

From: Todd_Flournoy@mpaa.org
Date: 27 October 2007 7:23:53 AM
To: twomey@icann.org
Subject: MPAA WhoIs Comments

Please find attached a copy of MPAs WhoIs Comments for your consideration. Thank you and please dont hesitate to contact me should you need more information.

Best Regards,

Todd Flournoy

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The Motion Picture Association (MPA) is pleased to offer these views in response to ICANN's solicitation of public comments on changes to the Whois system. See http://www.icann.org/public_comment/#whois-comments-2007.

The Motion Picture Association (MPA) serves as the voice and advocate of six of the largest producers and distributors of filmed entertainment. Founded in 1922 as the trade association for the American film industry, MPA today 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.

MPA and its member companies have been active participants in the ongoing debate within ICANN regarding Whois. Both last year and earlier this year, we have participated in public comment exercises within ICANN on this topic. We refer you to those submissions for more information on how MPA and its member companies use Whois, and why we strongly believe that the system of public access to contact data on domain name registrants via Whois is in the best interests of the Internet as a whole. See <http://forum.icann.org/lists/whois-services-comments/msg00027.html> for the 2007 submission, and <http://forum.icann.org/lists/whois-comments/msg00010.html> for the 2006 submission.

We understand that three specific motions regarding Whois will be presented for consideration by the GNSO council on October 31. These are set out on pages 9-10 of the "Staff

Overview of Recent GNSO Activities” cited in the request for comments. We focus our comments on these three proposals.

Motion #1: MPA urges the Council to reject Motion #1, which endorses the “operational point of contact” proposal (OPOC) and pushes forward with its implementation. The OPOC proposal has been the subject of debate within ICANN for years, and has been under special scrutiny by a Working Group over the past six months. That Working Group reached agreement on a few points, notably that gTLD registrants who are “legal persons” should not be able to hide their contact data, or that of their administrative or technical contacts, from public access. However, in many other critical areas, the Working Group made little if any progress. Taken as a whole, whatever refinements the Working Group recommended to the OPOC proposal still do not provide a viable basis for departing from the well-established and time-tested policy of public access to Whois data.

To give just one example: under the OPOC proposal, the OPOC is supposed to “reliably pass on data to resolve operational issues relating to the domain name.” As MPA noted in its previous comments, “[E]ven if the OPOC did ‘pass on data’ [such as a query from an MPA member company] 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.” The Working Group sought to address this problem by defining the circumstances under which an OPOC would be obligated to “reveal” the contact data of the registrant when presented by the requester with reasonable evidence of actionable harm. However, some Working Group participants rejected this approach in its entirety, insisting that under no circumstances should the OPOC “reveal” this data. Ultimately, no agreement could be reached, and thus MPA’s concern remains entirely unsatisfied.

Similarly, MPA warned in its previous submission 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.” The Working Group was specifically directed to work on developing such a mechanism. But it made virtually no progress toward this goal. It could not even reach agreement on whether any such mechanism should be made available to entities in the private sector, even to combat phishing or other forms of online fraud. Here again, the efforts of the Working Group did not produce anything that would make it possible to move ahead with implementation of the OPOC proposal. MPA strongly urges the GNSO Council NOT to endorse the OPOC proposal at this time.

Motion #2: MPA supports this motion, which would initiate a comprehensive study of several issues relating to Whois, its uses and abuses. A well-designed, well-executed study could provide ICANN with meaningful factual data that would support better policymaking regarding Whois in the future. The lack of such data is certainly one reason why the policy development process regarding Whois has been so protracted.

Motion #3: MPA strongly urges the GNSO Council to reject this motion, which would eliminate the provisions in ICANN's contracts with gTLD registries and registrars that require the collection of accurate, current contact data on registrants, and its publication via Whois. Since publicly accessible Whois data has been a feature of the domain name system ever since its inception, adoption of this motion would be a giant step into the unknown. The most likely outcome is that every registry and registrar would set its own rules about what contact information (if any) it collected from registrants; how it used that information, and what data (if any) would be available to the public, or even to the highest bidder. Such a "system," if it can be called that, would be a boon to online fraud artists of every description, and a disaster to nearly every one else, including domain name registrants as well as intellectual property owners, consumer advocates, and law enforcement agencies.

In closing, MPA wishes to stress that it is not arguing that the current Whois system is perfect and cannot be improved. Indeed, we believe ICANN should refocus its efforts on improving Whois. Further pursuit of the unworkable OPOC plan simply drains resources of ICANN and its participants that could better be directed toward improving the accuracy of Whois data and other efforts to enhance the role of Whois in promoting accountability and transparency online.

Respectfully submitted,

Todd Flournoy

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