

October 30, 2007

Mr. Vinton Cerf, Chairman
Mr. Paul Twomey, President & CEO
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601
USA

Dear Mr. Cerf, Mr Twomey, and Members of the ICANN Board,

The purpose of this letter is to express our support for changes to WHOIS services that would protect the privacy of individuals, specifically the removal of registrants' contact information from the publicly accessible WHOIS database.¹ It is also to propose a sensible resolution to the long-running discussion over WHOIS that would establish a bit of "policy stability" and allow the various constituencies to move on to other work

EPIC has had long-standing involvement in the WHOIS issue. As a member of the WHOIS Privacy Steering Committee, EPIC assisted in the development of the WHOIS work program, and has been a member of the Non-Commercial Users Constituency for several years. EPIC has submitted extensive comments to ICANN on WHOIS, and has testified before the US Congress in support of new privacy safeguards for WHOIS as well as filing a brief in the US courts on the privacy implications of the WHOIS registry.² The Public Voice coalition also organized an important letter in 2003 to ICANN regarding WHOIS policy that was signed by 57 organizations from more than 20 countries which recommended simply that ICANN consider the views of consumer organizations and civil liberties groups.³

Both the WHOIS Task Force and the WHOIS Working Group agree that new mechanisms must be adopted to address an individual's right to privacy and the protection of his/her data.⁴ Current ICANN WHOIS policy conflicts with national privacy laws, including the EU Data Protection Directive, which requires the establishment of a legal

¹ EPIC's comments on the ICANN WHOIS Task Force's "Preliminary Task Force Report on WHOIS Services," January 12, 2007, available at <<http://www.epic.org/privacy/whois/comments.html>>.

² See, e.g., EPIC, "Privacy Issues Report: The Creation of A New Task Force is Necessary For an Adequate Resolution of the Privacy Issues Associated With WHOIS," before the GNSO Council (Mar. 10, 2003), See EPIC Testimony Before House Subcommittee, Financial Institutions and Consumer Credit, Committee on Financial Services "ICANN and the WHOIS Database: Providing Access to Protect Consumers from Phishing," (July 18, 2006), available at <http://financialservices.house.gov/media/pdf/071806mr.pdf>; Brief Amicus Curiae of EPIC, Peterson v. Nat. Telecomm. & Info. Admin., No. 06-1216 (4th Cir. Apr. 24, 2006), available at http://www.epic.org/privacy/peterson/epic_peterson_amicus.pdf; See generally EPIC WHOIS page, <http://www.epic.org/privacy/whois/>.

³ The Public Voice, "WHOIS Letter to ICANN," (Oct. 28, 2003), <http://thepublicvoice.org/news/whoisletter.html>.

⁴ Final Report of the WHOIS Task Force, March 12, 2007, available at <<http://gns0.icann.org/issues/whois-privacy/whois-services-final-tf-report-12mar07.htm>>; and Final Report of the WHOIS Working Group, August 20, 2007, available at <<http://gns0.icann.org/drafts/icann-whois-wg-report-final-1-9.pdf>>.

framework to ensure that when personal information is collected, it is used only for its intended purpose. As personal information in the directory is used for other purposes and ICANN's policy keeps the information public and anonymously accessible, the database could be found illegal according to many national privacy and data protection laws including the European Data Protection Directive, European data protection laws and legislation in Canada and Australia.⁵

The Article 29 Working Party, an independent European advisory body on data protection and privacy, states that “in its current form the [WHOIS] database does not take account of the data protection and privacy rights of those identifiable persons who are named as the contacts for domain names and organizations.”⁶ The conflict with national privacy law is real and cannot be dismissed. A sensible resolution of the WHOIS matter must take this into account.

In addition, country code Top Level Domains are moving to provide more privacy protection in accordance with national law. For example, regarding Australia's TLD, .au, the WHOIS policy of the .au Domain Administration Ltd (AUDA) states in section 4.2, "In order to comply with Australian privacy legislation, registrant telephone and facsimile numbers will not be disclosed. In the case of id.au domain names (for individual registrants, rather than corporate registrants), the registrant contact name and address details also will not be disclosed."⁷

The Final Outcomes Report recently published by the WHOIS Working Group contains several key compromises and useful statements and represents significant progress on substantive WHOIS issues. The WHOIS Working Group found agreement in critical areas that advance the WHOIS discussion within ICANN and provide clear guidance to the ICANN Board.

In its report, the WHOIS Working Group accepted the Operational Point of Contact (OPoC) proposal as a starting point, and the best option to date. The OPoC proposal would replace publicly available registrant contact information with an intermediate contact responsible for relaying messages to the registrant. The Working Group agreed that there may be up to two OPoCs, and that an OPoC can be the Registrant, the Registrar, or any third party appointed by the Registrant. The Registrant is responsible for having a functional OPOC. The Working Party also agreed that the OPOC should have a consensual relationship to the Registrant with defined responsibilities. This would necessitate the creation of a new process, and changes to the Registrar Accreditation Agreement and Registrar-Registrant agreements to reflect this relationship.

⁵ EPIC and Privacy International, PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS 154-57 (“WHOIS”), available at <<http://www.epic.org/phr06>>.

⁶ Letter from Article 29 Working Party to ICANN Chair Vinton Cerf, March 12, 2007, available at <<http://www.icann.org/correspondence/schaar-to-cerf-12mar07.pdf>>.

⁷ For additional country code Top Level Domain policy examples, see EPIC Testimony Before House Subcommittee, Financial Institutions and Consumer Credit, Committee on Financial Services “ICANN and the WHOIS Database: Providing Access to Protect Consumers from Phishing,” available at <<http://financialservices.house.gov/media/pdf/071806mr.pdf>>.

The Board should support the agreed standard for disclosure of unpublished Whois personal data – reasonable evidence of actionable harm. But the Board should leave this term undefined, as it is now in the RAA for proxy services. This standard will allow the OPoC contact, registrars and registries to work within the framework of their national and local laws to provide access to this personal data.

OPoCs must be allowed to employ strategies and standards similar to those of the registrars and registries to ensure that the person receiving the protected personal WHOIS data is in fact a law enforcement official.

The OPoC proposal does not impede reasonable law or intellectual property enforcement efforts. In fact, effective implementation of the OPoC proposal would benefit all stakeholders by improving the accuracy of the information in the database. Because personal data will be kept private, individuals will provide more accurate data. As a result, the Whois database will be more useful and more reliable.

The OPoC proposal is not the ideal privacy solution. EPIC, as well as groups such as the Non-Commercial Users Constituency, recommended a distinction between commercial and non-commercial domains in order to protect the privacy of registrants of domain names used for religious purposes, political speech, organizational speech, and other forms of non-commercial speech. EPIC has previously stated that the WHOIS database should not publicize any registrant information, including name and jurisdiction.

The WHOIS Working Group has proposed a workable framework. It is not a perfect framework. But it will help ensure that the WHOIS policy conforms with law and allow ICANN to move forward. If it is not possible to adopt this solution, then the only sensible approach would be to allow the current WHOIS terms to simply sunset. Resolution 3 would be the only real option.

The signatories to this letter are willing to assist in finishing off the implementation details of the OPoC proposal.

Sincerely,

Marc Rotenberg
EPIC Executive Director

Allison Knight
Coordinator
Public Voice Project

Valerie Gordon,
Jamaica Sustainable Development
Network

Robin Gross
IP Justice

Robert Guerra, CPSR

Kim Heitman,
Board Member EFA
Deputy Chair AUDA

Norbert Klein
ICANN GNSO Council member
ICANN NCUC
Open Institute of Cambodia

Kathy Kleiman
Co-Founder, NCUC

Dan Krimm
TJ McIntyre (Chairman)
Digital Rights Ireland

Ville Oksanen
Vice Chairman, EFFI

Ross Rader,
Domain Direct

Members of the EPIC Advisory Board

Steven Aftergood, Project Director
Federation of American Scientists

David Banisar, Director
Freedom of Information Project, Privacy
International;
Visiting Research Fellow,
School of Law, University of Leeds

Christine L. Borgman
Professor & Presidential Chair
Dept of Information Studies, UCLA

James Boyle
Professor of Law
Duke Law School

David Chaum
Founder
Punchscan

Julie E. Cohen
Professor Law
Georgetown University Law Center

Simon Davies
Director General
Privacy International

David Farber
Distinguished Career Professor of
Computer Science and Public Policy,
Carnegie Mellon University

David H. Flaherty
Professor Emeritus
University of Western Ontario.

Austin Hill
Brudder Ventures

Jerry Kang
Professor of Law
UCLA Law School

Chris Larsen
CEO
Prosper Marketplace, Inc.

Mary Minow
Founder
LibraryLaw.com

Pablo Molina
Chief Information Officer
Georgetown University Law Center

Deborah C. Peel, MD,
Founder and Chair
Patient Privacy Rights

Anita Ramasastry
Associate Professor of Law
Director, Shidler Center for Law
Commerce & Technology
University of Washington School of
Law

Ronald L. Rivest
Professor of Electrical Engineering and
Computer Science
Massachusetts Institute of Technology

Pamela Samuelson
Distinguished Professor of Law;
Professor of Information Management;
Chancellor's Professor
School of Law – Boalt Hall
University of California at Berkeley

Bruce Schneier
CTO
BT Counterpaine

Edward G. Viltz
President and Founder
Internet Collaboration Coalition