

Whois Review Team Discussion Paper Questions to the community, June 2011

The members of the Whois Team are to be commended in their fortitude in assisting ICANN to address, yet again, the issue of Whois policy and practice in the Internet DNS.

It will be recalled that these matters have been studied, negotiated and reported on in several ICANN fora during at least the past decade, without resolution. Although the underlying issues remain important, it is not clear what new elements have emerged since the AoC which would create expectations of a more successful outcome on this occasion.

The following headline issues would appear to be relevant:

1. **Purpose of Whois:** I rather doubt that the initial purposes of the Whois protocol and database extended to their current utilisation. It would appear that rather more is expected of Whois than it is capable of delivering in view of the legacy of past practice and the current and prospective scale of the Internet.

Alternatively, the Registries and Registrars could be obliged to provide accurate and verified data about those specific domains for which a legitimate enquiry or request had been made.

Without wishing to suggest that matters are even more complicated than they are already, I shall pass here on the prospect of applying current Whois policy to IDN Registries.

2. **Whois accuracy:** Accuracy of the data has been demanded for as long as I can remember. If the Discussion Paper is correct (p.5) in suggesting that nearly 30% of records are still inaccurate, then one might imagine that we are barking up the wrong tree. Registrars have long asserted that full verification of the accuracy of all records, including what by now must be a considerable backlog, would be financially unsustainable. If so, then a different approach will be necessary. If not, then some serious compliance efforts would be required, including budgetary aspects. But as this matter has not been resolved since the creation of ICANN, then I wonder what new elements have arisen to facilitate a solution now.

3. **Public access to Whois:** It has long been known that unrestricted public access to personal data for individual registrants recorded in Whois infringes EU/EEA (and some other countries') privacy laws. Accordingly, the AoC qualification that ICANN should enforce Whois policy "subject to applicable laws" effectively exempts Registrars and Registries incorporated in these jurisdictions from those effects of this policy. However, the exemption begs the question as to which rule applies if the Registry or the Registrar is not in an EU/EEA jurisdiction but the Registrant is.

On the other hand the [ICANN procedure for handling Whois conflicts](#) with privacy law, addressed to ICANN staff, (January 2008) is rather more circumspect and describes a detailed Five Step procedure leading eventually to “ICANN's forbearance (*sic*) from enforcement of full compliance ...”. In view of the potentially broad generality of these exemptions, it would be interesting to learn how many times this procedure has been invoked during the past three years or more, and what decisions the ICANN Board and staff have taken as a result.

4. “The Public”: Who exactly does this refer to? In my experience very few individual members of the general public are interested in the registration records of domain name registrants, which is quite understandable. On the contrary, the principal interested parties are not the general public, but are the law enforcement authorities and the agents and delegates of the intellectual property communities. Without prejudice to the necessity and validity of their respective interests in this matter, it would be preferable to be semantically specific and to seek legally safe and workable solutions to their particular legitimate needs, which are not necessarily the same.

Furthermore, in view of the, by now, quite large number of registration records which are said to be incomplete or inaccurate, I would expect those domains engaged in fraud to tend to be among them.

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Since the closing date for comments is tomorrow, I shall abstain today from answering at length all the 14 questions in the Discussion Paper. I suppose that the gist of my point of view is reasonably clear from the above paragraphs. Should the Review Team wish to discuss anything further, I would be available.

Needless to say, these comments are made in my personal capacity and do not imply consultation or accord with those entities with which I have been or am presently associated.

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