) decreased confidence in the Internet marketplace; c) difficulty in obtaining the redress of wrongs through the judicial system because of the inability to locate the wrongdoer; and, d) conversely, unnecessary litigation in cases that would otherwise be resolved informally, had the aggrieved party been able to discover the registrant's contact information. We support Motion 2 for a comprehensive study of the uses and abuses of Whois data, hopeful that the study will provide an effective means of understanding and evaluating the need for complete and accurate Whois data, in comparison with the precise nature and extent to which Whois data is abused. More thoroughly understanding the problems will also help design an effective and narrowly-tailored way to address those abuses, without sacrificing the great public benefits that come from access to the Whois database.

**ABOUT INTA AND THE WHOIS SUBCOMMITTEE**

The International Trademark Association (INTA) is a 129-year-old global organization with members in 190 countries. One of INTA's key 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 served as the leading voice of trademark owners in the development of cyberspace, including as a founding member of ICANN's Intellectual Property Constituency. INTA's Whois Subcommittee (part of the INTA Internet Committee) is a group of over twenty trademark attorneys and professionals charged with monitoring adoption or modification of Whois policies in new and existing TLDs and advocating for adequate access to domain ownership information.

INTA has a particular interest in policy relating to the Whois database, because the information contained in the Whois database assists trademark owners and authorities in policing abuses of intellectual property and preventing consumer confusion and consumer fraud. Moreover, the information in the Whois database also allows Internet users and consumers from all walks of

life to identify the owners of web sites selling goods or disseminating information over the World Wide Web.

## **INTRODUCTION AND BACKGROUND**

The INTA Whois Subcommittee appreciates this opportunity to comment publicly on the Report titled *ICANN Staff Overview of Recent GNSO Whois Activities* (the "ICANN Report"), and particularly, the three motions summarized at pages 9-10 of the ICANN Report.

### A. *The Importance of the Whois Database*

With the growth of the use of the Internet, and in particular commercial use of the World Wide Web, the Whois database has become an important, if not the most important, source of information for contacting the person or persons responsible for administering domain names (including domain name holders) to resolve issues over control, ownership, or use of the domain name. Both the private sector and government agencies use Whois databases daily. Consumers use Whois to verify the identity and trustworthiness of parties they deal with on the Internet. Trademark owners and consumer protection authorities use Whois when working to prevent schemes to confuse and defraud consumers. Law enforcement uses Whois to investigate terrorism and violations of law and, along with trademark owners, to take down fraudulent websites. The public interest weighs strongly in favor of preserving access—not only to law enforcement, but also to consumers and to all those who have a role in preventing fraud and abuse on the Internet.

### B. *Whois Task Force and Working Group*

In June 2005, the GNSO Council convened a Whois Task Force to address a number of important questions with respect to the Whois database, and specifically, the purpose of the Whois database or service, and the conflicts, if any, between the public availability of Whois data and the requirements of national or local privacy laws. The Task Force completed its work in 2006, but its report revealed significant disagreements between the various constituent groups with respect to various issues including (i) the purpose of the current Whois contacts; (ii) the type of data that should be available for public access; (iii) the method by which non-public data can be accessed; and (iv) the process for investigating and correcting inaccurate Whois data.

The attempt to resolve these issues led some constituencies to advocate a proposal known as Operational Point of Contact, or "OPoC", in which a contact by that name would be published in the Whois database instead of the administrative and technical contacts and, most significantly, the registrant's address and contact information would cease to be displayed. In March 2007, the GNSO Council considered the OPoC proposal, but recognized that there were many 'issues' that remained to be addressed and unanswered questions with the OPoC proposal. Rather than adopt or table the OPoC proposal, the GNSO Council chartered a Whois Working Group to examine these unresolved issues.

Unfortunately, the discussion in the Working Group, and its final report titled *The Whois Working Group Outcomes Report*, which was submitted in August 2007 to the GNSO Council

for consideration, make clear that even fundamental issues could not be resolved. Although the Working Group discussed many possible work-arounds to address the obstacles to legitimate needs for Whois access, many of those ideas proved unacceptable to those seeking to limit access, or would require expensive and complex solutions. In addition (or perhaps as a result) the Working Group reached agreement on so few issues that, considering only those areas on which agreement was reached, the OPoC does not form a complete, coherent, or implementable proposal and almost all of the issues identified by the GNSO Council in March still remain. In particular, it was impossible for the Working Group to reach meaningful agreement on: (i) the key responsibilities and requirements of the OPoC; (ii) how ICANN, the registrar, or any third party would impose any consequences if the OPoC does not fulfill its responsibilities; and (iii) how legitimate interests may access registration data that is not longer published via Whois.

Although frustrations often ran high in the Working Group, the Working Group's lack of success highlights the inherent flaws of the OPoC proposal: it raises barriers to those with critical needs to access the Whois database that can only be solved with cumbersome and incomplete mechanisms that are not justified by the purported threats to privacy resulting from Whois accessibility.

### C. *INTA's Position*

We believe that the current Whois database, and specifically, the public availability of domain name ownership information, is consistent with the operation of the Whois database from the very early days of the Internet. Indeed, both RFC 812 (March 1, 1982) and its replacement, RFC 954 (October 1985), refer to the Whois database as “a netwide directory service for Internet [ARPANET] users.” Perhaps more importantly than the practices at a time when the Internet—limited to government, academic and military users—was all but free of commercial activity or illegal behavior, ever since the private availability of domain names, the expectation and the purpose of the publicly-available Whois database has included public accessibility and use to resolve legal issues.

The existing Whois database has been operating in its current form for many years without, apparently, any judicial decisions, enforcement actions, or court orders in any country requiring that public access to Whois data be disabled or restricted due to national or local privacy laws. Where various concerns have been raised, those concerns appear to focus on creating enhanced privacy rights, not on addressing any specific non-compliance with national or local privacy laws.

So long as the Whois debate operates with a dearth of solid information about the uses and abuses of Whois data, there will always be conflict between abstract proposals that urge the removal of certain data fields from the publicly-available Whois system, and the benefits of maintaining access to those same data fields. After all, every field's data is both private, to a greater or lesser extent, and useful in legitimate investigations, to a greater or lesser extent. Only with a foundation of solid information can we hope to devise solutions that address abuses in a narrow fashion (for instance, security measures on the modes of the delivery of Whois data) without impact on legitimate queries and uses.

As a result, and as discussed in more detail below, we believe that the GNSO Council should reject both Motion 1 and Motion 3 because they greatly curtail legitimate access to the Whois database. We support Motion 2, hopeful that a comprehensive study will provide an effective means of understanding and evaluating the need for complete and accurate Whois data, in comparison with the precise nature and extent to which Whois data is abused.

## **MOTION 1: ADOPTION OF OPoC, “AS CONTAINED IN THE TASK FORCE REPORT”**

Motion 1 proposes to adopt the OPoC recommendation of the Whois Task Force. In addition to our general comments about the incomplete and unimplementable nature of the OPoC proposal, the wording of Motion 1 illustrates that Motion 1 is fatally flawed. The GNSO Council acknowledged in March 2007 the existence of several critical issues with the OPoC proposal, as recommended by a very slim majority of the Whois Task Force. The proponents of Motion 1, however, urge the adoption of the OPoC Proposal “as Contained in the Task Force Report,” seeking to ignore both the problems identified by the Task Force and the GNSO Council with the OPoC proposal, and that the Working Group could not find consensus on solutions to any of them (except perhaps the inapplicability of the OPoC proposal to legal persons). To ignore these facts would be a textbook example of how not to develop policy.

As outlined in greater detail in our comment of January 15, 2007<sup>1</sup>, the main deficiencies of the Task Force’s OPoC recommendation are that it:

- lacks a requirement that OPoC pass on legal demands, and legally required notices
- lacks standards for the timely transmission of communications
- lacks a viable means of enforcing OPoC compliance with obligations

While certain of these concerns are discussed in the Final Outcomes report of the Working Group, the motion treats the Working Group’s report as strictly advisory. Even were the Working Group’s report adopted, it does not present a coherent, final proposal, as discussed above, because the Working Group could reach “agreement” on none of the issues with OPoC and identified a number of significant unresolved issues and differences of opinion. These include the responsibilities of the OPoC, how those responsibilities might be enforced, and access by interested parties to unpublished data. Not surprisingly, ICANN staff that reviewed the Working Group’s report found notable “difficulty involved in formulating an implementation of OPoC” that would address the issues identified by the Working Group.

As a final note, we appreciate the gTLD Registries Constituency’s (“RyC”) position that the OPoC proposal cannot be implemented without addressing the issue of access to unpublished data.<sup>2</sup> We also appreciate the RyC’s efforts to remain constructive and propose solutions to the problem. However, we respectfully disagree that access to the data that would no longer be published under the OPoC proposal is best handled through a tiered access system. First, it is no accident that this is the area in which the Whois Working Group made the least progress. The Working Group bogged down on the ideological question of what parties should have access in what circumstances, with several parties suggesting that no private parties should have any

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<sup>1</sup> <http://forum.icann.org/lists/whois-services-comments/msg00030.html>

<sup>2</sup> <http://www.gns0.icann.org/drafts/icann-staff-overview-of-whois11oct07.pdf> at pages 32-33.

access to unpublished data, and that law enforcement should have only very limited access. Second, however, we believe that the practical difficulties of a tiered access system—a subject barely even broached in the Working Group—are even more immense than the philosophical ones. Fairness, the inability to credential law enforcement (let alone diverse private intellectual property rights), security, response times, and logistics all pose daunting challenges in developing a tiered access system. ICANN should not move forward on the faithful assumption that a tiered access system can fill the voids in the OPoC proposal without first exploring whether a cost-effective tiered access system is possible. Our own examination (and the complaints that arose in the Working Group over the costs involved in implementing other aspects of an OPoC system) suggests that it is not possible to address these issues cost-effectively. We agree with the RyC, however, that the question of providing necessary access to unpublished data cannot be separated from the question of adopting OPoC.

Therefore we strongly urge the Council to reject Motion 1.

## **MOTION 2: COMPREHENSIVE, OBJECTIVE STUDY OF THE USES AND ABUSES OF WHOIS DATA**

We agree with the two primary assertions behind Motion #2, namely:

- (1) that the “Working Group report [is not an] adequate basis for any implementation of the Operational Point of Contact (OPoC) proposal, due to the inability to reach agreement on a number of key issues identified in the charter of the Working Group”; and
- (2) that “no comprehensive, objective study has yet been made of key factual issues regarding the Whois system, and that future ICANN policymaking could greatly benefit from the results of such a study.”

Indeed, we believe that much of the discussion advanced by the various constituencies during Whois Working Group discussion revolved around positions that, while potentially valid, were backed by little objective data.

Motion #2 calls for a “comprehensive, objective study” of: (1) the characteristics of gTLD registrants; (2) the uses and abuses of Whois data; and (3) a review and analysis of the different proxy services available today. Finally, the motion mandates that the GNSO Council take the results of the study into account in deciding on the next steps in Whois policy development.

Much of the discussion and positions taken by the various constituencies during the tenure of the Working Group rested upon speculation about the second category identified above, namely the alleged uses and abuses of Whois data. Finding itself in disagreement about which uses are legitimate and which are not, and about the extent and cause of any abuse, it is no surprise that the Working Group was not able to agree on how best to improve Whois and prevent abuse. We believe that ICANN and all of its various constituencies would benefit greatly from a study that focuses upon alleged Whois abuses. The October 12, 2007 ICANN Staff Implementation Notes concerning the Whois Working Group Report appear to agree insofar as the “staff recommends that studies related to use and misuse of Whois data [should] precede ... other areas of research.”

We believe that the Governmental Advisory Committee principles, setting forth numerous ways that Whois data can be used in support of legitimate activities, is an admirable guidepost for differentiating between legitimate and illegitimate uses. However, in order to focus on the collection of useful data, we recommend that the study focus on describing the particular uses that occur, and their effects on Internet users and the public, avoid *characterizing* particular uses as beneficial (uses) or malign (abuses). The study will likely require extensive public data gathering and the soliciting subjective data, including circumstances where Whois data has been used to address or end a perceived abuse.

We hope that the results of this study will go a long way toward addressing the most basic failing of the OPoC proposal: that the resulting implementation challenges and the risks to Internet users would be far greater than might be necessary to address, in a more targeted way, the true nature and extent of the abuses of Whois. We also hope that the results of the study will suggest practical solutions, where abstract proposals such as OPoC have failed—as one Working Group participant suggested, “narrower more manageable increments that will have a better chance of success within a reasonable time period” and that will “better fit[] the reality of today's privacy issues and needs for access.”<sup>3</sup>

### **MOTION 3: ELIMINATION OF WHOIS REQUIREMENTS FOR REGISTRIES, REGISTRARS, AND REGISTRANTS**

Motion 3 proposes the complete elimination of Whois. Hardly any action that ICANN could take would threaten the stability and security of the Internet as a marketplace of goods and ideas more than eliminating the Whois mandate.

The utility of publicly available Whois is undeniable. On the most basic level, without the Whois databases as a valuable resource there would be no starting point when attempting to effectively conduct day-to-day business that involves domain names. Whois is used for the routine tasks associated with properly managing domain name portfolios and for initiating and completing commercial transactions involving domain names (whether they be aftermarket domain purchases, or the transfer of a domain portfolio as part of a corporate acquisition).

The extended and extensive debate within and work performed by the Whois Task Force and Whois Working Group underscores the importance of publicly available Whois databases.

In summary, the Whois databases are the foundation for most Internet-related investigations and transactions and it would be shortsighted to make any change to the current registry/registrar Whois obligations without first conducting a comprehensive study on Whois, including the uses and abuses of publicly available Whois databases. Therefore we strongly urge the Council to reject Motion 3.

### **CONCLUSION**

We thank ICANN for the opportunity to provide these comments. For the reasons stated above, the Whois Subcommittee of the International Trademark Association urges the GNSO Council to

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<sup>3</sup> <http://forum.icann.org/lists/gnso-whois-wg/msg00373.html>

reject motions 1 and 3 before it, preserving the current Whois obligations and not moving forward with the incomplete and flawed Operational Point of Contact proposal. We urge the Council to adopt motion 2, for a comprehensive study of the uses and abuses of Whois data, as a foundation for further policy-making on Whois. If there are any questions concerning this submission, please contact Claudio DiGangi at [cdigangi@inta.org](mailto:cdigangi@inta.org).