

VIA ELECTRONIC MAIL: JPAMidTermReview@ntia.doc.gov

TO: Ms. Suzanne R. Sene, Office of International Affairs, National  
Telecommunications and Information Administration

FM: Sam Mosenkis, VP of Legal Affairs, ASCAP

RE: Response to Notice of Inquiry, Docket No. 07102363-7617-01

DT: February 15, 2008

The American Society of Composers, Authors and Publishers (ASCAP) appreciates this opportunity to comment in response to the notice at 72 Fed. Reg. 62220 (November 2, 2007). We believe that the Joint Project Agreement (JPA) between the Department of Commerce and the Internet Corporation for Assigned Names and Numbers (ICANN) should not be terminated at this time, as ICANN requests.

ASCAP has been engaged in activities related to ICANN for many years. We are a founding member of, and an active participant in, the Intellectual Property Constituency (IPC) of the GNSO Council. We have been particularly active in the ongoing debate regarding accessible and accurate Whois data.

ASCAP speaks for hundreds of thousands of individuals – the more than 315,000 U.S. composers, songwriters, lyricists and music publishers that are members of our association, and hundreds of thousands of other music creators worldwide whom we represent through agreements with affiliated international performing rights societies. While many of these creative people have an active presence on the Internet, many others do not. The vast majority, we are sure, know little or nothing about ICANN. Yet the decisions that ICANN makes can impact every one of these people, whether or not they fall within anyone’s definition of the “Internet community.”

ASCAP protects the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works, including performances that take place online. Publicly available and accurate Whois data – particularly contact information on domain name owners – is critical for ASCAP to perform this function. When our members’ music is being performed on a website corresponding to a particular domain name, we often rely on Whois data to contact website owners, so that we can negotiate performance licenses, and fairly distribute royalties to the music’s creators and publishers. To the extent access to Whois data is restricted or eliminated, this process will become slower, more onerous and more costly to perform. The result is that music creators, who depend upon these license fees for an important part of their livelihoods, will receive less compensation for use of their works, will receive it later, or may not receive it at all.

While ASCAP members are creators and publishers of music, they are also much more. They are consumers, who need protection against online frauds such as phishing; they are parents, who want to know who stands behind the websites and other Internet resources to which their children are exposed; they are citizens, who expect their law enforcement agencies to be

vigilant and effective against online criminals of all kinds. ICANN decisions on Whois and many other topics have an impact in all these areas and more.

ASCAP was pleased that the “Affirmation of Responsibilities” adopted by the ICANN board in 2006 --- the list of tasks that ICANN set for itself under the JPA – included enforcement of the provisions in ICANN’s contracts with domain name registries and registrars regarding publicly available and accurate Whois data. We note that ICANN now asserts that it has executed all the terms of the JPA and thus the agreement is no longer necessary. We cannot agree that ICANN has fulfilled its task of enforcing its contractual terms regarding Whois. We acknowledge that it has taken some steps in that direction, such as creating a small contract compliance staff. But the fact remains that many registrars are not living up to their obligations to respond to reports of false Whois data, or to enforce their own contractual terms with registrants that require the provision of current and accurate Whois data. Some registrars also operate proxy registration systems that do not comply with the terms set in the Registrar Accreditation Agreement. Indeed, ICANN’s own staff has determined that some registrars do not make Whois data available on the web at all. Yet no meaningful action has been taken to enforce compliance with these contractual obligations.

In more general terms, ASCAP questions whether ICANN has “develop[ed] additional mechanisms for involvement of those affected by ICANN policies,” as it pledged to do in the Affirmation of Responsibilities. Certainly ASCAP and its members have not seen any additional mechanisms developed for ensuring that their voices are heard in ICANN’s deliberations, even though many ICANN policy decisions directly affect them. Indeed, we note that the ICANN board is about to consider “GNSO reform” proposals that could weaken those voices, by reducing the voting power within the GNSO Council of parties that do not have contracts with ICANN.

ASCAP supports the basic premise of ICANN: that a private-sector led entity is best situated to manage the domain name system. We believe that ICANN has made considerable progress in recent years in many areas. We would be quite concerned if ICANN’s role were diminished in favor of management of the DNS by governments or intergovernmental organizations. We hope that this mid-term review will recognize ICANN’s achievements while remaining realistic about the tasks that it still has not effectively tackled, and encouraging it to do so. For these reasons, ASCAP believes that continuation of the JPA through its scheduled conclusion in September 2009 would be in the best interests of Internet users as a whole. Beyond that, we hope there will be a robust discussion over the next 18 months about whether the JPA should be extended unchanged, modified, or succeeded by a new phase in the relationship between the US government and ICANN. ASCAP looks forward to participating in that discussion, and we thank NTIA for this opportunity to comment.