

IPC Statement on Whois Task Force Preliminary Report

The Intellectual Property Constituency (IPC) submits the following statement for inclusion in the Whois Task Force Preliminary Report, dated 22 November 2006.

I. Re: OPOC Proposal (Annex A)

Annex A of the Report lists the “four main areas of consideration dealt with” by the OPOC proposal, which we address seriatim below.

1. The IPC does not support point 1 of the OPOC proposal (regarding the type of contact data to be published by registrars via Whois). Adoption of this proposal would have a serious negative impact on members of the constituency.

The many legitimate uses that constituency members make of Whois data are well documented in previous submissions. For most of these uses, especially those regarding protecting the intellectual property rights of companies, non-profit institutions, trade associations, and individuals, ready access to the full range of Whois data is critical. This access enables intellectual property owners to quickly contact the party responsible for the registration or use of a domain name that involves infringement of trademark or copyright, cybersquatting, or other illegal behavior. In most cases, this quick contact leads to a prompt resolution of the problem, without the need to invoke the UDRP or more formal legal processes. In those cases which do proceed to a UDRP complaint, civil litigation, or a criminal investigation, the data currently available in Whois is often essential to effective enforcement.

Basically the same holds true when constituency members access Whois for other legitimate purposes such as combating or preventing online frauds, conducting due diligence in mergers and acquisitions, and the like: quick access to contact data on registrants and their administrative and technical agents facilitates quick resolution of problems in the great majority of cases, which is in the best economic and legal interest of all parties concerned. When a quick resolution is not possible, Whois data plays an important role in the service of legal process, further investigations, and other follow-on activities.

Under the OPOC proposal, most of the data in Whois that enables these quick contacts and that supports these follow-on activities would no longer be available to IPC members (or any other member of the public). Only the registrant’s name and country/state or province would be published. Instead, the intellectual property right holder would have to work through whomever the registrant had designated as his/her/its “operational point of contact.” This entity’s “purpose” would be “to resolve, or to reliably pass on data to resolve, operational issues relating to a domain name.” But the proposal raises far more questions than it answers about how an intellectual property right holder would achieve the quick contact with the registrant which the current system of public access facilitates. These questions include (but are not limited to):

(a) *On what issues is the OPOC expected to act?* “Operational issues relating to a domain name” is only minimally defined, and may not include some or all of the issues summarized above, which are the reasons why members of the IPC to seek to contact the registrant. In such cases, contacting the OPOC may be a fruitless gesture.

(b) *What is the OPOC supposed to do?* Its “purpose” includes “pass[ing] on data.” Is this purpose fulfilled if the OPOC simply notifies the registrant of a query and does nothing more? If so, contacting the OPOC would not only be fruitless but often counter-productive, since it could alert an infringer or other wrongdoer of the existence of an investigation and prompt him to take evasive action.

(c) *How quickly must the OPOC act?* Even if a matter falls within the range of issues for which the OPOC has responsibility, and even if the OPOC responds by providing the requester with the contact data of the registrant (assuming that the OPOC is even authorized to do this), this process will inevitably be far slower and less efficient than the status quo, in which contact data is available via Whois almost instantaneously. If the OPOC does not put the requester into direct contact with the registrant, but instead remains in the role of a go-between through whom all communication must be channeled, delay is virtually guaranteed. Accordingly, many of the efficiencies achieved by quick contact with the registrant and prompt resolution of the matter will be lost.

(d) *What if the OPOC fails to act or to act promptly?* The OPOC may do absolutely nothing (indeed, there is nothing to prevent a registrant from designating an OPOC who does not even know the registrant or how to contact him/her/it). The proposal provides the requester with no recourse in this case. The OPOC would owe no contractual duty to ICANN, either, so ICANN would appear powerless as well to do anything about an OPOC that fails to act. The likely result would be more requests to the registrar/registry (whether through litigation or other channels) for actionable contact information to be divulged, thus increasing costs both for requesters and for registrars/registries.

In sum, interposing an “operational point of contact” between the Whois requester and the registrant will generally make the process of contacting the registrant slower, more difficult, and less reliable than it is today. The benefits for all parties of quick contact and prompt resolution will be largely forfeited; more cases will have to be resolved through more formal channels such as UDRP or litigation; and expense and delay will increase for all concerned. Certainly there may be some cases in which the OPOC will have the desire and capability to facilitate a resolution, but IPC is concerned that these instances will be far outweighed by the number of cases in which the opposite will occur.

2. IPC does not take a position at this time on point 2 of the OPOC proposal (the type of contact data published by registries via Whois). From our perspective, in the thick registry environment it is advantageous to have two sources – registrars and registries – for Whois data, because at any given time one of these sources may be unavailable. Furthermore, not all registrars live up to their obligations to make Whois data publicly available. However, we understand that there are countervailing concerns arising from discrepancies between data about the same domain name in the registry and registrar Whois services. IPC believes that more information is needed before it can take a position on this issue.

3. IPC supports in principle the third aspect of the OPOC proposal, which concerns correcting inaccurate Whois data. This proposal would clarify what registrars are supposed to do when they receive notice of inaccurate data, a point of some confusion today, and spells out that they must take reasonable steps to validate corrected information that is provided to them in

response. This would certainly be an improvement over the current Whois Data Problem Reporting System, which is ineffective. Thus the effect on constituency members would be beneficial, but only to a very modest degree. This proposal would be of very limited value if the entire OPOC proposal were adopted; since only the name and country/province/state of the registrant would be made accessible, there would likely be very few reports of inaccurate data on registrants. IPC would also note that the proposal is purely reactive to complaints of inaccurate data; it lacks any proactive element in which registrars would be required to review, check or verify some or all of the contact information and take other steps to improve the overall accuracy of Whois data. IPC urges ICANN to consider setting more proactive requirements in this area, as was recommended by a predecessor to this task force in 2004. See <http://gns0.icann.org/issues/whois-privacy/Whois-tf3-preliminary.html#SummaryofWork>.

4. IPC takes no position on the fourth aspect of the OPOC proposal, which concerns facilitating domain name transfers.

II. Re: Special Circumstances Proposal (Annex B)

IPC supports this proposal in principle. It would remove from public access only that Whois data whose publication would represent a demonstrable threat to the personal security of a domain name registrant. Unlike the OPOC proposal, which deprives the public of access to registrant contact information even when no privacy interests are present (e.g., when the registrant, or an administrative or technical contact, is a business entity, not an individual), the special circumstances proposal ties the issue of access directly to personal privacy concerns. The determination of which data the public should be denied access to would be made by an objective third party, using transparent and consistent standards, and subject to annual review. This would be a marked improvement over the status quo. Today, with the proliferation of private and proxy registration systems, any registrant who wishes to hide this data can do so if the registrant is willing to pay a cooperative registrar for the privilege. This undermines the long-standing policy of publicly accessible Whois.

While a number of important practical and implementation issues remain to be resolved with the special circumstances proposal, IPC is aware that a similar system has functioned successfully for several years in the relatively large .NL ccTLD. We believe that the proposal in Annex B includes many of the modifications necessary to adapt the .NL model to the gTLD environment. IPC urges ICANN to pursue further development of the special circumstances proposal.

One feature of the special circumstances proposal which departs from the .NL model is the requirement that only a registrant who is using or will use the name for non-commercial purposes is eligible for special circumstances. This non-commercial criterion has been criticized, primarily on the ground that it will be difficult to apply and enforce. IPC recognizes that, at a minimum, the use of this criterion will complicate the administration of the special circumstances system. Although we feel strongly that anonymity is inappropriate in any case in which someone registers a domain name for the purpose of doing business, and that the need for transparency is at its zenith in such a situation, we would certainly support further study of this criterion and review of point 9 of the proposal, and would be prepared to modify or omit this criterion if this study demonstrates that it would be impractical to maintain it.

III. Proposals for Access to Data (pages 24-27)

Since the two proposals before the Task Force each call for the elimination of public access to some data that is now publicly available through the Whois service, the question of how to provide an alternative mechanism through which those with a specific legitimate need can obtain this data is crucial. As the representative of a group of stakeholders who clearly have such a legitimate need, the IPC believes that neither of these proposals (nor indeed any proposal that shares the characteristic of removing any Whois data from public access) should be adopted unless or until an efficient, reliable and speedy alternative mechanism for such access is ready to be implemented.

At the same time, it must be acknowledged that the demands on this mechanism will be much greater under the OPOC proposal (or any variant that deprives the public of great quantities of contact data) than it will be under the “special circumstances” proposal (or any variant in which relatively little contact data will be suppressed, based only on an objective showing of need, and only for a limited time period). This is another compelling argument in favor of the latter over the former.

IPC does not believe that any of the five proposals mentioned in the Preliminary Report, standing alone, marks the path toward the alternative access mechanism that is needed, though several of them might contribute elements to that mechanism. At this point we would offer only the following brief comment.

The first proposal listed would essentially leave the question of access to non-public data to the unilateral decision of registrars, although “made subject to best practices.” The experience of IPC members with proxy and private registration services illustrates why this is not acceptable standing alone. The preliminary report contains an “early stage statement of how registrars typically deal with” requests for data that is hidden by such services (referred to as “type 1 requests”). This statement asserts that “in a typical case, after the request has been deemed to have been made in good faith, the information is disclose [sic] to the requester.” While a system operated consistently with this quotation could go far toward addressing the concern about access to data that is withheld from the public (especially if a relatively narrow set of data fell into that category), the quoted statement does not conform to the experience of many IPC members in dealing with many proxy or private registration services today. All too often, the operators of these services are unresponsive to such requests, even when they are backed up by reasonable evidence of actionable harm. See Registrar Accreditation Agreement, section 3.7.7.3.

IPC would welcome the development of best practices or other protocols that would make the treatment of these requests more consistent, more predictable, and more likely to succeed whenever a bona fide intellectual property concern exists. We would be eager to engage in such a development process, and believe that if sound best practices were successfully applied to proxy/private registration services in the current environment, it would augur well for the prospects of an alternative access mechanism of the kind that would be absolutely essential, if the Whois system were changed to withhold some publicly available data.