

CCDN Comments on CIRA Proposed Whois Policy

The Copyright Coalition on Domain Names (“CCDN”) is made up of leading copyright industry trade associations; performance rights organizations; and copyright-owning companies. Its participants share the common goal of maintaining public access to Whois data, and improving its accuracy and reliability, as a key enforcement tool against online copyright infringement. CCDN appreciates this opportunity to comment on the Canadian Internet Registration Authority’s (CIRA) proposed changes to its Whois policy.

In its role as administrator of .ca country code Top Level Domain (ccTLD), CIRA is proposing changes to its Whois policy to drastically limit the amount of contact information available in the publicly accessible Whois database for .ca domain name registrations. Adoption of these changes would virtually eliminate, within the .ca namespace, much of the value provided by Whois as a critical tool for providing transparency and accountability on the Internet, to the detriment of all Internet users, including but not limited to copyright and trademark owners.

CCDN strongly opposes the proposed changes to the policy and urges that CIRA reconsider its proposal. Barring this reconsideration, CCDN proposes that CIRA implement a mechanism for allowing intellectual property owners, including copyright owners, to gain prompt access to accurate and reliable contact information for the purposes of investigating online infringement.

Why Public Access to Whois Data is Vital

Public, real-time access to accurate and reliable Whois data in all domain name registries, including country-code Top Level Domains (ccTLDs) is a vital concern for all Internet stakeholders, including intellectual property owners, law enforcement, and the public at large.

Copyright owners face an epidemic of online piracy. In the online environment, near limitless numbers of unauthorized, digital copies of music, movies, and software can be made and distributed worldwide with the stroke of a key. Whois is a key tool for investigating these cases and identifying the parties responsible. Though no piracy case can be resolved through the use of Whois alone, nearly every case involves the use of Whois at some point.

Many copyright owners are likewise trademark owners, and the use of Whois for trademark enforcement is equally important. Trademark owners use Whois to combat cybersquatting, the promotion of counterfeit products online, and a wide range of other infringement problems. Trademark-owning businesses also depend on accurate and publicly 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 and bankruptcies.

Law enforcement also needs quick, real-time access to publicly available Whois in order to swiftly investigate online crimes. And while Whois is by no means the sole tool used by law enforcement investigators, many, if not most, online criminal investigations employ the Whois database to determine who is operating sites engaged in illegal conduct.

Finally, and perhaps most importantly, individual Internet users need access to publicly available Whois information. Consumers visiting websites, shopping or conducting other transactions over the Internet have a strong interest in avoiding fraud. The recent epidemic of “phishing” attacks gives credence to this concern as a number of institutions have been the victims of corporate identity theft. Such harms directly affect individuals who pass on sensitive, personal financial information believing they are in contact with trusted banks, credit card companies, or retail institutions. Publicly available Whois information is an important tool in combatting such fraud by empowering consumers to verify the identity of the sites soliciting their information.

CIRA’s Proposed New Whois Policy

In its proposed new Whois policy, CIRA states it will continue to collect extensive information about individual registrants at the time of registration. This includes the registrant’s name, postal address, email address, telephone number, and where available, fax number, as well as contact information for the registrant’s administrative contact and authorized representative. *See* CIRA Policies, Rules and Procedures, Draft for Consultation, Sec. 5, *available at* http://www.cira.ca/en/Whois/whois_privacy-policy.html (hereafter “Consultation Draft”). However, only a limited amount of information would be publicly available through a Whois query regarding individual registrants who are Canadian citizens, permanent residents, legal representatives or aboriginal persons. This information would include the domain name; the identity of the registrant’s registrar; the registration, expiration, and last changed dates of the domain name registration; whether the domain name has been suspended or is in the process of being transferred; and the IP numbers associated with the domain name. *See* Consultation Draft at Sec. 6.1.1. Notably absent is any identification of or contact information for the domain name registrant, though registrants are given the option to include that information if they choose. *See id.*, at Sec. 6.1.3. Such a default position is wholly inadequate for the needs of consumers, copyright owners, and law enforcement officials who require prompt access to registrant contact information (and that of administrative contacts and other representatives) in order to investigate fraudulent, criminal, or infringing online activities.

Furthermore, CIRA’s proposed policy would allow corporate registrants to remove contact information from the database if they receive permission to do so from CIRA. *See id.*, at Sec. 6.1.4. Under CIRA’s policies, all of the information collected at the time of registration for a non-individual registrant (including registrant contact information) would be made available through the Whois database thirty-one days after the date of registration. *See id.* However, non-individual (i.e., corporate) registrants could elect to remove that data from the publicly accessible database upon written request to CIRA. CIRA retains the authority to accept or deny such a request. *See id.* There do not appear to be any published criteria that CIRA uses to make its determination as to whether or not a non-individual registrant can remove data from the database. Thus, under this provision, a non-individual registrant, such as a business or other organization, engaged in copyright infringement, could register a domain name in the .ca space and upon request, effectively hide its identity. Such an obstacle to online transparency and accountability not only impedes the legitimate interests of intellectual property owners in combatting online piracy and counterfeiting, but undermines consumer confidence in the Internet as a whole.

The new proposed system depends on being able to reliably distinguish between individual and non-individual, or non-Canadian registrants. Discrimination like this raises a number of serious problems. First of all, how is CIRA going to determine who is or is not an individual? Presumably, a registrant could indicate that it was a non-individual registrant in the “description field. . . describing the Registrant or the Registrant’s business,” at the time of registration. *See id.*, at Sec. 6.1.2. Does CIRA intend to individually examine each one of the registrations to determine if in fact the registrant is or is not an individual? How will CIRA prevent organizations from claiming they are individuals or simply having an employee register a corporate domain name in the employee’s own name, in order to take advantage of the rules to suppress public access to Whois data for that registration?

The proposed policy makes clear that registrant contact information, if not already included in the publicly accessible Whois database at the registrant’s request, will only be made available

- (a) in the event that a law enforcement agency, court of competent jurisdiction, tribunal, judicial board, administrative body, judicial commission, or any other judicial body of competent jurisdiction requests personal information by way of an order, ruling, decision, subpoena, warrant or judgment;
- (b) pursuant to the *Personal Information Protection and Electronic Documents Act* S.C. 2000, c. 5; or
- (c) if the domain name is subject to a proceeding under the CIRA Dispute Resolution Policy, to the relevant Dispute Resolution Provider.

Id. at Sec. 6. In other words, there appears to be no mechanism, short of a subpoena or other judicial or administrative order, which would allow individuals, copyright owners, or even law enforcement, to get access to any registrant contact information, even if the registrar were presented with a strong showing that the domain name owner was engaged in infringing or other illegal activity. The phrasing of subsection (a) above, while ambiguous, strongly indicates that it would take some sort of judicial or administrative order or ruling to obtain registrant contact information. This creates a considerable obstacle to effective and timely investigation and enforcement, and runs the risk of making the .ca ccTLD a haven for online pirates and others engaged in illegal activity.

At a time when millions of illegal copies of music, movies, and software, can be distributed across the world in seconds, swift, real-time access to accurate and reliable contact information is a vital necessity. CIRA’s proposed Whois policy creates significant barriers to promptly accessing contact information for those engaged in infringing and other illegal activities. In short, this policy may very well harm the Internet users it is purportedly seeking to help. Individual consumers would not get the swift access to contact information for websites they are doing business with, which may increase their chances for being harmed by phishing attacks. Law enforcement officials would have a much more difficult time identifying those engaged in illegal activities, thus increasing the difficulty of preventing those activities. Finally, copyright and trademark owners would be unable to get prompt access to contact information, thus escalating the epidemic harms they already suffer from piracy, trademark infringement, and

counterfeiting, in the online environment of inexpensive “perfect” copying, and swift worldwide distribution.

Currently, CIRA will provide to third parties a list of .ca domain names registered by a particular registrant, if the request is made in writing, pursuant to CIRA’s Registration Information Access Rules and Procedures, available at <http://www.cira.ca/en/documents/q3/access-rules-procedures-EffectiveDateJune52003.pdf>. The new policy proposal recommends notifying that particular registrant, within ten working days, who made the request and what information was disclosed. *See* Consultation Draft, at Sec. 6. This requirement will severely hamper investigations of copyright and trademark infringement by effectively tipping off those engaged in illegal activity that they are being investigated.

In a section of the proposed policy on Whois use, CIRA suggests that no Whois user be permitted to use “automated and/or electronic processes” to query the Whois database. While unclear, we presume that CIRA’s intent is to limit the mass harvesting of the Whois database, such as for marketing purposes. However, this proposal could also (perhaps inadvertently) prohibit legitimate automated querying of the Whois database as is often carried out by domain name management companies. These organizations often manage a portfolio of thousands of domain names for their corporate clients and may need to automate Whois queries to effectively serve their customers. In any case, nearly all Whois queries will take place through “electronic processes” – i.e., online. Surely, CIRA does not intend to prohibit all online access to the Whois database. This provision needs to be clarified and narrowed.

FOISA, .CA and .COM

Although CIRA’s proposed changes to its Whois policy are ostensibly motivated by its view of the requirements of PIPEDA, it also appears to have an agenda of differentiating itself from generic Top Level Domains for competitive purposes. This is spelled out in its Proposed New Whois Policy Consultation Backgrounder, *available at* http://www.cira.ca/en/Whois/whois_backgrounder.html (hereafter “Consultation Backgrounder”). CIRA argues there that the changes it proposes making in .ca will provide greater privacy protection for domain name holders in the .ca domain space than .com domain name holders currently have. Unfortunately, this argument is based on a blatant mischaracterization of a statute recently enacted in the United States. *See* Fraudulent Online Identity Sanctions Act, Pub. L. No. 108-482, Title II, 118 Stat. 3912 (Dec. 23, 2004).

According to CIRA’s Consultation Backgrounder,

... the U.S. House of Representatives recently approved a bill that would impose considerable jail time for people who provide false information when registering a dot-com domain name. If this bill is passed by the U.S. Senate, many dot-com domain name Registrants will be forced to either publicize contact details such as home phone numbers and addresses, or risk being sent to jail if they wish to protect their privacy by masking personal contact details.

This is completely incorrect. The criminal provision of the Fraudulent Online Identity Sanctions Act (FOISA), which was approved by the Senate and signed by the President after CIRA released its Consultation Backgrounder, simply gives U.S. federal courts the authority to increase penalties for those convicted of a felony committed in connection with a domain name if that domain name was registered using false contact information. The act of registering a domain name using false information, standing alone, is not a crime in the United States, and FOISA does not make it so.

Furthermore, and contrary to CIRA's statements in the Consultation Backgrounder, the effect of FOISA is not limited to .com registrations. If a .ca registrant is subject to the criminal jurisdiction of the United States, she will be subject to the enhanced penalties of FOISA if she knowingly registered the .ca domain name using false information and knowingly used the domain name in the course of committing a felony under U.S. law. This is true no matter what the Whois policies of CIRA are or may be. The extent to which CIRA's proposal is motivated by a misreading of U.S. law provides another reason for CIRA to reconsider its proposal.

Alternative Proposals

CCDN urges CIRA to reconsider its proposal to limit so drastically the amount of data in the publicly accessible Whois database for .ca domain name registrations. CIRA argues that these changes are necessary to bring it into compliance with the Personal Information Protection and Electronic Documents Act (PIPEDA), which governs the protection of personal information. *See Personal Information Protection and Electronic Documents Act, available at http://www.parl.gc.ca/PDF/36/2/parlbus/chambus/house/bills/government/C-6_4.pdf*. However, CIRA could simply require that a condition of registration be that registrants consent to having their contact information placed in the publicly available Whois database. This would arguably not run afoul of PIPEDA if CIRA re-stated the purpose of the Whois database in such a way as to identify public access to registration data as an "explicitly specified, and legitimate purpose." S.C. 2000, ch.5, Schedule 1, 4.3.3. In fact, this may already be the case. In its proposed policy, CIRA states that the purposes of the Whois database include, "facilitat[ing] the identification of instances of trademark infringement. . . and. . . enhanc[ing] accountability of dot-ca domain name registrants." *See Consultation Draft, at Sec. 6.1.*

Barring this reconsideration, CCDN proposes that CIRA develop and implement a policy which would allow intellectual property owners to swiftly obtain registrant contact information for the purposes of combatting and preventing online copyright and trademark infringement. A starting point for devising such a policy could be the Internet Corporation for Assigned Names and Numbers (ICANN) Registrar Accreditation Agreement (RAA), which allows proxy registration services to put their own names in the publicly accessible Whois database for generic Top Level Domain registrations in place of the actual registrant's name. If, however, the proxy registrant is presented with "reasonable evidence of actionable harm," the proxy must then promptly disclose the actual registrant's information. *See Registrar Accreditation Agreement Sec. 3.7.7.3, available at <http://www.icann.org/registrars/ra-agreement-17may01.htm>*. A similar mechanism could be devised that would allow intellectual property owners to quickly access the contact data submitted by registrants when necessary. In CCDN's view, such a system would be markedly inferior to the status quo, would impose unnecessary costs and delays on achieving transparency

and accountability, and would pointlessly sacrifice many of the social benefits of full public access to Whois data – however, it would be better than the current proposal.

Another alternative may be to use the non-individual contact information “opt-out” scheme proposed by CIRA for individuals as well. This would shift the default position to that of preserving public access to registrant contact data in the Whois database. However, registrants could opt to have their information removed from the database upon written request to CIRA. Some ccTLDs already use this model, most notably the .nl ccTLD for the Netherlands. *See* SIDN, at http://www.domain-registry.nl/sidn_english/flat/Home/. If CIRA were to pursue this path, it would be advisable for it to make clear what criteria it would use to determine whether or not an individual registrant would be permitted to remove data from the publicly accessible database. (For that matter, such criteria should be announced even if the procedure is restricted to non-individual registrants.)

Conclusion

CCDN would welcome the opportunity to discuss these and any other proposals with CIRA, in order to ensure that Whois in .ca remains a publicly accessible and useful tool for all Internet stakeholders.

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CCDN participants include:

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