

STATEMENT OF AMICUS CURIAE

The Electronic Privacy information Center (EPIC) is a public interest research center in Washington, D.C. that was established in 1994 to focus public attention on emerging civil liberties issues. EPIC has participated as amicus curiae in a wide variety of privacy cases, most recently *Hiibel v. Sixth Judicial Ct. of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2004); *Smith v. Doe*, 538 U.S. 84 (2003); and *Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150 (2002). In this case, NTIA's policies compel registrants of .us domain names to disclose their personal information in violation of the First Amendment and in contravention of international policy and practice. EPIC believes it is vital to understand the extent to which the NTIA's policy for the .us domain is contrary to international expertise and the practices of other countries that administer similar country code top level domains (ccTLDs). This brief is filed with the consent of Appellant and Appellees. Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

Implicit in the right to free speech is the right to speak anonymously, without fear of retaliation. *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 341-42 (1995); *Talley v. California*, 362 U.S. 60, 64-65 (1960). As the means by which we can be contacted increase, so too do the means by which

we can be retaliated against. Speakers and their right to free speech is not protected merely by shielding their names, but also shielding their personal information from those who would use it to intimidate or harm them. Thus, the right to free speech is not only the right to speak without giving a name, but the right not to disclose personal information as a condition of speech.

The WHOIS database was created to allow system administrators to quickly contact domain owners to track down, isolate, and repair technical problems on the Internet.¹ As more users, both individual and corporate, began to register their own domains, the potential uses for WHOIS grew. In the absence of privacy protections, WHOIS provides an automatic, immediate way to connect the content of a message originating from a domain to its publisher, if not its author. The NTIA has not only failed to implement privacy protections into the .us domain name registration process, it now actively seeks to ban privacy and anonymity protections developed by the private market.

The .us domain, administered by the National Telecommunications and Information Administration (NTIA) through the private company Neustar, thus exposes registrants' personal information and chills their

¹ For additional background information on WHOIS, see *Privacy and Human Rights: an International Survey of Privacy Laws and Developments* 133-37 (Marc Rotenberg & Cedric Laurant, eds., 2004). See also EPIC, *WHOIS* <http://www.epic.org/privacy/whois> (last visited Apr. 21, 2006).

speech. An opinion posted on a .us website or originating from a .us email account is thus linked with the name, physical address, email address, and phone number of its author or publisher.²

Such a policy is contrary not only to the right to speak and publish freely, it is contrary to the limited purpose of the WHOIS database, and out of step with international consensus on handling domain name registrants' contact information. Several international data protection bodies have addressed the privacy threats inherent in WHOIS, and agree that individuals should not be compelled to broadcast their personal information as a precondition to registering a domain name.

The .us country code top level domain (ccTLD) is also but one of hundreds of ccTLDs, administered by countries and international bodies around the world. Comparing the .us policy to a sampling of other ccTLDs shows that NTIA falls far below the standard for protecting registrants' privacy.

ARGUMENT

I. NTIA's Policy Against Proxies Contradicts the Opinions of

International Organizations Expert in Communications Privacy

² The District Court appeared to draw a distinction between Peterson's rights as a speaker and those as a publisher, noting that Peterson could have found another domain holder to publish his anonymous opinions. This distinction should not affect Peterson's rights to anonymity, however. *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (Ordinance prohibiting anonymous distribution of materials authored by others unconstitutional).

The need to safeguard the privacy of those who register Internet domain names antedates NTIA's policy of prohibiting proxies. Several international organizations have addressed the issue of WHOIS privacy, and these experts are in consensus that registrants should not be compelled to disclose personal information. These organizations include the International Working Group on Data Protection in Telecommunications, the Article 26 Working Party, and the Directorate General of Internal Markets for the European Commission.

The International Working Group on Data Protection in Telecommunications (IWGDPT) is composed of the data protection commissioners and telecommunications authorities of various nations. The IWGDPT issued an opinion on WHOIS as early as 2000, stating that collecting and publishing the personal information of registrants violated several national and international laws. IWGDPT, *Common Position on Privacy and Data Protection Aspects of the Registration of Domain Names on the Internet* (2000).³ According to the IWGDPT, the right to keep information like telephone numbers private "should not be abolished when registering a domain name." *Id.* Furthermore, the IWGDPT stated that the data collected and published through WHOIS should be limited to that

³ http://www.datenschutz-berlin.de/doc/int/iwgdpt/dns_en.htm.

which is necessary for WHOIS's original purpose. *Id.* That purpose, according to a recent ICANN determination, is to resolve technical problems with the name servers. E-mail from Generic Names Supporting Organization, ICANN, to GNSO Mailing List (Apr. 12, 2006, 19:03:43 +0200).⁴ Since the personal contact information of the registrant is unnecessary for these purposes, the IWGDPT concluded that such private information should not be collected.

The European Union's Data Protection Directive established the Article 29 Working Party (A29WP) to make recommendations to the European Commission and the public on matters affecting personal data protection and privacy. Council Directive 95/46, art. 29, 1995 O.J. (L 281) 31 (EC).⁵ In 2003, the A29WP issued an opinion on WHOIS and its impact on privacy. *A29WP, Opinion 2/2003 on the Application of the Data Protection Principles to the Whois Directories.*⁶ In this report, the A29WP concluded that "there is no legal ground justifying the mandatory publication of personal data referring to [an individual] person." *Id.* at 3. The A29WP went on to specifically note that users should be able to use proxies. *Id.* The

⁴ available at <http://gns0.icann.org/mailling-lists/archives/council/msg02393.html>.

⁵ reprinted in *The Privacy Law Sourcebook: United States Law, International Law, and Recent Developments* 501-04 (Marc Rotenberg, ed., 2003).

⁶ available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2003/wp76_en.pdf.

A29WP also concluded that WHOIS data should be used only for the original purposes of the database. *Id.*

The European Commission's Internal Market Directorate-General, which coordinates the Commission's commercial policies, also determined that WHOIS directories posed privacy problems. Internal Market Directorate-General, Contribution of the European Commission on the Whois Database (2003).⁷ The Directorate-General first noted that WHOIS entries contained more personal information than was necessary to fulfill the database's original purpose of resolving technical issues. *Id.* The comment goes on to specifically suggest that "Trusted Third Parties" (i.e., proxies) would be a welcome solution to protecting registrants' privacy. *Id.* It further encouraged that the general public's access to WHOIS data be limited, with necessary information being disclosed for legitimate legal purposes on a case-by-case basis.

II. NTIA's Policy of Disclosure for .us Provides Less Privacy than Many Other Countries Provide for their Country Code Domains

The .us domain is a country code top level domain (ccTLD) that is uniquely under the administrative control of the United States government. There are 243 ccTLDs, each assigned to a particular national body. For

⁷ *available at* <http://www.dnso.org/dnso/notes/ec-comments-whois-22jan03.pdf>.

instance, just as the .us is administered by a United States entity, the .ca ccTLD is administered by a Canadian authority and the .au ccTLD by an Australian administrator. Each country-specific administrator determines its ccTLD's policy on WHOIS data and how personal information is disclosed.

The WHOIS policies for ccTLDs around the world provide a range of privacy protections. Unfortunately, NTIA's policy is one of the worst. It is particularly unfortunate that a federal agency shows little regard for the privacy rights of those who register an Internet domain name administered by the United States while the United States seeks to promote better human rights practices in other countries. *See* Condoleezza Rice, *Preface* to U.S. State Dep't, *Country Reports on Human Rights Practices 2005* (2005).⁸

A. ccTLDs Prohibiting Access to Personal Information

One of the best methods of protecting domain holders' privacy is to refrain from publishing personal contact information in the WHOIS database, rendering the data inaccessible to the general Internet-using public.

Chile's ccTLD, .cl, provides one of the most robust protections for the domain name holders' privacy. Only the administrative and technical contacts can be viewed, and even then, only after a user provides an email address to which the data can be sent. *See* NIC Chile, *Busqueda de*

⁸ <http://www.state.gov/g/drl/rls/hrrpt/2005/61552.htm>.

Dominios.⁹ Australia's ccTLD, .au, does not disclose the address, telephone numbers, or fax numbers of domain name holders. Australian Domain Name Administration, *WHOIS Policy* § 4 (2003).¹⁰ Only the name and email address of the holder and technical contact are provided.¹¹ Canada likewise provides only an email address as a point of contact for the domain name holder, publishing only the contact information for technical and administrative managers, who will often be persons associated with the registrar or Internet service provider, regardless of whether or not a proxy is used. Canadian Internet Registration Authority, *CIRA Privacy Policy v.1.2*, §6.¹²

Other ccTLDs' WHOIS policies recognize a distinction between the privacy that should be afforded to natural persons that register an Internet domain name and the accountability required of businesses that register a domain name for commercial purposes. The .eu ccTLD for the European Union requires only an email address as the contact information for a natural person, restricting the disclosure of individuals' physical address and phone

⁹ <http://www.nic.cl/busqueda.html> (last visited Apr. 19, 2006). Searches for several .cl domain names reveal this policy. Chile, notably, is one of the treaty signatories that Respondents cited for the proposition that the .us WHOIS must contain personal contact information. Def.'s Opp'n to Prelim. Inj.15.

¹⁰ <http://auda.org.au/policies/auda-2003-08/>.

¹¹ Australia was another country cited as a treaty signatory that agreed to provide contact information for domain registrations. Def.'s Opp'n to Prelim. Inj.15.

¹² <http://www.cira.ca/en/privacypolicy.html> (last visited Apr. 19, 2006).

number. European Registry of Internet Domain Names, *WHOIS Policy v. 1.0*, § 2.4(ii) ¹³

In Germany and Switzerland, threats of phone harassment, spam, and identity theft informed the decision to keep private domain name holders' email addresses and phone numbers. DENIC eG, *Data Protection*; ¹⁴ SWITCH, *SWITCH WHOIS Gateway*. ¹⁵ Facing a lower threat of physical harassment, stalking, and attack in their respective countries, the administrators of the ccTLDs instead provide a mailing address, still noting, however, that domain name holders can provide alternate contact information. See DENIC eG, *FAQ for Domain Holders*; ¹⁶ SWITCH, *General Terms and Conditions* § 1.6 (2005). ¹⁷

Other ccTLDs' WHOIS policies provide even more protection. Ireland's .ie ccTLD provides no contact information for registrants via WHOIS--only a registrant's unique "handle." .ie Domain Registry, *Domain*

¹³ http://www.eurid.eu/en/shared/documents/whois_policy_v1_0.pdf (last visited Apr. 19, 2006).

¹⁴ *translated in* <http://www.denic.de/en/domains/recht/datenschutz/index.html> (last visited Apr. 19, 2006).

¹⁵ *translated in* http://www.switch.ch/search/whois_form.html (Follow hyperlink at bottom of page, then follow "Search" hyperlink) (last visited Apr. 19, 2006). Searches for various .ch domains reveal this policy.

¹⁶ *translated in* http://www.denic.de/en/faqs/domaininhaber/index.html#section_98 (last visited Apr. 19, 2006).

¹⁷ *translated in* https://nic.switch.ch/reg/terms/AGB_v7_en.pdf.

Name Search.¹⁸ Morocco does not provide any WHOIS data on its .ma domain registrations.¹⁹

B. ccTLDs Allowing Registrants to Opt-Out of Disclosing Information

A key feature of protecting an individual's privacy rights is the ability to control how information is kept or disclosed. In accordance with this principle, several other countries have ccTLD's WHOIS policies that allow individual users to opt out of the sharing of their personal information in the WHOIS database.

Some ccTLDs add stronger protections for individuals on top of the privacy measure provided for all domain name registrants. For instance, the United Kingdom allows individual users to opt out of having their addresses published on WHOIS. The .uk registry also will not publish the email addresses and phone numbers for registrants, technical contacts, or administrative contacts, for either natural or corporate persons. Nominet,

¹⁸ <http://www.domainregistry.ie/dns-search.php> (last visited Apr. 19, 2006) Searches of several .ie domain names reveal this policy.

¹⁹ Multiple attempts with multiple WHOIS clients failed to retrieve any data from the .ma WHOIS database; the administrating authority, ANRT, does not allow Web-based WHOIS searches on its site. ANRT, <http://www.anrt.net.ma> (last visited Apr. 19, 2006). Morocco is yet another country cited by Defendants as a signatory to a bilateral treaty requiring that the NTIA publish personal information in WHOIS that in fact provides better privacy protection for WHOIS data than does the NTIA. Def.'s Opp'n to Prelim. Inj.15.

FAQ WHOIS.²⁰ The Netherlands lets personal applicants choose to have contact details withheld or withdrawn from published WHOIS data. SIDN, *SIDN and Privacy*.²¹ Even organizational and commercial registrants can request this service, if special circumstances exist. *Id.*

Many ccTLDs in other countries provide protections only for individuals. France allows registrants of .nom.fr domains (who must be natural persons) to remove all personal information from the WHOIS database, including the name, address, phone number, fax number, and email address. AFNIC, *fr Naming Charter*, Art. 32.²² Denmark allows users to omit their names, addresses, and identities from WHOIS. DK Hostmaster, *General Conditions* § 9 (2006).²³ Poland's .pl domain also permits "private," or natural, persons to hide their personal information. NASK, *FAQ WHOIS*.²⁴ Austria allows registrants of .at domains to prevent Internet

²⁰ <http://www.nic.uk/other/whois/faq/> (last visited Apr. 19, 2006); Nominet, *Consumer Opt Out*, <http://www.nic.uk/other/whois/optout/> (last visited Apr. 19, 2006). See also Nominet, *WHOIS*, <http://www.nic.uk/other/whois/> (last visited Apr. 19, 2006). Searches on the .uk WHOIS reveal this policy.

²¹ translated in http://www.sidn.nl/ace.php/c,728,2999,,,SIDN_and_privacy.html (last visited Apr. 19, 2006).

²² translated in http://www.afnic.fr/obtenir/chartes/nommage-fr_en

²³ translated in [http://www.dk-](http://www.dk-hostmaster.dk/fileadmin/filer/pdf/generelle_vilkaar/General_conditions_under_DK_ver-01.pdf)

[hostmaster.dk/fileadmin/filer/pdf/generelle_vilkaar/General_conditions_under_DK_ver-01.pdf](http://www.dk-hostmaster.dk/fileadmin/filer/pdf/generelle_vilkaar/General_conditions_under_DK_ver-01.pdf). See also DK Hostmaster, *Anonymity*, <http://www.dk-hostmaster.dk/index.php?id=145> (last visited Apr. 19, 2006).

²⁴ translated in <http://www.dns.pl/english/whois.html> (last visited Apr. 19, 2006).

searches from revealing their email addresses, phone numbers and fax numbers. Nic.at, *Registration Agreement* § 5 (2004).²⁵

Canada, which already refrains from publishing individual registrants' contact information, will soon prevent registrants' names from appearing in WHOIS without their specific consent. Canadian Internet Registry Authority, *CIRA Proposed New WHOIS Policy Consultation* ²⁶

C. ccTLDs Allowing Registrants to Protect Anonymity Through Third Parties

Even those countries that do not provide specific protections in their ccTLD policies for privacy and anonymity will note the availability and benefits of proxy services that can safeguard individual registrants. This applies both to countries that do not explicitly limit any data disclosures and countries that specifically require certain disclosures.

For example, Japan's ccTLD registry does not explicitly limit the disclosure of WHOIS information, yet proxy registrations are acknowledged and allowed. JPRS, *Compliance of JP Domain Name Registry Service to "Personal Information Protection Act"* (2005).²⁷ Germany, however, while

²⁵ translated in <http://www.nic.at/en/registrierungsrichtlinien/#397>. See also Nic.at, *WHOIS Policy*, http://www.nic.at/en/service/legal_information/whois_policy/ (last visited Apr. 19, 2006).

²⁶ http://www.cira.ca/en/Whois/whois_privacy-policy.html (last visited Apr. 19, 2006).

²⁷ translated in <http://jprs.co.jp/en/topics/050510.html> ("In addition, it is noted that the new services to protect personal information, such as so-called proxy service, are emerging. "). A WHOIS search on the domain name "sony.jp," for instance, reveals that

specifically noting the policy reasons behind publishing registrants' addresses, notes that registrants may be able to enter instead the address of a trusted third party, who will essentially function as a proxy. See DENIC eG, *FAQ for Domain Holders*.²⁸ The ccTLDs for Austria and Sweden also suggest that a trustee may be designated to provide an address. Nic.at, *WHOIS Policy*;²⁹ II Foundation, *General Conditions for Registration of Domain Names* § IV.9 (2006)³⁰

Other ccTLDs, including Finland's .fi domain, actively promote the use of proxy services to protect the privacy of WHOIS data. During the registration process, the .fi domain gives registrants the option of designating a "representative," a proxy company whose contact information will appear in the WHOIS database. Fi-Domain, *Fi-Domain Instructions*.³¹ Switzerland not only allows the use of a trustee-type proxy, it also allows "recognized partners" (i.e., registrars) to act as proxies for registrants who

Sony Corporation has registered via a registrar's proxy service, PSI-Japan's Proxy Service Dept. See JPRS, *jp WHOIS*, <http://whois.jprs.jp/en/> (last visited Apr. 19, 2006); PSI-Japan, WHOIS Proxy Service, <http://www.psi.jp/support/article.php?id=241> (last visited Apr. 19, 2006).

²⁸ *translated in* http://www.denic.de/en/faqs/domaininhaber/index.html#section_98 (last visited Apr. 19, 2006)

²⁹ http://www.nic.at/en/service/legal_information/whois_policy/ (last visited Apr. 19, 2006).

³⁰ *translated in*

http://www.iis.se/english/domaner/allmanna_villkor_060315.shtml?lang=en

³¹ https://domain.ficora.fi/fiDomain/aca.aspx?Target=Help&language=en-GB#HELP_YLEINEN_08_OTSIKKO (last visited Apr. 19, 2006);

remain liable for the content and administration of their domain names.

SWITCH, *General Terms and Conditions* § 1.6 (2005)³²

CONCLUSION

NTIA's WHOIS policy, which actively bars proxy registration, falls below the lower limit of privacy protections set by the policies of other ccTLDs around the world. While other registries actively seek to protect the privacy of registrants' information, or at the least encourage the use of proxy registration, NTIA requires that any individual registering a .us domain submit detailed information that will allow any person, with good or evil intent, to email, call, fax, or visit in person that individual.

This survey of international opinions and the practices of other ccTLDs reveals that the NTIA's policy prohibiting proxies in the .us domain not only violates the First Amendment's guarantees of free and anonymous speech, but that it also contradicts established policy for privacy protection of Internet users who register domain names in many countries throughout the world. The United States cannot credibly promote respect for international human rights when it fails to safeguard the basic privacy rights of those who seek to register an Internet address in the domain managed by

³² translated in https://nic.switch.ch/reg/terms/AGB_v7_en.pdf.

the United States. For the foregoing reasons, the ruling of the District Court should be reversed.

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