



DATE: 15 January 2007

SUBJECT: Comments of the Motion Picture Association (MPA)
on “Whois Task Force Preliminary Report”

The Motion Picture Association (MPA) serves as the voice and advocate of six of the largest producers and distributors of filmed entertainment¹. Founded in 1922 as the trade association for the American film industry, today, the association represents not only the world of theatrical film, but also major producers and distributors of entertainment programming for television, cable, satellite, home video, Internet and looking into the future, for delivery systems not yet imagined. Among its principal missions, the MPA directs an anti-piracy program to protect U.S. films from infringement throughout the world, including online. MPA relies upon ready access to Whois data in carrying out its anti-piracy role on behalf of its member companies. In addition, those companies have regular recourse to Whois data in identifying cybersquatters and other infringers of their valuable trademarks.

We have reviewed the Preliminary Report of the Whois Task Force (<http://gnso.icann.org/issues/whois-privacy/prelim-tf-rpt-22nov06.pdf>), with particular attention to the two proposals it contains for changing the system of public access to Whois data. MPA believes that this public access system, which has characterized the domain name system since its inception, serves the best interests of Internet users as a whole. Publicly accessible Whois has made a positive contribution to ensuring stability, security and accountability online. We urge ICANN to examine with great care any proposal to deviate from or abandon this successful policy.

Between the two proposals discussed in the Preliminary Report, MPA has a strong preference for the “special circumstances proposal” set out in Appendix B. This proposal is based on a system that has functioned successfully in the .NL country code Top Level Domain for some years. It would permit individual domain name registrants to apply to have some or all of their contact data removed from public access via Whois. Decisions on such applications would be made by an independent third party, chosen by ICANN, which would apply privacy criteria that had been developed in consultation with all relevant ICANN stakeholders. If granted, a Special Circumstances designation would last for one year, and could be renewed if the concrete threat to personal safety or security which justified the designation was still applicable.

¹ Members of the Motion Picture Association (MPA) are Buena Vista International, Inc.; Columbia TriStar Film Distributors International; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal International Films, Inc.; Warner Bros. International Distribution, a subsidiary of Time Warner Entertainment Company, L.P.

While some important practical details remain to be developed, MPA believes that the Appendix B proposal should be pursued. Although it would have the effect of depriving MPA, its member companies and other members of the public of access to some Whois data, it would be a significant improvement over the current practice of allowing nearly every domain name registrant to hide Whois data via a private or proxy registration service, subject to no objective criteria and no enforced rules about the circumstances under which the data would be made public. In MPA's experience, these proxy registration services are commonly used by registrants engaged in copyright or trademark infringement in order to make it more difficult to identify and locate them; they have nothing to do with privacy in these instances. By contrast, the Appendix B proposal is a reasonable response to privacy concerns.

The same cannot be said, in our view, about the OPOC proposal in Appendix A. This would eliminate a wide range of contact data from the publicly accessible Whois – all that would remain would be the name of the registrant, the country and state/province where it operated, and the contact details for an “operational point of contact.” This OPOC would be responsible to “resolve, or to reliably pass on data to resolve, operational issues relating to a domain name.” While it is very unclear just what this means, it is quite likely that inquiries from copyright and trademark owners or their agents, such as the MPA or its member companies, would not be viewed as raising “operational issues” and thus could (and likely would) be ignored by the OPOC. The rights holder would then be left without any recourse and would have to find other, more costly and time-consuming ways to identify and locate the infringing registrant. Even if the OPOC did “pass on data” (i.e., the query) to the domain name registrant, that would not necessarily be effective in revealing the identity or location of the operator of, for instance, a website corresponding to the domain name at which infringing activities were taking place. It would, however, alert the infringer to the existence of an investigation, a fact that would be sure to impede any enforcement efforts undertaken either by the copyright owner or by law enforcement authorities.

This scenario is but one example among many of how the OPOC proposal would represent a major step backward from the status quo. Since it would apply to every gTLD domain name, including those registered by corporations or for the purpose of carrying out illegal or criminal activity, it clearly is not aimed at protecting anyone's personal privacy. ICANN should reject this proposal.

Finally, MPA observes that if ICANN decides to remove some registrant contact data from the public accessible Whois service, it must simultaneously provide a mechanism through which those with a legitimate need to access this data can do so quickly, efficiently, reliably, and on a uniform basis across all generic Top Level Domains. Crafting and implementing this mechanism will not be easy; but this task will be unavoidable if the choice is made to abandon the historical approach of a publicly accessible Whois. Otherwise, a host of legitimate and socially valuable activities, from consumer protection to criminal investigation and enforcement, will be hampered in the online world, with negative consequences for everyone who uses the Internet to work, shop, learn

or play. While the protection of intellectual property rights is indisputably among those legitimate needs which must be accommodated in this process, it is far from the only one. Of course, if the amount of data that is hidden from the public is relatively small, as it would be under the special circumstances proposal, the task of designing an alternative access mechanism may be somewhat less daunting than it would be if something like the OPOC proposal were adopted. But neither proposal is complete unless a clear and convenient path for such access is provided.

MPA thanks ICANN for considering its views.