

October 2, 2017

To: Theresa Swinehart, SVP Multistakeholder Strategy and Strategic Initiatives
Akram Atallah, President Global Domains Division, ICANN

cc: Dr. Steve Crocker, Chair, ICANN Board of Directors
Göran Marby, CEO, ICANN

Dear Ms. Swinehart and Mr. Atallah:

The Intellectual Property Constituency (IPC) supports the ICANN Business Constituency's letter¹ to Steve Crocker and Göran Marby requesting that ICANN alter its approach in the efforts to analyze the impact of the GDPR on WHOIS.

The WHOIS system, as it exists today, is a critical tool utilized by many Internet stakeholders to ensure the security, stability and resiliency of the Internet infrastructure, as well as the safety and security of Internet users of all kinds, each of which is an important component of ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems. The critical role WHOIS plays in protecting the vital public interests in this regard, its role in supporting ICANN's mission, as well as the stability and safety of the DNS system itself, cannot be underestimated.

Assessing the impact of the European Union's General Data Protection Regulation (GDPR) and ensuring the WHOIS system continues to be available and accessible to protect the public interests is a top priority for the IPC.

Given this importance, the IPC greatly appreciates the recent focus on this issue by ICANN and the formation of the Ad-Hoc Working Group comprised of members of the ICANN community. Gaining broad knowledge and understanding as to how the WHOIS system is used today is a critical first step in assessing any impact the GDPR may have on the multitude of legitimate and many compelling interests in WHOIS access – including those, as mentioned, that serve public interests.

Once the use case data has been updated to capture the community's feedback, it should not be used in discussions with the data protection agencies or any other parties until the legal analysis has been completed. The results of the legal analysis should be shared with the community for feedback. The results should also be used to inform discussions around the goals for any interactions with data protection authorities or other relevant parties that may need to be approached – based on input from the community. We cannot emphasize enough that ICANN must explicitly state the goals for these discussions in advance, and outline a strategy *with assistance from the community to meet the goals*, expressly including any backup plans that should be considered to mitigate any harm or damage to the public interests at stake. The Ad-Hoc Working Group could be very helpful in this regard.

¹ <https://www.icann.org/en/system/files/correspondence/mack-to-crocker-marby-31aug17-en.pdf>.

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ICANN must update its plan for addressing the impact of the GDPR by focusing on the important public interests for maintaining the WHOIS system as well as the centrality of WHOIS to the stability and secure operation of the DNS System, rather than starting out with the assumption that WHOIS is somehow incompatible with the GDPR.

ICANN must leverage the deep knowledge within the community and take advantage of the knowledge and experience gained by many years of ICANN community activity and research in this area. Leveraging and referencing past work product will ensure this important work is completed in a timely manner – vs. starting from scratch.

ICANN must ensure as much legal clarity regarding the GDPR for the community as possible, and as far in advance of its implementation as possible so that the community can get involved. For example, ICANN should encourage the development of a procedure by which business conduct can be proposed for fact-and-circumstance-specific scenarios to a DPA with enforcement authority, for evaluation, which would indicate its views on whether the proposed conduct is in conflict with national privacy laws.

The IPC looks forward to working with the ICANN and the ICANN community to address this important topic.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gregory S. Shatan', with a long horizontal flourish extending to the right.

Gregory S. Shatan
President