

28<sup>th</sup> June 2007

Dear Mr. Pritz

Telnic has reviewed with interest the comments by the GNSO Business Constituency (BC) the Coalition for Online Accountability (COA) and INTA, the International Trademark Association, concerning Telnic's proposed Whois policy. We appreciate their insights and applaud their active involvement in the Whois discussions that have been taking place within ICANN over the past years. We would like to take this opportunity to respond to some of the their concerns regarding Telnic's proposed Whois policy and to clarify some aspects of the policy that appear to have been misunderstood.

Before addressing the specifics of the issues raised, we want to reaffirm a key point on which Telnic and the Business Constituency appear to agree: the Whois policy implemented by many ICANN-approved TLDs potentially conflicts with UK data protection laws. UK data protection authorities have told Telnic (and have long expressed concern) that a Whois policy that does not allow individuals to have some control over the disclosure of their personal contact information is unlikely to be compatible with UK data protection laws. Telnic wishes to stress to everyone it is this incompatibility between ICANN's standard Whois policy and UK data protection laws that drove Telnic to develop and propose a modified Whois policy with respect to individual registrants.

A second point on which all parties agree is the importance of the ICANN process. We support ICANN's role as a technical coordination body and want to affirm that once ICANN mandates a new Whois policy that does not put Telnic in the position of conflicting with applicable data protection laws Telnic will of course abide by that policy. Similarly, Telnic will abide by the process ICANN implements for addressing conflicts between Whois policies and data protection laws once that has been agreed.

With these points made, we now wish to address the matter in hand. Telnic is preparing to launch the .tel TLD and so urgently needs to implement a Whois policy now that will not be at odds with UK laws. The concerns raised by the BC, COA and INTA broadly speaking fall into a few general categories:

- \_ The process Telnic followed to develop its proposal;
- \_ Other TLDs have been able to provide Whois services in accordance with local laws;
- \_ Telnic did not consider various alternatives to modifying its Whois policy, such as a thin registry, relocating Telnic's base of operations, or allowing proxy registrations;
- \_ That Telnic should not be able to charge a fee for access to unrestricted Whois information;
- \_ That Telnic was improperly applying UK data protection laws to non-UK registrants;
- \_ The verification process was too burdensome for law enforcement and legitimate requesters; and
- \_ That Telnic's policy is internally inconsistent in that it allows registrants to restrict disclosure of their personal information in the public Whois, while also requiring them to consent to the disclosure of their information through other means.

We discuss each of these issues below and trust our response allays any concerns.

## Process

The GNSO is in the process of developing a proposal for a Whois policy that would make more of an effort to address data privacy issues. The comments posted on Telnic's proposed contract change suggest that no modifications to standard Whois policies should be approved before ICANN has made its final decision. However, Telnic is in the final stages of preparing to launch the .tel TLD, and thus simply cannot afford to wait indefinitely for this process to run its course. Telnic must be in a position to implement a Whois policy that does not conflict with UK data protection laws.

The GNSO is also in the process of developing a mechanism to address conflicts between ICANN's Whois policy and local data protection laws. The submissions by the BC, COA and INTA suggest that Telnic should have followed this conflict process in developing its Whois proposal. There are two practical issues with this suggestion.

First, as the submissions acknowledge, this mechanism has not yet been finalised. Since the GNSO is awaiting comments from the Governmental Advisory Committee, ICANN is not yet in a position to adopt and implement that process. It is unreasonable to oblige Telnic to follow a process that has not actually been implemented. Instead, Telnic has followed the current ICANN procedure that is in place for modifying registry services.

We would also draw attention to the GAC Communique that was released today, June 28<sup>th</sup> 2007. Section IV states the GAC will provide formal advice on that conflict process for the Board to consider at the Los Angeles meeting. Clearly, implementation of this conflict process is some way off. The GAC Communique goes on to state that in the interim specific cases should be referred to the relevant national government for advice. Telnic expects that all parties would welcome this pragmatic approach for handling conflicts until such times as a formal process has been adopted and implemented by ICANN.

Second, the current draft of this process requires the applicable registry to wait until it receives notice of an actual investigation or other proceeding against the registry that might impact its ability to comply with existing Whois policy. However, UK data protection authorities tend to act on complaints by individuals. They are unlikely to initiate an investigation into the Whois practices of a TLD that has not actually launched. In short, even if the proposed mechanism were in effect it would not apply to Telnic's current situation.

The position of the BC, COA and INTA suggests that Telnic should knowingly implement a Whois policy that is incompatible with UK data protection laws and then wait for an investigation before being able to address those issues. This suggestion is unreasonable.

## Other TLDs Operating Under Similar Laws

The submissions by the BC and COA argue that some other TLDs operating out of the European Union have implemented Whois policies that do not seem to conflict with local laws. This is true but these TLDs have developed and implemented Whois policies similar to the one proposed by Telnic. Each of these TLDs restricts or allows some degree of user choice with respect to the information published in Whois.

In our submission to ICANN, Telnic noted the similarity between its proposed Whois system and the one approved by ICANN for the .name TLD, which is also operated by a registry based in the UK. The BC and COA suggest that this comparison is inapt, in that .tel's target community includes businesses as well as individuals, unlike .name which is specific to individuals. We believe this may reflect a misunderstanding of Telnic's proposal. Our proposal would facilitate limited disclosure of Whois contact data for individual registrants, not corporate registrants. Whois information for corporate registrants would be made public in the same way as in other ICANN-approved TLDs. Individuals would have the right to control how their contact data is displayed in Whois in a manner that is identical to that offered to individuals under the .name TLD. In cases where individuals choose to have their contact data published in Whois, Telnic's proposed policy would make that data available through the standard Whois system in the same way as it would for its corporate registrants.

### Other Alternatives

In their comments, the Business Constituency and COA suggest that Telnic did not consider alternatives to modifying the standard Whois policy, such as operating a thin registry, relocating its base of operations or allowing proxy registrations. Telnic would like to make clear that it considered a variety of options that would allow it to comply with UK data protection laws while offering an accessible Whois system. Telnic did not describe these considerations in detail when the contract change template was submitted because we felt those alternatives were evidently inappropriate. Below we describe why each of the Business Constituency's suggestions was not accepted by Telnic during these deliberations.

The thick registry model has become well established as the standard model for registry operators for a variety of reasons. Telnic believes it would be inappropriate to revert to the older thin registry model. For example such a model would impose significant burdens on registrars, placing Telnic at a disadvantage in encouraging registrars to offer .tel domain names. Furthermore, transitioning from a thick model to a thin model would require significant financial expenditures for Telnic.

Telnic believes that requiring registries to relocate their operations because some constituencies believe that local legal requirements are unfavourable to their interests would set a dangerous precedent. ICANN has traditionally encouraged geographic diversity among registry operators and Telnic believes that this diversity provides valuable benefits to the community. If ICANN imposes on registries an obligation to conflict with local laws or lose their ICANN accreditation – whether due to privacy or other local legal obligations – ICANN will destroy the very diversity it has tried to establish. Furthermore, as a practical matter, and as the Business Constituency and COA are no doubt aware, relocating Telnic's base of operations is an expensive undertaking. Telnic believes that imposing such a burden on Telnic due solely to Whois concerns is inappropriate and unreasonable.

The Business Constituency also suggests that allowing Telnic to adapt Whois to meet local data protection requirements would encourage “forum shopping” by registry operators. They suggest that the proposal would encourage a “race to the bottom” by registries seeking to minimise their obligations. Rather than reducing Telnic's obligations, Telnic's proposal imposes significantly greater burdens on Telnic with respect to Whois. More importantly, however, the constituency's position would undermine the geographic diversity that ICANN seeks. We also point out that other ICANN constituencies who take a more robust view on privacy and data protection would characterise the Business Constituency's comments on “forum shopping” as a “race to the top”. This is an inevitable

consequence of the community diversity that ICANN nurtures.

Finally, proxy registrations do not fully meet Telnic's legal and community obligations. As the Data Controller, Telnic must provide all individual registrants with the option to keep their personal information out of the public Whois service, regardless of whether these customers choose to use a proxy service or not. Furthermore, not all registrars offer proxy services, and many charge additional fees for using them. Telnic does not believe it would be appropriate to impose on registrants the burden of finding such proxy services or paying additional fees for privacy protections. Telnic also considered that it would be unwise to extend its remit as a registry to operate a proxy service itself, a service that has traditionally been provided by registrars.

### Fees for Access to Unrestricted Whois Service

Under Telnic's proposed system, public access to the unrestricted Whois information will of course be free as it is with other TLDs. Access to the restricted personal contact information regarding the registrant will be subject to a fee.

In our proposal to ICANN, we did not describe the specific amounts we would charge, and Telnic will not be in a position to do so until the applicable systems are implemented. However, we can assure the community that Telnic does not see Whois information as a profit centre. Instead, the fees will – at best – be revenue neutral to Telnic, and we suspect that the service will actually operate at a loss. In reality, the fees have three purposes. One is to cover some of the costs of providing the service. The second is to discourage frivolous requests for Whois information. Finally, a fee-based mechanism should reduce the scope for uncontrolled data mining, a particular concern of EU and UK data protection authorities.

The Business Constituency and COA specifically objected to Telnic charging a higher fee for email service than postal mail service. These fees will be higher for two reasons. First, it is common in many businesses to charge higher fees for faster services. Second, Telnic is concerned that unscrupulous requesters are more likely to use email addresses (which are more difficult to trace and verify) than physical addresses, so we believe that a higher fee is appropriate to discourage abuse.

### Application of UK Data Protection Laws

The Business Constituency and COA suggest that Telnic is improperly applying UK data protection laws to registrants that are not UK residents. Instead they claim that Telnic should offer different layers of protection based on the registrant's country of residence.

We believe this argument reflects a misunderstanding of UK data protection laws. Under UK law, the data protection obligations are based on the location of the Data Controller, which in this case is Telnic. It does not matter under UK law whether the Personal Data relates to UK residents. Telnic is obligated to apply the data protection laws to all personal information it collects and processes.

### Verification Process

As part of Telnic's Whois proposal, those seeking access to the restricted Whois information will be asked to identify themselves and provide an explanation of why they need the full contact information for the registrant. In our proposal, we stated that the information regarding the request

might be disclosed to the registrant, though Telnic would have no obligation to do so. The constituency says that this verification process is too burdensome for law enforcement and civil investigations that require discreet inquiries.

As noted in Telnic's proposal, Telnic is actively engaged in discussions with UK law enforcement representatives to develop a non-Whois-based procedure for disclosing full contact information in connection with criminal investigations. With respect to civil investigations, Telnic does not see how our proposed process is more burdensome or poses greater risks than proxy systems, which the constituency elsewhere suggests is a preferred model for Telnic's Whois service.

### Internal Inconsistency

Finally, the Business Constituency suggests that Telnic's Whois proposal is internally inconsistent in that it allows registrants to withhold their contact information from the public Whois system but also requires them to consent to disclosure of this information to third parties. Telnic does not agree that such an inconsistency exists. Individual registrants will have control over whether their contact data is published in the freely accessible, public Whois database. However they will not have the ability to restrict the disclosure of this information to law enforcement officials or if the requesting party follows the procedures outlined in the Telnic proposal.

The public Whois system cannot be policed from a data protection perspective because it is a global resource available to all. Access to registrant data through the additional system Telnic proposes can be controlled and monitored. For instance, the Registry will be able to keep track of who makes requests, what they request and why they were made. In addition, the terms and conditions for using that service can be arranged so that Telnic can properly discharge its data protection obligations: i.e. that users of that service follow general data protection principles on fair use of the data and appropriate safeguards for its processing, access and storage.

We hope that the foregoing clarifies Telnic's Whois proposal and addresses the concerns raised by the constituency. We are happy to discuss these issues in greater detail at your earliest convenience.

Sincerely  
K. Mahdavi, CEO