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2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

August 8, 2003

The Honorable Donald Evans
Secretary
U.S. Department of Commerce
Washington, D.C. 20230

Dear Mr. Secretary:

As Chairman and Ranking Member of the Subcommittee on Courts, the Internet, and Intellectual Property, we are interested in developments that affect the operation of the Internet's Domain Name System (DNS) and the public domain name registrant database known as "Whois."

It is critical that the Department of Commerce exercise sustained vigilance over the Internet Corporation for Assigned Names and Numbers' (ICANN) and its role in implementing policies and decisions that affect DNS users.

With the current Memorandum of Understanding (MOU) between ICANN and the Department due to expire on September 30, we write to express our support for the inclusion of strong intellectual property enforcement provisions in any successive MOU. Additionally, to achieve maximum transparency and accountability, we urge the Department to limit any extension of the MOU to a one-year period.

In the transition to private management of the Internet, it is vitally important to (1) preserve public access to online systems, like Whois, which display contact information of owners of Internet addresses; and (2) improve the integrity of the contact information that is provided.

Law enforcement officials have said that continued access to accurate Whois data is necessary to identify and apprehend criminals, including child pornographers, those who commit fraud or piracy on the Internet, and individuals or groups that might threaten network security. Intellectual property owners and individual consumers rely on the

accuracy and public accessibility of Whois information to protect their rights and to pursue civil claims. Trademark and copyright owners, in particular, require accurate and accessible Whois data to resolve domain name disputes and investigate intellectual property violations such as piracy and counterfeiting.

The importance of providing Whois access is clear. ICANN's obligation to ensure such access is also clear. Since 1999, all accredited registrars have been required to provide public access to the full database of registered domain names. Explicit provisions of ICANN's Registrar Accreditation Agreement (RAA) require registrars to:

- inform registrants of their obligation to provide "accurate and reliable contact details and promptly correct and update" such information;
- obtain the consent of registrants to the specified use of their contact information;
- take steps to ensure that Whois data provided by registrants is accurate, complete, and current;
- respond to reports of false contact data;
- make specified Whois data publicly available online, in real time, and without charge; and
- provide "bulk Whois" data to third-party providers under stated terms and conditions.

Despite the demonstrated need and obligation for registrars to provide reasonable access to accurate Whois data, there is growing evidence that ICANN has failed to enforce these contractual agreements effectively. The persistent practice by accredited registrars of accepting obviously false contact data from registrants and the recent actions by some large registrars to impose onerous and adhesive contractual restrictions on the availability of bulk Whois data are two examples of apparent non-compliance that ICANN has not adequately addressed.

ICANN management and its constituent bodies are aware of these concerns. Nevertheless, there is little indication that enforcement of these contractual agreements is a priority. The steps ICANN has taken are modest. For example, while ICANN recently created a central mechanism for receiving complaints about false Whois data, there is little transparency to complainants who often find it difficult to obtain information regarding what actions, if any, a given registrar or ICANN has taken in response. Additionally, there are reports that registrars have refused, in violation of their obligations under the RAA, to transfer domain name registrations after being so ordered by adjudicators under ICANN's Uniform Dispute Resolution Policy. Where there is a record of non-compliance with the terms of the RAA, ICANN must be more aggressive in exercising its authority to revoke a registrar's Accreditation.

Our Subcommittee has previously conducted hearings that examined privacy and intellectual property issues affecting Whois. The current discussion within ICANN involving "tiered access" and other proposals to change long-standing Whois policies have served to refocus attention on these issues. While we support efforts to protect privacy, it is imperative that the Internet's anonymity not serve as a shield for those who would harm children, consumers, network security, or the legitimate interests of intellectual property owners.

Given these concerns, we will appreciate your assessment of ICANN's efforts to enforce the Whois-related provisions of the RAA and your description of the specific steps the Department has taken to encourage ICANN, registrars, and registries to honor their contractual obligations. Additionally, an assessment of how the Department will address these concerns in any possible extension of the MOU will be greatly appreciated.

Another area of great interest to the Subcommittee is the increased role of the country code Top Level Domains (ccTLD's), the fastest-growing segment of the DNS. Many ccTLD's have adopted prohibitive Whois access policies that are substantially more restrictive than those that generally apply in the generic Top Level Domains (gTLD's), such as .com, .net, and .org.

We understand that ICANN currently has no contractual agreements with ccTLD's concerning access to Whois data or the related issue of dispute resolution in cybersquatting cases. While we are sensitive to the need to achieve consensus in seeking to bring ccTLD's under the umbrella of ICANN and we are encouraged by the recent approval by the ICANN Board of Directors of a new Country Code Name Supporting Organization (ccNSO), we were disappointed to learn that the ccNSO charter apparently seems to anticipate no meaningful role for ICANN in shaping ccNSO Whois and dispute resolution policies.

The Department is to be commended for seeking to promote the establishment of stable relationships between ICANN and the ccTLD's. However, we are troubled by ICANN's apparent inability to meaningfully contribute to accountability, transparency, and the establishment of a forum for the efficient resolution of domain name disputes in the formative stages of the relationship with ccTLD's.

In light of the foregoing, we ask that you provide us with your opinion of whether the ccNSO structure and charter adopted by the ICANN Board last month satisfy the MOU obligation of ICANN with regard to the ccTLD's; and, if not, what steps are required to meet those obligations. Additionally, we will appreciate your assessment of whether the ccNSO charter permits the development of binding policies on Whois or dispute resolution within the ICANN framework or whether other steps are necessary to


expand that scope.

Finally, we will appreciate your detailing for the Subcommittee the specific steps the Department has either taken or is in the process of implementing to encourage ccTLD's to adopt open Whois and dispute resolution policies. We are interested in understanding the full range of the Department's activities in this area, including activities internal to ICANN, such as participating in the Governmental Advisory Committee, as well as activities external to ICANN, including the use of bilateral discussions with other governments and the promotion of these policies through other intergovernmental organizations including WIPO and ITU.

In light of the imminent expiration of the current MOU, we would appreciate your addressing our concerns as soon as possible. Your responses will help the Subcommittee exercise its oversight responsibility and assist us in assessing the need for legislation to promote the accessibility, integrity, and comprehensiveness of domain name registrant contact information.

Thank you for your prompt attention to these important issues.

Sincerely,



LAMAR S. SMITH
Chairman, Subcommittee on Courts,
The Internet, and Intellectual Property



HOWARD L. BERMAN
Ranking Member, Subcommittee on
Courts, The Internet, and Intellectual
Property