



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

LE SECRÉTAIRE GÉNÉRAL
THE SECRETARY-GENERAL

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Dear Mr. Lynn,

We recently invited ICANN's attention to a report entitled *Cybersquatting: The OECD's Experience and the Problems it Illustrates with Registrar Practices and the 'WHOIS' System* (<http://www.oecd.org/pdf/M00027000/M00027316.pdf>.)

OECD's experience appears to be just one example of widespread fraudulent registrations, assisted by registrar practices. The person behind the cybersquatting of *ocde.org* currently has over 990 registrations, mostly with three registrars, according to a recent case study posted on the web-site of Harvard's Berkman Center for Internet and Society. (<http://cyber.law.harvard.edu/people/edelman/invalid-whois/>) Other research indicates that a significant percentage of all domain name registrations use false information. The many victims of illegal activities carried on anonymously behind such registrations incur losses and costs. Serious harm is done to public interests going well beyond protection against cybersquatting. Confidence in the internet system itself suffers.

The problem could be significantly reduced by properly interpreting and enforcing the present framework of ICANN contracts to require registrars to deal responsibly with "whois" information, particularly when complaints are made or when fraud is obvious. As the accrediting agency and the only party with standing to enforce the accreditation agreements, ICANN has a unique opportunity -- and the responsibility -- to accomplish this. ICANN's 10 May advisory to Registrars was a step in the right direction, but insufficient.

I urge that ICANN require Namescout, Inc. to cease sponsoring the other patently false registrations which it maintains and commit to proper handling of justified complaints in the future, or face termination of its Accreditation Agreement pursuant to Sections 5.3.4 (breach) and 5.3.6 (endangering Internet's stability or operational integrity). I further urge that ICANN similarly require the other registrars identified in the case study cited above to cease sponsoring the registrations in question and any other patently false registrations on their books. Enclosed is a note on the apparent violations of registrar duty in the *ocde.org* case. OECD stands ready to furnish the detailed record of that case and to co-operate fully with ICANN in any other way we can in this.

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Mr. M. Stuart Lynn
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Copy: Dr Paul Twomey, Chair, ICANN Government Advisory Committee



If the registration system facilitates and protects fraudulent registrations through systematic negligence or the intentional turning of a blind eye, there is a potential for litigation to bring to bear standards of care and responsibility which national laws apply to other sectors, or for regulatory efforts to correct the problem.

I look forward to your reply.

Yours sincerely,

Donald J. Johnston



NOTE ON VIOLATIONS OF REGISTRAR DUTY BY NAMESCOUT, INC

In its handling of registrations by Domain for Sale since the OECD initiated its complaint about *ocde.org*¹, Namescout, Inc., appears to have violated a number of express or implied obligations under the Registration Accreditation Agreement it has with ICANN

1. Section 3.3.1: a Registrar is required to provide the public with access to specified elements of information identifying the Registered Name Holder and its administrative and technical contacts.

Section 3.7.7.1 makes clear that this means accurate and reliable information. It further requires that, where the Name Holder is a legal person, a natural person must be listed as contact.

Section 3.7.8: a Registrar “shall, upon notification by any person of an inaccuracy in the contact information associated with a Registered Name sponsored by Registrar, take reasonable steps to investigate that claimed inaccuracy. In the event Registrar learns of inaccurate contact information associated with a Registered Name it sponsors, it shall take reasonable steps to correct that inaccuracy.”

- OECD informed Namescout from its first contact that Domain for Sale appeared to be a fictitious person falsely claiming to be located in Armenia, and that this registration was part of a notorious pornographic cybersquatting scheme being carried out anonymously. OECD stressed, as evidence of the fraudulent nature of the registration, that it falsely listed as administrative and technical contact a person at the American Institute of Architects, itself previous victim of the same cybersquatter.
- In response to OECD’s complaint, and despite both the obviously wilful nature of the provision of the false information and the improper (illegal) purpose of the registration, Namescout chose to afford the “owner” of *ocde.org* multiple opportunities to “correct” (i.e., modify) the registration.
- The first opportunity was an e-mail letter sent to the listed administrative and technical contact, with a cc to *admin@elazy.net*, an anonymous e-mail contact which was not even listed on the “whois *ocde.org*” at the time. The letter indicated that Namescout had received a complaint but did not indicate which elements of the information were being questioned. The listed contact replied that the information was not accurate; he was not the administrative or technical contact and that he had no knowledge of the true identity of the registrant.
- The anonymous contact, however, deleted the listed contact person and substituted the “information” that “Domain for Sale” was Domain for Sale’s administrative and technical contact and occupied the position “President” of Domain for Sale. This response was false and inadequate on its face, and omitted an important element of information specifically required by Section 3.7.7.1, the identity and contact information of a real human being who was willing to admit a relationship to the registered Name Holder.

¹ Described in some detail in *Cybersquatting: The OECD’s Experience and the Problems it Illustrates with Registrar Practices and the ‘WHOIS’ System*



- Namescout insisted that the “owner” had thereby “corrected” its filing and the registration could not be terminated for breach. Though it had the contractual right to require evidence, it declined to take the simple step of asking the registrant for evidence of its legal existence or any other element of its information, such as a phone or utility bill to show its presence at the address claimed.
- Faced with Namescout’s passive acceptance of the registration information, the OECD, at its own expense, had an investigation made in Armenia and supplied affidavit evidence to Namescout that Domain for Sale was not a registered legal person in Armenia and was not at the address claimed. This was dismissed by Namescout on grounds which were empty and, as noted in the section 2 of this note, inconsistent with the section 3.3.7 of the Registrar Accreditation Agreement
- Namescout failed to investigate and shifted the burden of investigation to the OECD. It then failed to evaluate the information and evidence available to it reasonably or in good faith. In the circumstances of this case, providing an anonymous e-mail contact multiple opportunities to modify the registration information and accepting inadequate and unsubstantiated modifications from it cannot be considered to constitute the “reasonable steps” required under 3.7.8. either to investigate or to correct the information.
- Namescout’s breach of Sections 3.3.1, 3.7.7.1 and 3.7.8 regarding the “whois *ocde.org*” was serious and wilful: the inaccuracies and unreliability were systematic and obviously designed to frustrate the purposes of a public registry and allow a criminal to operate anonymously. The person behind the registration had wilfully submitted false information at the outset and his motivation to continue to lie was evident. Namescout maintained its sponsorship well after becoming aware of the problem and, it appears, would have continued to do so indefinitely had the “owner” continued to reply and modify its registration in response to Namescout requests.

2. Section 3.3.7: the Registrar “shall require all Registered Name Holders to enter into an electronic or paper registration agreement with Registrar” containing certain required provisions.

- Despite OECD’s complaint that Domain for Sale in Armenia appeared to be fictitious (which Namescout staff almost certainly was already aware of, given the notoriety it had already achieved in the industry), and despite affidavit evidence OECD later supplied to substantiate that, Namescout maintained its sponsorship of the registration. It also continued to insist that its contractual obligations to the registrant precluded deregistration and return of the domain name to OECD unless the registrant failed to respond within fifteen days to a request to confirm or correct its filing information.
- In dismissing the evidence from Armenia, Namescout claimed that the Armenian couple at the listed address might be doing business as Domain for Sale. However, the requirement of a contract with a registrant does not permit a Registrar to sponsor registrations for unidentified persons doing business under the listed name.
- If, as appears to be the case, “Domain for Sale” is not a real legal person, Namescout had no contract with a registrant concerning *ocde.org* and was in material breach of Section 3.3.7 in maintaining its sponsorship.
- Namescout informed OECD that it had over 100 registrations with Domain for Sale listed as the Name Holder. It is likely that Namescout continues to sponsor those registrations after being on notice that it does not have the required genuine contract. It may be doing so with other of the well-known aliases of this cybersquatter.



3. Under Section 3.7.2, the Registrar, in its business dealings, is required to “abide by applicable laws.” While no similar case concerning a registrar has been decided, it would appear that Namescout is not abiding by applicable laws.

- Namescout maintained its sponsorship of the *ocde.org* registration and over 100 other registrations under the “Domain for Sale” name, with inaccurate and unreliable contact information affording the cybersquatters an essential anonymity. It did so after being informed that this was part of a notorious pornographic cybersquatting extortion scheme. Moreover, it asked OECD to indemnify it for loss of that business it might suffer if it deregistered *ocde.org* for false information. Namescout contributed in an essential way to this illegal activity and acted with bad faith intent to profit from it.
- Such conduct would appear to be sanctionable trafficking or contributory cybersquatting under the US Anti-Cybersquatting Protection Act (ACPA). That law would be applicable to Namescout in its business of sponsoring registrations in TLD Registries located in Virginia.
- Under Canadian law, such conduct would appear to constitute an unlawful conspiracy to injure, tortious interference with economic interests, and a breach of the ordinary duty of care articulated by Canadian courts in economic tort matters. Namescout is in Canada.

4. Section 3.7.7.9: the Registrar must obtain a representation from the Registered Name Holder that, to its best knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly being used infringes the legal rights of third persons.

- The cybersquatting scheme carried out under the name “Domain for Sale” and other aliases infringes the legal rights of third persons and is intended to do so. Accordingly, no representation to the contrary from the Registered Name Holder can be considered valid.
- In these circumstances, continuing to sponsor registrations for this scheme, knowing its nature, is in violation of Section 3.7.7.9.

5. Under Section 5.3.6, the Registrar can be required to cease “acting in a manner that ICANN has reasonably determined endangers the stability or operational integrity of the Internet.

- Where disregard of the accuracy and reliability of “whois” information assists and protects fraudulent or other illegal activity, it endangers the stability or operational integrity of the Internet in an important sense and erodes confidence.
- Moreover, the functional importance of “whois” information has been underlined by ICANN to the Government Advisory Committee, in respect of the stability and operational integrity of the Internet, in areas such as fighting denial of service attacks.
- For those reasons, Namescout’s knowing or reckless sponsorship of false registrations can and should reasonably be characterised as activity which “endangers the stability or operational integrity of the Internet.”