

Copyright Coalition on Domain Names

PARTICIPANTS:

American Society of Composers,
Authors and Publishers (ASCAP)

Business Software Alliance (BSA)

Broadcast Music, Inc. (BMI)

Motion Picture Association of
America (MPAA)

Recording Industry Association
of America (RIAA)

Software and Information
Industry Association (SIIA)

Time Warner

Walt Disney Company

Counsel:

Steven J. Metalitz
Smith & Metalitz LLP
Email: metalitz@smimetlaw.com

Ryan M. Lehning
Smith & Metalitz LLP
Email:
rlehning@smimetlaw.com

Internet Domain Name Fraud – New Criminal and Civil Enforcement Tools

Prepared Testimony of

Mark Bohannon

General Counsel and Senior Vice President Public Policy
Software & Industry Information Association (SIIA)

On Behalf of
Copyright Coalition on Domain Names

Before the

**Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary
United States House of Representatives**

Washington, DC

February 4, 2004

Mark Bohannon
General Counsel and Senior Vice President Public Policy
Software & Information Industry Association (SIIA)
1090 Vermont Ave. NW, 6th Floor
Washington, DC 20005
Tel: (202) 289-7442; Fax: (202) 289-7097
Email: MBohannon@sia.net

U.S. House Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual Property
February 4, 2004

Summary of Testimony of Mark Bohannon, SIA
on behalf of the Copyright Coalition on Domain Names

The Copyright Coalition on Domain Names (“CCDN”) is made up of leading copyright industry trade associations; performance rights organizations; and copyright-owning companies. Its focus is to maintain public access to Whois data, and improve its accuracy and reliability, as a key enforcement tool against online infringement.

- **WHOIS: Accuracy and Accessibility are Critical to E-Commerce and Accountability Online**

Access to accurate and reliable Whois data is not only important for enforcing intellectual property rights, but is also vital for consumer protection; law enforcement investigations of online crimes; and network security. The recent epidemic of “phishing” or corporate identity theft involves all these concerns, and accurate Whois data could play a critical role in preventing or investigating such frauds. All Internet users have a stake in keeping Whois data accessible and making it more accurate.

- **Proposed Legislation is a Step Forward**

The Whois database remains riddled with inaccurate data, as it was at the time of the last hearing in September, 2003. We believe the legislation on the table at this hearing takes the right approach. It targets the “bad actors” who are using the Internet to commit crimes, infringe on intellectual property rights, or commit cybersquatting. It focuses solely on those already convicted of serious crimes, or found liable for online infringements, and who also have chosen to try to hide their tracks, complicate the work of law enforcement and undermine public confidence in e-commerce by deliberately inserting materially false contact data into Whois. It would increase the punishment that online criminals who employ this evasive technique are exposed to, and would firm up the possibility of enhanced statutory damages under copyright, and of treble damages under the Lanham Act, against pirates and counterfeiters who do likewise. In these ways, the proposed legislation would take an important step in the right direction toward cleaning up the Whois database.

- **What Further Steps Should be Considered?**

This legislation must be one element of a broader strategy to make comprehensive progress on this issue of improving the accuracy and currentness of Whois contact data. Besides enacting stronger incentives for registrants to provide accurate Whois data we look forward to working with all the key participants to increase the incentives on domain name registries and registrars to demand accurate data, to take reasonable steps to verify the accuracy of the data they receive, and to cancel the registrations of registrants who refuse to live up to this obligation. Given the attention Whois received in the recently completed Memorandum of Understanding between ICANN and the Department of Commerce, we hope that ICANN will more aggressively enforce its contracts, thus enhancing the accuracy of the Whois database. Though we do not have a specific legislative proposal to put forth at this time, we do believe that this is an appropriate subject for Congressional attention to ensure that the accuracy of Whois data – especially in the generic Top Level Domains – is improved, and that public access to this important data is not curtailed.

Chairman Smith, Representative Berman, and members of the Subcommittee:

Thank you for this opportunity to present the views of organizations of copyright owners on an issue that is vital to the enforcement of intellectual property rights in the online environment: ready access to accurate Whois data.

Before beginning my testimony, I would like to commend the Subcommittee for its diligent and consistent focus on this critical issue over the past several years, and especially, over the past few months. The September 4, 2003 hearing held by this subcommittee reinforced the importance of accurate and reliable Whois information, particularly in the context of the Department of Commerce's recent renewal of its Memorandum of Understanding with ICANN.

I am here today on behalf of the Copyright Coalition on Domain Names (CCDN), which has worked since 1999 on this issue. CCDN participants include leading industry trade associations such as the Business Software Alliance (BSA), the Motion Picture Association of America (MPAA), the Recording Industry Association of America (RIAA), and the Software and Information Industry Association (SIIA); the two largest organizations administering the performance right in musical compositions, ASCAP and BMI; and major copyright-owning companies such as Time Warner and the Walt Disney Company.¹

¹ I also serve as treasurer of the Intellectual Property Constituency (IPC), the international group organized under the auspices of the Internet Corporation for Assigned Names and Numbers (ICANN) and its Generic Names Supporting Organization (GNSO), to advise ICANN on intellectual property issues generally, including trademark as well as copyright matters. While this testimony has not been formally approved by the IPC, I believe it is generally consistent with the public policy positions that group has taken.

The interests of copyright owners in preserving and improving access to reliable Whois data overlap considerably with those of trademark owners. Of course, many of the companies represented by participants in CCDN own some of the world's most valuable trademarks and service marks. These companies invest heavily in defending these marks against infringements of their intellectual property rights that take place online. Many of my remarks today apply at least as much to trademark concerns as they do to copyright matters.

This testimony will address three main questions:

- Why is real-time public access to complete and accurate Whois data essential?
- How will your proposed legislation help?
- What further steps should be considered to improve the situation?

I. WHOIS: Accuracy and Accessibility are Critical to E-Commerce and Accountability Online

In its hearings over the past few years, this Subcommittee has compiled a comprehensive record establishing why it is essential for the public to continue to have real-time access to contact data on domain name registrants – referred to as “Whois data” – and why the accuracy and currentness of this data is of the utmost concern. CCDN's primary focus includes the availability of Whois data for use in enforcing intellectual property rights online, but we know that is only part of a wider picture of the importance of accurate and accessible Whois.

As you know, copyright owners are currently battling an epidemic of online piracy. Whois is a key tool for investigating these cases and identifying the parties responsible. Every pirate site has an address on the Internet; and through Whois and similar databases, virtually every Internet address can be linked to contact information about the party that registered the domain name corresponding to the site; about the party that hosts the site; or about the party that provides connectivity to it. No online piracy case can be resolved through the use of Whois alone; but nearly every online piracy investigation involves the use of Whois data at some point.

Trademark owners use Whois in a similar way to combat cybersquatting, the promotion of counterfeit products online, and a wide range of other online infringement problems. They also depend on accurate and accessible Whois for a number of other critical business purposes, such as trademark portfolio management, conducting due diligence on corporate acquisitions, and identifying company assets in insolvencies/bankruptcies.

Enforcing intellectual property rights is only one of the beneficial uses of Whois data. Others include:

- Consumer protection: In your hearings in 2002, the Federal Trade Commission explained how they rely upon accessible and accurate Whois data to track down online scam artists, particularly in the cross-border fraud cases to which consumer protection agencies around the world are devoting increasing attention.
- Law enforcement: Last fall you heard from a representative of the FBI about the role Whois data plays in law enforcement activities generally. Public access to

this data is critical to facilitate the gathering of evidence in cases of crimes carried out online, particularly in complex cybercrimes.

- Network security: The applications of Whois data in this arena deserve more attention than they have received. When a virus is detected, a denial of service attack unfolds, or another threat to the security of networked computing resources is identified, the response often requires instantaneous access to Whois data. ICANN's expert Security and Stability Advisory Committee recently concluded that "Whois data is important for the security and stability of the Internet" and that "the accuracy of Whois data used to provide contact information for the party responsible for an Internet resource must be improved."

Whois data has other important uses. It helps parents know who stands behind sites their children visit online; it helps consumers determine who they are dealing with when they shop online; and it plays a role in ferreting out the source of e-mail spam. In short, all Internet users need Whois to provide essential transparency and accountability on the Internet. We all have a stake in preserving and enhancing real-time access to this database, and in improving its quality and reliability.

II. Proposed Legislation is a Step Forward

It goes without saying that Whois cannot perform the critical functions I've just mentioned if the data is inaccurate, out-of-date, or otherwise unreliable. Unfortunately, despite this subcommittee's focused attention on this issue over the last few years, the Whois database remains woefully riddled with inaccuracies.

Empirical evidence showing this problem has been presented to this subcommittee before, notably with the testimony last fall of Ben Edelman of the Berkman Center for Internet & Society at Harvard University. There is little I need to add to his statistical studies and anecdotal examples. Furthermore, many of the domain names identified in the Edelman study are engaged in illegal, or suspect activity such as intellectual property infringement or cybersquatting. Law enforcement officials have repeatedly observed that those who commit crime online through the use of registered domain names routinely cover their tracks by providing false contact information for the Whois database. This includes fraudsters engaged in crimes such as “phishing” or corporate identity theft, which CCDN discussed at length in its testimony last fall.

It’s time for Congress to do something about this problem, and we believe that the legislation on the table at this hearing takes the right approach. The legislation is focused and narrowly tailored. It does not create any new crime or civil cause of action; it does not target those whose registrant contact information has grown stale or outdated; it does not penalize inadvertent or immaterial errors in Whois data; and it does not interfere in any way with the activities of those who register domain names and use them for legitimate purposes. Instead, it targets the “bad actors” who are using the Internet to commit crimes, infringe on intellectual property rights, or commit cybersquatting. It focuses solely on those already convicted of serious crimes, or found liable for online infringements, and who also have chosen to try to hide their tracks, complicate the work of law enforcement and undermine public confidence in e-commerce by deliberately inserting materially false contact data into Whois. It would increase the punishment that online criminals who employ this evasive technique are exposed to, and would firm up the possibility of enhanced statutory damages under copyright, and of treble damages under the Lanham Act, against pirates and counterfeiters who do likewise. In these

ways, the legislation before you today would take an important step, and in the right direction, toward cleaning up the Whois database.

It is important to note that this would not be the first step Congress has taken in that direction. Congress has legislated forcefully against those who abuse the domain name registration system as far back as 1999, with the Anti-Cybersquatting Consumer Protection Act. Public Law 106-113; 113 Stat. 1501A-550. Indeed, Congress has acted twice more just in the past year. In the Truth in Domain Names Act, approved by this Committee and incorporated into the PROTECT Act, Public Law 108-21, title V, subtitle B, sec. 521, Congress cracked down on those who register misleading domain names for the purpose of enticing children to visit pornographic web sites. As this Committee is well aware, there has already been a successful prosecution under this statute, and that the defendant was one of the most notorious and incorrigible cybersquatters to ply his unseemly trade in cyberspace. *USA v. Zuccarini*, No. 03-CR-01459 (S.D.N.Y. 2003). More recently, in the CAN-SPAM Act, Congress imposed civil and criminal liability on persons who fraudulently register domain names and use them as a launching pad for illegal and invasive unsolicited commercial e-mail. Public Law 108-187, sec. 4, sec. 7. By enacting legislation based on the bill before you today, the 108th Congress would provide a strong incentive for all registrants to provide accurate and up-to-date contact data, as they are already required to do.

As the Subcommittee moves forward to marking up this bill and preparing a report, we think it should be made absolutely clear that providing false contact data in connection with a domain name used to commit a felony is not the exclusive way of proving that copyright or trademark has been infringed willfully in the online environment. Willfulness is and must

remain a flexible concept, and the subcommittee should make sure that this legislation cannot be misread to undercut this. Similarly, the subcommittee should consider whether the legislation should specifically address the role of the U. S. Sentencing Commission in ensuring that Congress' intent – that those who abuse the domain name registration system in the course of criminal activity must receive stiffer punishment – is fully carried out.

The Subcommittee might also consider extending the criminal provisions not only to those who knowingly submit false contact information, but to those who knowingly cause such information to be submitted. This would recognize that in a number of business models, registrant contact data is not submitted directly to a registrar but goes through an intermediary.

In sum, while some further tinkering with the language in the proposal before you today may be needed, CCDN is pleased to support this legislation in principle. We commend your leadership in introducing it and look forward to working with the subcommittee and your colleagues to see it enacted.

III. What Further Steps Should Be Considered?

While CCDN believes the enactment of the legislation under consideration would mark an important step forward, we are under no illusions that it would provide a panacea. It will discourage domain name registrants, especially those who are contemplating illegal or fraudulent activities online, from providing false contact data, but it certainly will not end this practice.

Ultimately, this legislation must be one element of a broader strategy to make comprehensive progress on this issue of improving the accuracy and currentness of Whois contact data. Domain name registrars and their resellers, who actually sell registrations at retail, and the domain name registries, which maintain the master lists of registrations within a particular Top Level Domain, such as .com, .net or .org., have key roles to play.

Both registrars and registries have contractual obligations to ICANN – the Internet Corporation for Assigned Names and Numbers – that address the accessibility and accuracy of Whois data. But, as you may recall from our previous testimony on this subject, we believe that while ICANN has made some efforts to use its contractual authority to correct this problem, it has not done nearly enough.

The current stance of ICANN on Whois has not changed substantially over the past few months. Within the gTLD environment, the contractual framework for a viable Whois policy is already in place. In order to be accredited by ICANN to register domain names, registrars are required to notify registrants about the need to provide accurate, complete and current contact data; to obtain their consent for making this data available to the public through Whois; to take steps to ensure that the data is in fact bona fide; to respond to reports of false contact data (including by canceling registrations that are based on false data); and to make specified Whois data available to the public, both in real time on an individual query basis, and through bulk access, under specified terms and conditions. The problem is – and the problem has long been – that these obligations have not been consistently and effectively enforced by the one entity with clear authority to enforce them: ICANN.

Thanks in great part to the oversight activities of this Subcommittee, the Department of Commerce, in the revised Memorandum of Understanding with ICANN which it concluded last September, underscored the depth of concern of the U.S. government on issues of Whois accuracy and accessibility. Specifically, in section II.C.10 of the MOU, DOC instructed ICANN to “[c]ontinue to assess the operation of Whois databases and to implement measures to secure improved accuracy of Whois data.” ICANN is supposed to report on its progress in this area as well as others every six months, beginning in March. ICANN is also obligated to “augment its corporate compliance program,” including its efforts to “audit material contracts for compliance.” Certainly those contracts include the agreements with registrars and registries, and the audits should address compliance with the Whois obligations of those agreements.

It is far too soon to tell whether the new features of the revised MOU are having the desired effect. We note that the MOU set a deadline for ICANN to develop a strategic plan to address a number of issues, including contract compliance. That deadline was December 31, 2003. That day came and went without any public release from ICANN. This does not bode well for the host of tasks and deadlines that ICANN is yet obligated to meet.

Copyright and trademark owners, and the organizations that represent them, support ICANN, and we continue to participate actively in the many and manifold ICANN policy development processes, including those related to Whois. Much can be accomplished through dialogue in the ICANN framework, and we remain deeply engaged in that dialogue. But it is essential that ICANN understand that its failure to effectively tackle the problems plaguing Whois – which translates, to a great extent, to its failure to effectively enforce the contracts it has

entered into with registrars and registries – is severely testing this continued support and engagement.

We are under no illusions here; we know that it will not be easy to overcome ICANN's long-standing reluctance to step up to these issues. But we hope that, through the oversight of this Subcommittee and the revitalized attention of the Department of Commerce to these issues, ICANN can be strongly encouraged to carry out these MOU obligations fully and comprehensively. This would be in the best interests of the world Internet community that ICANN is institutionally pledged to serve.

While there is much more that could be said about ICANN, this hearing is not about ICANN, but primarily about how Congress can effectively legislate to improve Whois and thus to bring greater transparency and accountability to the domain name system and to the Internet as a whole. In this regard, besides enacting stronger incentives for registrants to provide accurate Whois data we look forward to working with all the key participants to increase the incentives on domain name registries and registrars to demand accurate data, to take reasonable steps to verify the accuracy of the data they receive, and to cancel the registrations of registrants who refuse to live up to this obligation.

It is obvious that today, far too many registrars and registries do far too little to screen out false contact data at the time of submission; to verify or spot-check contact data that is submitted; or, at a minimum, to respond promptly and effectively to complaints of false contact data, including by canceling the domain name registrations which the false data supports. We hope that more aggressive and effective enforcement by ICANN will make a difference. But if it

does not, or if the needed ICANN enforcement campaign is not forthcoming, Congress must seriously consider stepping in.

We do not have a specific legislative proposal to put forth at this time, but we do believe that this is an appropriate subject for Congressional attention. We recognize the international aspects of the domain name registration system, which may make it more difficult to craft an effective legislative solution. And we acknowledge the important role that ICANN must and should play, a role for which additional legislative authority may not be needed. However, just as Congress was not deterred from legislating against abusive domain name registration practices of pornographers and spammers, it should not hesitate to take the necessary steps to ensure that the accuracy of Whois data – especially in the generic Top Level Domains – is improved, and that public access to this important data is not curtailed. In the meantime, we look forward to working with the subcommittee to refine and perfect the legislative proposal under consideration today.

Thank you once again for the opportunity to testify today. I would be pleased to answer any questions.

Biographical Sketch of

Mark Bohannon

Mark Bohannon is the General Counsel and Senior Vice President Public Policy for the Software & Information Industry Association (SIIA).

As the principal trade association of the software code and information content industry, the more than 600 members of the Software & Information Industry Association (SIIA) develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members are software companies, e-businesses, and information service companies, as well as many electronic commerce companies. Its membership consists of some of the largest and oldest technology enterprises in the world as well as many smaller and newer companies.

Mr. Bohannon is responsible for the legal and public policy agenda of SIIA that includes, for example, taxation, privacy, standardization, eCommerce, trade policy (including customs modernization and trade facilitation), intellectual property protection, education policy, Internet security, and electronic contracting. Mr. Bohannon's experience includes detailed engagement with hundreds of companies developing online services for the business, consumer and government markets.

Prior to joining SIIA, Mr. Bohannon was a senior official of the U.S. Department of Commerce where he served as Chief Counsel for Technology and Counsellor to the Under Secretary. During his tenure, his responsibilities included a number of technology policy initiatives, fighting against technical barriers to trade, and promoting effective eCommerce, intellectual property, and Internet policies. During his tenure at the Department of Commerce, he was actively engaged in the transition of management of the Internet domain name system to the private sector. Mr. Bohannon also served on numerous USG delegations to bilateral talks with major trading partners and to multilateral fora such as the Hague, UNCITRAL and WTO.

A native of Austin, Texas, Mr. Bohannon is a graduate of the Edmund A. Walsh School of Foreign Service at Georgetown University and of the George Washington University Law School in Washington, D.C.

January 30, 2004