

Intellectual Property Constituency (IPC) Statement on Whois Task Force
Recommendation: Conflicts Between National Privacy Laws and Registries' or
Registrars' Contractual Obligations to ICANN
July 25, 2005

<http://forum.icann.org/lists/gnso-dow123/msg00415.html>

(see TOR 5 of Whois Task Force)

This statement responds to the request for constituency input on the Whois Task Force recommendations regarding conflicts between local law and Whois requirements. See Call for constituency statements: WHOIS Consensus Policy & Procedure for conflicts with national law, at <http://forum.icann.org/lists/gnso-dow123/msg00415.html>. Pursuant to requirements of the GSNO policy development process, outlined by the ICANN bylaws, see Annex A, Sec. 7(d), available at <http://www.icann.org/general/archive-bylaws/bylaws-19apr04.htm>, the IPC came to the following conclusion.

The Intellectual Property Interests Constituency (IPC) generally supports the “Policy/Advice Recommendation on conflicts between national privacy laws and registries’ or registrars’ contractual obligations to ICANN.”

While we agree with the statement by Whois Task Force 2 that “there is an ongoing risk of conflict between a registrar’s or registry’s legal obligations under local privacy laws and their contractual obligations to ICANN,” we believe this risk is generally low in the gTLD environment. Public access to Whois and local privacy laws have coexisted for many years, and the likelihood is that this will continue to be the case in the future. The main reasons for this are (1) under ICANN’s contracts, no domain name may be registered in a generic Top Level Domain until the registrant has been notified of, and consented to, the uses and disclosures that may be made of personally identifiable data submitted in connection with the registration;¹ and (2) Whois data has historically been, and continues to be, collected for the broad purpose of enabling contact with the entities responsible for a given Internet resource. Current ICANN agreements and long-standing registrar practices make clear that public access is one of the purposes for which Whois data is collected. Indeed, the contractual obligations of the Registered Name Holder *depend* on the public’s ability to access the information and use it.²

¹ See RAA Subsections 3.7.7.4 and 3.7.7.5.

² Most notably, Registered Name Holders agree to be subject to the Uniform Dispute Resolution Policy, as imposed by RAA Subsection 3.7.7.11. It is impossible for a member of the public claiming trademark rights to bring a proceeding under the UDRP without using Whois data to specify the Respondent. See, e.g., *Wells Fargo & Co. v. Doe*, No. FA0411000362108 (Nat. Arb. Forum Dec. 30, 2004) (ruling on complainant’s request to name “John Doe” as the respondent because the actual registrant had inserted the personal information of an innocent identity theft victim in the Whois database, the panel held that under the UDRP the complainant must name the party appearing in the Whois record as the Respondent in the complaint, but could request that the panel replace that name with “John Doe” in its published opinion).

However, because the risk of conflict between RAA obligations and national law, while probably very low, is not zero, we support the idea that ICANN should have a procedure in place for handling claims of such conflicts. The alternative -- to have no formal procedure in place for this eventuality -- could have adverse consequences. Registrars and registries might simply unilaterally change their policies and practices so that they fail to comply with ICANN agreements, and wait for compliance action from ICANN, if any. This could create uncertainty, insecurity and instability in the domain name system, and reduce uniformity of Whois policies. The result could be confusion and frustration of the purposes of the Whois database, to the detriment of intellectual property owners, businesses, consumers, parents, law enforcement agencies, and others who rely upon access to it.

The goals for the procedure, set out in item 2 of the Consensus Policy Recommendation, are critical:

- ICANN should be made aware of a potential or asserted conflict as soon as possible, and where appropriate ICANN should actively assist in efforts to resolve the issue in a way that allows full compliance with both local law and contractual obligations. For example, local law may require that the registrar do more than the ICANN contract requires in order to obtain a consent from the registrant, which is legally valid under that jurisdiction's laws, for a use of Whois data. In such a circumstance, the registrar should be required to take those extra steps to obtain such consent, if it is practical to do so, and if consent obtained simply by following the contractual obligations would make the use problematic under local law.
- The mechanism for recognizing an exception to contractual obligations should be exercised only in extraordinary circumstances, and should not be mandatory or automatic whenever efforts at resolution meet an impasse. Recognizing exceptions could have adverse impacts on the security and stability of the current system, and on the competitive playing field among registrars. Conceivably, the application of some local law could be so rigid or demanding that a registrar or registry subject to that law simply cannot fulfill its contractual obligations to ICANN and thus the contractual relationship must be phased out.³
- Finally, flexibility is critical, since we cannot now anticipate the specific contours of a future potential conflict, and the legal issues -- beginning with which jurisdiction's law is even applicable -- may be extremely complex.

In general, IPC believes the Recommended Procedure meets these goals and forms a good starting point for development of the policy. The General Counsel (or some other ICANN staff person) should be designated to receive notifications of potential conflicts, to engage in consultation efforts to help resolve them, and to inform the Board and ultimately the ICANN community of any action that needs to be taken. While this may include, in an extraordinary

³ Similarly, if a local law is applied to prevent registrars from obtaining valid consent from registrants in a particular jurisdiction, it may ultimately no longer be possible for such registrars to accept such registrations

case, forbearance from full enforcement of contractual obligations, it may also include enforcement action to compel compliance.

IPC offers a few specific comments regarding the Recommended Procedure, which it urges the ICANN staff to consider in formulating its own procedure:

A. We are concerned that the confidentiality provisions in Steps One, Two, and Three could, as a practical matter, foreclose the ability of interested parties to question or rebut the need for a departure from the RAA on a case-by-case basis. Such an ability to question a registrar's assertion of a conflict in a specific case is particularly important in light of the sparse or non-existent history of insurmountable conflicts between national laws and the RAA. Although we agree there could be circumstance in which confidentiality might be necessary, the policy should not favor such requests, and in fact should specify that they would be granted only in unusual circumstances.

B. The statement near the end of Step One that "Meeting the notification requirements permits Registrar/Registries to participate in investigations and respond to court orders, regulations, or enforcement authorities in a manner and course deemed best by their counsel" is ambiguous. This language may be intended to provide an incentive for registrars to comply with the notification requirements set out in Step One. However, the consequence of failing to meet the notification requirements is not specified. On the other hand, it may be that this sentence is intended as an explanatory comment only.

C. "Step Four: Resolution" should re-emphasize the goal of achieving uniform Whois disclosure requirements. Therefore, we suggest amending the first sentence to read as follows: "Keeping in the mind the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems, *and the value of uniform Whois requirements applying to all Registrars/Registries to the extent possible*, the Board should consider and take appropriate action on the recommendations contained in the General Counsel's report as soon as practicable."

D. The Public Notice portion of the Procedure should include information about how information made less accessible can be accessed through other sources. For example, if a departure from the RAA resulted in the registrant's name but not address being made available, the notice should include information on alternative ways in which such information might be obtained. Therefore, the final sentence of the recommendation should be amended as follows: "Unless the Board decides otherwise, if the result of its resolution of the issue is that data elements in the registrar's Whois output will be removed or made less accessible, ICANN should issue an appropriate notice to the public of the resolution and of the reasons for ICANN's forbearance from enforcement of full compliance with the contractual provision in question, *including relevant contact information for how such data might be accessed in appropriate circumstances*."

i) If a Supermajority Vote was reached, a clear statement of the constituency's position on the issue;

See above.

(ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by constituency members;

N/A

(iii) A clear statement of how the constituency arrived at its position(s). Specifically, the statement should detail specific constituency meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

The IPC membership was notified of the request for a constituency statement on June 22. A draft constituency statement was circulated on July 8. The statement and the issue were discussed at the IPC meeting in Luxembourg on July 11. A revised version of the statement was circulated on July 20 and discussed on an IPC membership call on July 22. At that meeting, on a motion, which was seconded, it was agreed without objection to approve the constituency statement, subject to minor drafting changes.

(iv) An analysis of how the issue would affect the constituency, including any financial impact on the constituency;

As noted above, a sound policy in this area would benefit the constituency, whose members rely upon public access to Whois data to manage their domain name portfolios, enforce their rights against copyright and trademark infringers, and combat cybersquatting, among other purposes. The lack of a policy in this area could ultimately reduce this access to Whois data, make access less uniform and predictable, reduce transparency and accountability, and encourage infringers and other violators to utilize particular registrars or registries in order to evade detection or enforcement efforts. This would have an adverse financial impact on constituency members.

(v) An analysis of the period of time that would likely be necessary to implement the policy.

While this question should be directed to ICANN staff, IPC believes that the recommended procedure is a sufficiently good starting point that a formal procedure could be promulgated within a short time after approval of this recommendation.