

TO: GNSO Council
CC: ICANN CEO; Chair, ICANN board of directors
FM: Sam Mosenkis, American Society of Composers, Authors, and Publishers
RE: Comments on Whois motions
DT: October 24, 2007

The American Society of Composers, Authors and Publishers (“ASCAP”) appreciates this opportunity to comment in response to the solicitation on ICANN’s public comment page, see http://www.icann.org/public_comment/#whois-comments-2007. For the reasons stated below, we urge the GNSO Council to reject motions 1 and 3 of the options before it regarding Whois (the motions can be found at pages 9-10 of <http://gns0.icann.org/drafts/icann-staff-overview-of-whois11oct07.pdf>).

ASCAP has been engaged in the Whois debates within ICANN for several years, as a founding member of, and an active participant in, the Intellectual Property Constituency (“IPC”) of the GNSO Council. Some of our previous comments on this subject can be found at <http://forum.icann.org/lists/whois-comments/msg00017.html> and at <http://forum.icann.org/lists/whois-services-comments/msg00021.html>.

ASCAP speaks for hundreds of thousands of individuals – the more than 300,000 U.S. composers, songwriters, lyricists and music publishers that are members of our association, and hundreds of thousands of other music creators worldwide whom we represent through agreements with affiliated international performing rights societies. While many of these creative people have an active presence on the Internet, many others do not. The vast majority, we are sure, know little or nothing about ICANN. Yet the decisions that ICANN makes can impact every one of these people.

In the case of Whois, ICANN’s decisions can help these people protect their rights when the music they have created is exploited online; or, ICANN’s decisions can place roadblocks in the way of that protection. Either way, ICANN must take into account the interests of these hundreds of thousands of people, whether or not they fall within anyone’s definition of the “Internet community.”

As we have explained in previous submissions, ASCAP protects the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works, including (since 1995) performances that take place online. Publicly available and accurate Whois data – particularly contact information on domain name owners – is critical for ASCAP to perform this function. When our members’ music is being performed on a website corresponding to a particular domain name, we often rely on Whois data to contact website owners, so that we can negotiate performance licenses, and fairly distribute royalties to the music’s creators and publishers. To the extent access to Whois data is restricted or eliminated, this process will become slower, more onerous and more costly to perform. The result is that music creators, who depend upon these license fees for an important part of their livelihoods, will receive less compensation for use of their works, will receive it later, or may not

receive it at all. With the assistance of accurate publicly-available Whois data, ASCAP has been able to license over 5,000 Internet sites and services over the past ten years. Without such data, thousands of creators would be potentially robbed of compensation they depend on to earn a living.

Our January 2007 submission spelled out our main concerns about the so-called OPOC proposal, under which most of the contact information now available through Whois would be suppressed from public access, and replaced by information for an “operational point of contact.” The OPOC proposal was opposed by half of the GNSO constituencies; and there existed sufficient concerns about this proposal that the GNSO Council chartered a Working Group to examine several aspects of it in more detail. This Working Group worked intensively over a period of several months, but in the end made little progress.

Working Group members did agree that the OPOC option should only be made available to individual domain name registrants, not to “legal persons.” This is a step forward. But at ASCAP we have licensed many individual website owners for the public performance of our members’ music, and it would have a significant detrimental impact on our members if such licenses became harder or more costly to acquire due to the unavailability of useful Whois data.

More significantly, the Working Group members failed to agree on either a clear “job description” for the OPOC, or on an alternative mechanism by which ASCAP and other entities with a legitimate need for complete contact data could reliably and efficiently access the data that would be hidden from public view under the OPOC proposal. In sum, our main concerns about the OPOC proposal remain unsatisfied, and thus we strongly oppose motion #1, under which the GNSO Council would endorse the OPOC proposal and push ahead with its implementation despite its fundamental flaws.

Some of the proponents of the OPOC proposal have put forward motion #3. In case the resolution to push forward with OPOC fails, they want the GNSO Council to go on record for the elimination of all Whois-related obligations from the contracts between ICANN and the registries and registrars. This irresponsible proposal would constitute an enormous step backwards. If it were adopted, every registry and registrar would set its own rules about what data to collect regarding domain name registrants; what data to sell to the highest bidder or to reserve exclusively for the registry/registrar’s own marketing efforts; and what data – if any at all – to make public. The result would be to destroy the enormous value that all Internet users – and many Internet non-users, including many of ASCAP’s members --- derive from the availability to all of a complete database of domain name registrant contact information. Were ICANN actually to take such a step, it would forfeit whatever credibility it had established over the past nine years as a responsible steward of the domain name system.

Also before the GNSO Council is motion #2, which calls for a comprehensive, objective study of the factual issues regarding Whois uses and abuses, and also regarding the proliferation of proxy registration services. It should simply be common sense that that such a study would improve the quality of ICANN’s future decision making on Whois issues.

In closing, ASCAP once again asks ICANN’s decision makers – on the GNSO council, on the Board of Directors, and in executive positions – to bear in mind the impact of their

decisions on the full range of the community that will be affected. ASCAP members are creators and publishers of music, but they are also much more. They are consumers, who need protection against online frauds such as phishing; they are parents, who want to know who stands behind the websites and other Internet resources to which their children are exposed; they are citizens, who expect their law enforcement agencies to be vigilant and effective against online criminals of all kinds. All of these interests are advanced by maintaining and strengthening public access to Whois data; all of them could be threatened by any move to dismantle or weaken this powerful tool for accountability and transparency online. It is time for ICANN to definitively reject such proposals and to turn its attention to other ways of making the domain name system work better in the interests of the entire community.

Thank you for considering ASACP's views.

Respectfully submitted,

Sam Mosenkis

Vice President of Legal Affairs