



## Comments of Intellectual Property Constituency

April 17, 2011

The Intellectual Property Constituency appreciates the opportunity to comment on the materials posted by the Whois Review Team on March 4. See <http://www.icann.org/en/public-comment/#whois-rt>.

IPC considers ICANN's Whois policies to be among the most important matters addressed by the organization in its stewardship of the domain name system. Ready public access to a reliable and current Whois database is a critical element in building public trust in the domain name system, in e-commerce, and in the Internet as a whole. Robust guarantees of Whois accessibility and accuracy are essential, not only for intellectual property owners, but also for law enforcement, consumer protection, child protection, and indeed for every Internet user.

The documents posted by the Review Team confirm that you are asking some of the right questions. As spelled out in the "Scope and Roadmap" document, you are taking on the important challenge of identifying and inventorying ICANN's Whois policy and how it is being implemented. We believe you will conclude that ICANN's current policy and its implementation are not effective in delivering the "timely, unrestricted and public access to accurate and complete Whois information" required by the Affirmation of Commitments (AOC), and we look forward to your recommendations for policy and implementation improvements.

We offer the following comments regarding the draft definitions contained in the materials:

As a general matter, broad definitions of the operative terms in AOC are essential. There is nothing in the AOC that suggests the existing policy—of open access to WHOIS data that is collected and provided consistent with applicable law—should be restricted merely to conform with a narrow definition of the legitimate needs of law enforcement and the promotion of consumer trust.

1. "Law Enforcement" -- The Review Team appears to read this phrase as limited to governmental enforcement agencies. We do not believe there is any evidence that the drafters of the AOC intended this reading. Rather, in assessing whether the implementation of Whois policy "meets the legitimate needs of law enforcement," the Review Team should focus on whether this implementation meets needs that are legitimate for the enforcement of laws. Many laws depend for their enforcement upon the efforts of private parties, including, to a great extent, laws protecting trademark and copyright. Certainly reliable access to accurate Whois data plays a significant role in advancing the legitimate needs of enforcement of these laws.

2. "Applicable Laws" – This definition lacks the precision needed for the Review Team's purpose. The AOC recites the commitment of ICANN "to enforcing its existing policy

relating to Whois, subject to applicable laws.” In order to assess whether ICANN is fulfilling this commitment, the Review Team must focus on which laws are applicable to ICANN in carrying out this policy. This can be a difficult question to answer. While some national laws may apply to ICANN’s ability to enforce the requirements of providing open Whois access, it seems inconceivable that “any and all local and national laws that regulate and/or control the collection, use, access and disclosure of personally identifiable information” are all applicable to ICANN in its enforcement of this policy.

A distinct and different question – and one that may be less relevant to the Review Team’s task – is which law is applicable to a particular registry or registrar in carrying out its contractual obligations to ICANN regarding Whois. Here, too, it does not seem helpful to assert that every law related to personal data from every jurisdiction is potentially “applicable.”

In this regard, the Review Team should give appropriate consideration to the long-standing ICANN procedure, adopted to implement a supermajority vote of the GNSO and a unanimous vote of the ICANN Board, for dealing with any situation in which those contractual obligations appear to conflict with a law applicable to the operations of the registry or registrar in question.) See <http://www.icann.org/en/processes/icann-procedure-17jan08.htm>.<sup>1</sup> The procedure is meant to address situations “where a registrar/registry can demonstrate that it is legally *prevented* by local/national privacy laws or regulations from complying” (emphasis added) with the Whois mandate, and that “The goal of the consultation process should be to seek to resolve the problem in a manner that preserves the ability of the registrar/registry to comply with its contractual Whois obligations to the greatest extent possible.” This policy recognizes that there will frequently be ways for registrars/registries to conform their practices with applicable law, so that they can comply with Whois obligations. AOC 9.3.1 should be read in the same way. For example, if applicable law permits the collection and use of Whois data consistent with ICANN’s “existing policy relating to Whois” if a certain form of consent is obtained, then the requirement that the registrar/registry obtain consent in that manner is enforcing the policy subject to applicable law.

Another imprecision in the draft definition involves its reference to “other relevant legal obligations,” listing as an example the U.N. Guidelines for the Regulation of Computerized Personal Data Files. As their title suggests, these guidelines do not establish any legal obligations, relevant or otherwise. For instance, the European Network and Information Security Agency has concluded that the U.N. Guidelines are “not legally binding, neither to natural persons, legal entities or countries.” <http://www.enisa.europa.eu/act/rm/cr/laws-regulation/data-protection-privacy/un-guidelines>. The U.N. General Assembly, in adopting the guidelines, simply “request[ed] Governments to take into account those guidelines in their legislation and administrative regulations.” A/RES/45/95 (14 Dec. 1990), viewed at <http://www.un.org/documents/ga/res/45/a45r095.htm>. This falls far short of establishing any legal obligation, much less one that could be deemed to conflict with or override contractual obligations to ICANN regarding Whois.

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<sup>1</sup> This link currently appears inoperative. A draft version of the procedure may be found at [http://gns0.icann.org/issues/whois-privacy/whois\\_national\\_laws\\_procedure.htm](http://gns0.icann.org/issues/whois-privacy/whois_national_laws_procedure.htm).

The Review Team's mandate in this field is actually rather narrow, and the excessively broad and imprecise definition proposed for "applicable laws" will do little to assist the Review Team in carrying out its assignment. Unless the Review Team can identify (or its research reveals) a particular law that has actually impeded, or realistically threatened to impede, ICANN's "enforcement of its existing policy relating to Whois," it may not even be necessary to reach agreement on a definition of "applicable law." In any event, if such a definition is needed at all, it should be much more focused than the draft proposed.

3. "Producers and Maintainers of Whois Data" – Unlike all the other draft definitions, this one does not refer to any wording in the AOC, and the Review Team has not explained why any definition of these terms (or of the subdefinitions listed in the draft) is needed. We recognize that these terms are used in the definition of "consumer," but as we note below, we do not think they are necessary there. We recommend that this definition be dropped.

4. "Consumer" – We agree with the Review Team that a broad interpretation of "consumer" is probably consistent with the intention of the drafters of the AOC, when they asked the Review Team to assess whether ICANN's implementation of its Whois policies "promotes consumer trust." The first definition provided – that all Internet users are "consumers" for this purpose – is sufficient. The second definition adds little but confusion. For example, it seems to suggest that ICANN itself --which is a "Maintainer of WHOIS Data" within the meaning of the previous definition, because it is a "Data Controller" (and indeed perhaps the sole Data Controller in the entire gTLD environment!) -- is a "consumer" for these purposes. This leads to the absurd conclusion that the goal of the ICANN Whois policy should be to promote ICANN's own trust in itself. We certainly doubt that this is what the drafters of the AOC had in mind when they stated that ICANN's policies should seek to "promote consumer trust."

The Review Team will find, when it reviews the voluminous record of debates and discussions within ICANN about Whois, that there is ample documentation of the broad ranges of Internet users who rely upon accurate and accessible Whois data, and why they need it. The Review Team simply needs to apply common sense to conclude that public trust in the Internet, in the domain name system, and in e-commerce is diminished, to the extent that this data is inaccurate, inaccessible, out-of-date, obfuscated, or unreliable. The first bullet in this draft definition is fully consistent with this common-sense conclusion, and should suffice. The definition should not even be limited to those Internet users who use Whois. After all, the very fact that domain owners are required to provide accurate ownership and contact information for Internet domain names has a potential deterrent effect against fraudulent, deceptive, and illegal behavior and thus "promotes consumer trust" in the legitimacy of web sites and other resources that users access on the Internet, whether or not those Internet users access Whois data.

We note that the Review Team does not propose a definition of the AOC phrase "consumer trust." IPC suggests that the consumer trust which sound Whois policy and implementation promotes is the expectation that actors on the Internet, particularly those who purport to engage in business activities or in electronic commerce in intellectual property, will be transparent and accountable for their actions. In other words, users of the Internet – consumers – have a legitimate expectation that they will be able to find out with whom they are dealing online. To the extent that this expectation is affirmed and upheld, Whois policy can make a

substantial contribution to consumer trust. To the extent that Whois policy and implementation undermines or erodes this expectation, it does not promote consumer trust, and thus fails the test set out in the AOC.

Finally, it is noticeable that the Review Team's Road Map contains no reference to the review of proxy and privacy registrations in relationship to Whois data. The IPC believes that ICANN policy regarding proxy and privacy registrations should be included in the review conducted by the Whois Review Team. While proxy and privacy registrations, which play an increasing role in the gTLD space, have grown out of a market need, the current ICANN policy regarding them undermines consumer trust and legitimate law enforcement concerns. A standardized process for the management of access to the Whois data hidden within a proxy or privacy registration is long overdue. We urge the Whois Review Team to take a detailed look at the issues surrounding the availability of the registration data protected by a proxy or privacy services.

IPC thanks all Review Team members for their hard work and dedication, and offers whatever assistance may be needed to facilitate the full accomplishment of the Review Team's mission.

Respectfully submitted,

Steve Metalitz, IPC Vice President