



IPC Reply Comments Regarding Whois Conflicts Procedure

August 1, 2014

The Intellectual Property Constituency (IPC) of the GNSO submits the following comments to supplement the preliminary comments it filed on July 3, 2014 regarding the ICANN staff paper on review of the Whois conflicts procedure (see <http://whois.icann.org/sites/default/files/files/review-privacy-conflicts-procedure-22may14-en.pdf>). This submission principally takes the form of responses to some of the questions posed in the ICANN staff paper, with a short addendum. These responses appear in *italics* below.

1.1 Is it impractical for ICANN to require that a contracted party already has litigation or a government proceeding initiated against it prior to being able to invoke the Whois Procedure? How can the triggering event be meaningfully defined?

The requirement that the contracted party demonstrate that it has been notified of an “investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance” with its contractual obligations to ICANN regarding Whois is not impractical, and is not necessarily limited to circumstances in which a litigation or proceeding has been formally commenced.

This requirement provides assurance that relief from these critical obligations will only be sought when there is a credible demonstration that the local law prevents the contracted party from fully complying with the obligations (“credible demonstration of legal prevention”), the standard that the GNSO Council correctly recommended in 2005. It also helps to ensure that the specific contractual obligations, and the specific legal provisions that prevent compliance with them, are clearly identified, so that any forbearance or waiver that is ultimately granted will be no broader than necessary to remedy the problem. In this regard, we agree with the comment filed by the European Commission to the extent that it stresses that “the decision of granting of an exemption to the implementation of the contractual requirements concerning the collection, display and distribution of Whois data should remain exclusively based on the most authoritative sources of interpretation of national legal frameworks.” See <http://forum.icann.org/lists/comments-whois-conflicts-procedure-22may14-en/pdfIqblYdaY1.pdf>.

1.2 Alternatively, does that suggest the Whois Procedure has not been invoked because of an absence of enforcement action?

IPC is not aware that any such enforcement action has ever occurred. If this is the case, it is symptomatic of a healthy system at work. The absence of any enforcement actions is strong evidence that the agencies with enforcement authority at the national level are reasonably satisfied with the current system.



1.3 Are there any components of the triggering event/notification portion of the RAA's Data Retention Waiver process that should be considered as optimal for incorporation into a modified Whois Procedure?

As IPC has already stated in its preliminary comments, the Data Retention Waiver process, as ICANN has applied it, has exhibited significant problems, leading to the granting of partial waivers in circumstances in which neither the specific legal basis for the request, nor the specific obligations from which relief was sought, nor the reasoning under which the relief requested would resolve the asserted legal conflict, were made clear. For this reason, IPC does not view incorporation of any component of the Data Retention waiver trigger into the Whois procedure as optimal.

We note that it may be useful to consider how the second prong of that trigger – receipt of “ruling or guidance from a governmental body of competent jurisdiction which states that collecting or retaining one or more data elements in the manner required by the specification violate applicable law” – could be adapted to inform the requirement that a Whois waiver process should be triggered only when the “credible demonstration of legal prevention” test has been met.

1.4 Should parties be permitted to invoke the Whois Procedure before contracting with ICANN as a registrar or registry?

If the procedures and practices of the governmental agency charged with enforcing or authoritatively interpreting the privacy laws of the relevant jurisdiction are such that the “credible demonstration of legal prevention” can be made even before the would-be contracted party has taken on the obligations in question, then in principle the answer to this question may be “yes.”

1.5 Would reaching different solutions with different registries with respect to exemption or modification of Whois requirements in light of different laws in various jurisdictions raise questions of fair and equal treatment?

Yes, such issues exist, but may be unavoidable in light of the legal differences from country to country, reflecting the will of each state concerned as embodied in its laws. The focus should remain on whether applicable laws of a particular jurisdiction prevent compliance with contractual obligations, not on whether the same would be true if the law of another jurisdiction were applicable. Narrowly tailoring each exemption to comply with the laws of a particular jurisdiction would ensure that the treatment is as fair and equal as possible.

2.1 As the current Whois Procedure incorporates consultation between the contracted party and ICANN, as well as relevant legal or other government authorities, are there other relevant parties who should be included in this step? What should their roles be in the consultation process?



Although they were excluded from any role in negotiating applicable contractual obligations regarding Whois, intellectual property owners have a vital stake in ensuring that these obligations are scrupulously observed and vigorously enforced. Therefore, consideration should be given to involving them in consultations at the earliest feasible stage in the process. The same could be true of other stakeholders within the ICANN community with a concrete interest in the transparency and accountability that Whois provides. We agree with the observation of the European Commission that national data protection authorities may have much to contribute to the process; the same is true of other law enforcement agencies on the national level.

3.1 How is an agreement reached and published? What standards for confidentiality, accountability and transparency are considered in advance of publication?

While redaction of truly confidential and/or trade secret information should be provided for, such redaction should be minimized so that all interested parties will have access to as much relevant information as possible regarding any proposed waiver, forbearance, or exception to critical contractual obligations regarding Whois.

3.2 If there's an agreed outcome among the relevant parties, should the Board be involved in this procedure? Who should make the final determination to grant an exemption or modification?

The ICANN Board should make the final decision in each case, and any decision to grant or approve a waiver, forbearance, or exception should be subject to robust and independent accountability mechanisms.

4.1 Would it be fruitful to incorporate public comment in each of the resolution scenarios?

Yes, public comment should be solicited in all cases, and public comments should be reviewed, analyzed, and responded to before a final decision. As noted in the preliminary IPC comments, this is another area in which the Data Retention Waiver process has fallen badly short.

4.2 What other avenues for engagement may be used to reach a mutually agreeable resolution?

IPC reserves its response at this time and looks forward to reviewing the suggestions of other commenters.

5.1 What impacts would an exemption or modification have on the contract, and on others in the same jurisdiction?

Each request for a waiver must be decided on its own merits. Contracted parties in the same jurisdiction may or may not be similarly situated. It would certainly be appropriate for final decisions on previous waiver requests from the same jurisdiction to be referenced and considered in the process.



5.2 Is the exemption or modification termed to the length of the agreement? Or is it indefinite as long as the contracted party is located in the jurisdiction in question, or so long as the applicable law requiring the objection is in force?

Periodic reviews of the exemption or modification could be considered in order to assess whether the facts or law have changed so that a waiver is no longer needed or could be modified. The contracted party also should be obligated to bring promptly to ICANN's attention any changes that could affect the scope of the waiver, forbearance, or exemption, including those to jurisdiction or material changes in the laws or precedents.

5.3 Should an exemption or modification based on the same laws and facts then be granted to other affected contracted parties in the same jurisdiction without invoking the Whois Procedure?

No, each request should be decided on its own merits. See answer to 5.1.

ADDENDUM: It should be made clear that the RSEP process (discussed on pages 6-7 of the ICANN staff paper) is not an appropriate substitute for the Whois conflicts procedure in the case of registries. IPC's experience with this process clearly shows that the RSEP process lacks clear standards or criteria for making the kinds of determinations involved here, and thus encourages forum shopping. For example, the registry operator for .cat successfully employed the RSEP process to obtain a significant relaxation of its Whois contractual obligations when the credible demonstration of legal prevention was not only absent, but the record clearly demonstrated the opposite – i.e., that the competent legal authority in the jurisdiction had specifically determined that the conduct of the registry in fulfilling its Whois contractual obligations was lawful. See Reconsideration Request 12-2, <https://www.icann.org/en/system/files/files/request-ipc-07jun12-en.pdf>.