

DEPOSITORY

January 27, 2011

Mr. Rod Beckstrom
President and Chief Executive Officer
Internet Corporation of Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292 6601

Re: Bulk Access Denial by the American Registry for Internet Numbers

Dear Mr. Beckstrom:

The Depository, Inc., a commercial registry for Internet Protocol (“IP”) numbers, respectfully submits this appeal to the Internet Corporation for Assigned Names and Numbers (“ICANN”) concerning the January 24, 2011, denial by the American Registry for Internet Numbers (“ARIN”) of bulk access to the public, Whois database currently maintained by ARIN. This appeal is based upon the intentional and anti-competitive nature of the denial and its negative effects on the security, stability and competitive environment of the Internet. These are the very goals for which ICANN was created by the United States government and accepted by the international Internet community.¹

The Depository, Inc. (“Depository”), submits this written appeal to ICANN because, although no formal appeal process exists for this matter, ICANN is authorized, through its contract with the U.S. Department of Commerce (“DoC”), to perform the IP number allocation functions previously provided by the Internet Assigned Numbers Authority (“IANA”)² (See DoC-ICANN Contract Number SA1301-06-

¹ “The new system must be open and competitive. The perpetuation or the establishment of a monopoly regime in the domain name system is not in the public interest.” Vint Cerf, speaking about the parallel system of second-level domain name registration, March 23, 1998, “Response to the White House Green Paper on Domain Name System Reform.”

² Beginning May 30, 1972, the IANA function (though its name was not used until 1990) was performed primarily by Jon Postel at the Information Sciences Institute of the University of Southern California (“USC-ISI”), under a contract USC-ISI had with the U.S. Department of Defense. As early as 1972, USC-ISI delegated the IANA function to SRI International (“SRI”) which handled the administration of IP number assignments and the central Internet registry function at its Defense Data Network Network Information Center (“DDN-NIC”). Effective October 1, 1991, Government Systems, Inc., replaced SRI and subcontracted the functions to Network Solutions, Inc. (“NSI”). On January 1, 1993, NSI was awarded a cooperative agreement by the National Sciences Foundation (“NSF”) to assume responsibility for IP number assignments, among other functions. On December 1, 1997, NSF allowed NSI to transfer the IP number distribution function to a newly-formed, private non-profit, 501(c) (6) corporation, known as ARIN. Although DoC has assumed the governmental oversight of these activities from the NSF, and the DoC has a contract with ICANN, ICANN has no contract with ARIN. For the first time in this entire

CN-0048 <http://www.icann.org/en/general/iana-contract-14aug06.pdf>). These functions include overall responsibility for allocated and unallocated IPv4 and IPv6 numbers and Autonomous System Numbers. ICANN also acts as the Internet registry for IPv4 numbers allocated before the advent of regional IP number registries, including ARIN.³ Although ARIN has declined to enter into any contractual relationship with ICANN, ICANN nonetheless distributes certain blocks of previously unallocated IP numbers to ARIN and, therefore, could withhold any further allocations should ICANN deem ARIN's denial of bulk access to be anti-competitive or not in the interests of stability and security of the Internet infrastructure.⁴

Bulk Whois Data

The concept of Whois data is nearly as old as the Internet. Registries for second-level domain names and for IP numbers maintain and update "authoritative," free "Whois" services open to the public. The concept of "bulk access" to an entire database of web information goes back at least to 1999, when NSI, as the *registry for .com, .org and .net*, began granting access to its entire top-level zone files to newly-formed registrars. Under the terms of the original bulk access agreement, known as a "Zone File Access Agreement," the data could be downloaded and used for any legal purpose, not prohibited under the agreement. The two specific prohibitions were: (1) spam (*i.e.*, "...the transmission... of mass unsolicited, commercial advertising or solicitations to entities other than your own existing customers"; and (2) high volume, robotic querying (*i.e.*, high volume, automated, electronic processes that send queries or data to the systems of "...the registry...." The recipient of bulk access data was permitted to redistribute the data insofar "as it has been incorporated by you into a value-added product or service that does not permit the extraction of a substantial portion of the data from the value-added product or service." Finally, the recipient agreed that no proprietary (*i.e.*, ownership) rights in the data were transferred due to the access and that the data was being provided "as is."⁵

38 year history, the entity performing the distribution of IP numbers has no contract with anyone in the U.S. governmental chain of authority. ARIN, as emperor, has no clothes. (For another discussion of this issue, see <http://ciara.fiu.edu/publications/Rubi%20-%20Property%20Rights%20in%20IP%20Numbers.pdf>, Ernesto M. Rubi, "The Impending IPv4 Crisis: How U.S. Courts are Likely to Approach the Question of Ownership Rights in IPv4 Numbers," November, 2010.)

³ In addition, the DNS zone maintenance function for IN-ADDR.ARPA will transition in February, 2011, to ICANN from ARIN. Thus, this function will now be managed by ICANN concurrently with its central assignment of IPv4 numbers to registries such as ARIN.

⁴ ARIN currently has over 48,000,000 IPv4 numbers in its inventory, so suspension of further distribution by ICANN will not affect any immediate impact on daily operations or pending requests.

⁵ A sample of the early bulk access agreement, known as a Zone File Access Agreement, can be found at <http://www.icann.org/en/nsi/nsi-registry-agreement-appd-04nov99.htm>.

In turn, *domain name registrars* followed the same pattern for allowing bulk access to their registration data. Bulk access to data maintained by the registrars is covered under the Registrar Accreditation Agreement, and includes the same two prohibitions (see <http://www.icann.org/en/registrars/ra-agreement-17may01.htm#3.3.6>, 3.3.6.3 - 5).

ARIN, as an *IP number registry*, also grants access to the data it maintains for IP numbers. IP number registries, including ICANN's function as an IP number registry, were created to enable different organizations, in an authoritative manner, to understand and identify which IP numbers were in use and who is (was) using those numbers. The concept is one of authentication. Search engines were provided through a service called Whois. The registries also processed requests to change or to delete the technical information regarding specific IP numbers. The technical information contained in these registry databases is published and shared with the entire Internet community to provide added security and stability to the infrastructure. The primary function is to enable operational contact persons to find their counterparts in other organizations to resolve technical problems. These registries also became the places where requests for numbers (and additional numbers) were made.

ARIN's published "Bulk Whois Data Request Form," which has been substantially the same since 2003, includes the following two-sentence "Acceptable Use Policy" ("AUP"):

The ARIN WHOIS data is for Internet operational or technical research purposes pertaining to Internet operations only. It may not be used for advertising, direct marketing, market research, or similar purposes.

The intent of this "Policy" is parallel to and consistent with the two prohibitions of spam and high-volume querying on the domain name registration side of the Internet infrastructure. AfriNIC, APNIC, LACNIC and RIPE have similar, if not identical, AUPs. The Depository has a similar, if not identical, AUP.⁶

⁶ ARIN, however, recently violated its own AUP. Turning to "Legacy" holders, *i.e.*, holders of IP numbers allocated long before the existence of ARIN, with whom ARIN has no contractual relationship whatsoever, ARIN sent emails trying to entice these Legacy holders to sign contracts with ARIN, contracts which eliminate Legacy holders' rights in their decades-old assignments:

"So, we've devised this sort of phased system, where we notify Class A holders – we notified them back in December, I think it was, or November – about the existence of the Legacy RSA. Then we recently worked our way through the Class B holders, there are 4,500 of those. So we sent notifications, just a letter of information. And based on that, this past letter, we've gotten quite a bit of feedback, quite a bit of interest, which I have a slide later to show that. And our third phase will be the Class C holders. That one's going to be really big, so we're kind of waiting a little bit, and we'll work our way through those, eventually. No, we're not recycling spam."

See ARIN XXI Members Meeting Draft Transcript, https://www.arin.net/participate/meetings/reports/ARIN_XXI/mem_transcript.html#anchor_5