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Date: October 26, 2007 12:58:35 PM EDT
To: <whois-comments-2007@icann.org>
Cc: <twomey@icann.org>, <vint@google.com>
Subject: Comment by ESA re: Whois motions pending before GNSO Council

Please accept the attached cover letter and comment by the Entertainment Software Association, addressing the motions on Whois reform pending before the GNSO Council. Thank you.

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October 26, 2007

By E-Mail

To: ICANN and GNSO Council
From: Entertainment Software Association

Re: ESA Submission on Pending GNSO Council Motions and
Related ICANN Reports

The Entertainment Software Association appreciates this opportunity to comment upon the important Whois policy issues presently before the GNSO Council. Attached please find our submission.

The ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the \$7.4 billion in entertainment software sold in the U.S. in 2006, and billions more in export sales of U.S.-made entertainment software.

Our industry's anti-piracy enforcement efforts depend upon being able to identify who is infringing our members' copyrighted software online. In this regard, the Whois service is a useful and valuable starting point. It is also a valuable resource for member companies seeking to protect and defend their trademark interests.

We urge the GNSO Council not to move forward with OPoC or do away with Whois contractual obligations for the reasons explained in the attached submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Stevan Mitchell', is written over a large, stylized circular flourish.

Stevan Mitchell
Vice President, Intellectual Property Policy



Comment of the ESA on GNSO Council Motions And Related ICANN Whois Reports

October 26, 2007

Thank you for this opportunity to provide the views of the Entertainment Software Association (ESA) on recent developments in Whois policy within ICANN.

The Entertainment Software Association (ESA) is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the \$7.4 billion in entertainment software sold in the U.S. in 2006, and billions more in export sales of U.S.-made entertainment software.

Reliable and simple access to domain name Whois data is very important to ESA and its members. We depend upon this access to facilitate a wide range of vital business activities. Perhaps most critical is the role that Whois plays in identifying the owners of domain names (and of other corresponding Internet resources, such as websites) that are involved in activities that infringe the intellectual property rights of ESA members.

When ESA and our member companies encounter websites that offer unauthorized downloads of copyrighted video games, or that advertise "mod chips" or other equipment that enable pirate video games to be played, we must move swiftly to protect our members' property and to prevent confusion among loyal customers. The Whois database, providing contact information on registrants and others involved in the maintenance of the domain name, is the first stop in many of these cases. It is also a valuable resource for member companies seeking to protect and defend their trademark interests. Whether the matter is quickly resolved through a simple e-mail to the site operator, or whether it ultimately results in a criminal prosecution for a felony violation of intellectual property laws, the ready availability of Whois data plays a key role in fostering public accountability for illegal activity on the web.

ESA has followed very closely the extensive debate within ICANN about possible changes to Whois policy, and has become a more active participant in those debates over time. For instance, an ESA staff member participated actively in the GNSO Council Working Group that spent last spring and summer debating several aspects of the OPoC (Operational Point of Contact) proposal. The report of that Working Group is now before the Council, along with three motions for consideration at the next Council meeting on October 31.

Motion #1

ESA and its members strongly urge the Council not to adopt Motion #1, which would simply move forward with implementation of the OPoC proposal, as it was presented in

a Task Force report earlier this year. When that Task Force report was initially presented, the Council identified several key problems or gaps in the OPoC proposal, and set up the Working Group to try to resolve the problems and fill the gaps. It is obvious, even from a cursory review of the Working Group's report, that this goal was not achieved. Some progress was made in some areas, but the major questions about the OPoC proposal remain unanswered. For instance, little agreement was reached on the roles and responsibilities of the person or entity designated by the registrant as the "Operational Point of Contact" for the registration – nor even on the threshold question of whether the OPoC would have to acknowledge the designation before the registration would become fully effective.

One of the most critical remaining gaps, from ESA's perspective, is the issue of access. ESA and its member companies need to know the full contact details of registrants of domain names involved in infringements of our members' intellectual property rights. Since many of these details would no longer be made public, how, under the OPoC proposal, would we achieve the needed access? A speedy, predictable and reliable alternative access mechanism is indispensable. The Working Group completely failed to devise one. Indeed, because some members of the Working Group believed that no one in the private sector should ever be able to use such a mechanism, no agreement could be reached even on the threshold question of who could invoke the alternative access method.

ESA is puzzled that the Council, having identified several serious concerns with the OPoC proposal seven months ago, would decide to press forward with this proposal after the Working Group set up to tackle these concerns could not resolve them. Scores of knowledgeable people from all sectors participated in the Working Group, and spent literally thousands of hours in analyzing and debating many different proposed implementations, trying to reach agreement on a workable solution. If there were a viable way to make OPoC work, would we not have found it by now? To press ahead with OPoC's implementation, in spite of the now evident shortcomings, forces the Internet community to assume an unreasonably high risk that the endeavor will fail.

Motion #2

Motion #2 provides a much better path for ICANN to follow. ICANN's efforts to change Whois policy have been undermined by a serious lack of concrete, factual data about how Whois information is used – and abused. With this shaky empirical foundation, it is no wonder that only minimal progress has been made. The right course now is to pause, reflect, and gather the factual information needed for sound policymaking in the future. ESA and its members urge the Council to adopt Motion #2.

Motion #3

Motion #3 is deeply disturbing and should be rejected. The current system of ready public access to Whois is a creature of contract – the contracts between ICANN and the registries and registrars in the generic Top Level Domain space. This system has been

remarkably successful over the many years that it has been in place. Publicly accessible Whois has helped to promote confidence in the Internet and in e-commerce, and has facilitated efforts by the private sector and by law enforcement agencies to combat online fraud and other illegal behavior. Motion #3 calls for ICANN to jettison all Whois-related obligations from its contracts, and let each gTLD registry and registrar set its own policy – or no policy – about what domain name registrant information it collects, uses, or makes available to third parties. Removing Whois contractual obligations could put consumers at greater risk. Whois access rules that vary from registrar to registrar would complicate anti-fraud enforcement efforts by both law enforcement and private industry. Just as significantly, Motion #3 tells the world that ICANN is abandoning its best tool for the management of the domain name system – its contracts. This would be fundamentally inconsistent with the reasons why ICANN was created in the first place, and certainly with the reasons why it has been delegated such important responsibilities. This inconsistency would certainly be noticed in many capitals where ICANN’s role and responsibilities are already controversial.

It is regrettable that these three motions are the only choices before the GNSO Council at this time regarding Whois. While we believe that the current Whois system has been a success, we know that it can and should be improved. For example:

- The problem of inaccurate data in the Whois database is well-documented, and undermines the value of Whois as a tool for accountability and transparency online. We hope that ICANN could take up the challenge of improving the quality of Whois data.
- We also urge the Council to revisit the proposal, supported by at least half of the GNSO constituencies, to explore a “special circumstances” system, modeled on the mechanism well established in the Dutch .NL Top Level Domain, for providing greater protection for the privacy of the most vulnerable individual domain name registrants. While ESA believes that the impact on personal privacy of the current Whois system is far less significant than some have claimed, it is not zero, and the .NL model should be studied with an eye toward whether it can be translated into the generic TLD environment.

No doubt other improvements in Whois could also be considered. Of course, if the study called for in Motion #2 were undertaken, it is certain that ICANN’s future decisions in this area would be better informed, and likely more effective as well.

Finally, ESA and its members urge the Council to consider the impact of its decisions on the broadest possible Internet community. All Internet users benefit from publicly accessible Whois data. Some of the most pernicious abuses of the Internet, which target vulnerable and unsophisticated users, would no doubt flourish if public access to Whois were sharply cut back (as the OPoC proposal would do) or were eliminated altogether (a likely consequence of Motion #3). Phishing is an excellent example. Consortia such as the Anti-Phishing Working Group, and a number of law enforcement agencies, including the U.S. Federal Trade Commission, have clearly told ICANN that

they depend upon public access to Whois in order to respond swiftly and effectively to these abuses. It would be irresponsible to take this critical tool from their hands.

Respectfully submitted,

ENTERTAINMENT SOFTWARE ASSOCIATION