

ISPCP CONSTITUENCY WHOIS STATEMENT

July 2005

Introduction

The ISPCP Constituency herein provides input to the combined Whois Task Force on its recommendations on policies related to the Whois database as required by the ICANN GNSO policy development process.

The ISPCP constituency's comments relate to

- 1) The task force recommendation on procedures to be followed in the event of a conflict between national privacy laws and registry/registrar contractual obligations to ICANN
- 2) The task force tasks 1 and 2 as set forth in the terms of reference for the combined Whois task force.
 - a. Task 1 is to define the purpose of the WHOIS service in the context of ICANN's mission and relevant core values, international and national laws protecting privacy of natural persons, international and national laws that relate specifically to the WHOIS service, and the changing nature of Registered Name Holders.
 - b. Task 2 Define the purpose of the registered name holder, technical, and administrative contacts, in the context of the purpose of WHOIS, and the purpose for which the data was collected. As required by the task force terms of reference, the relevant definitions from Exhibit C of the Transfers Task force is used as a starting point and commented upon.

The ISPCP constituency views on conflict of law resolution process.

The ISPCP is generally supportive of the task force recommendations on how conflicts shall be addressed in the event of a conflict between the national laws of a registrar or registry's home base and its ICANN contract.

The ISPCP does not deem such conflicts to be a common occurrence in the gTLD space and further, we do not see any indicators that this trend is likely to change in the foreseeable future. We are guided in our belief by the examination of the record over the course of the past

several years where, in the gTLD space, registries and registrars have rarely had reason to challenge their contractual obligations related to Whois disclosures as a result of conflicting national or local privacy laws.

ISPCP Position

The majority of established privacy regimes throughout many regions of the world require that actual information use and disclosure practices be limited to the list of intended use and disclosure practices that are provided to the data subject at the time of data collection. Accordingly, once adequate disclosure is provided and consent obtained, the subsequent use of the registrant data for Whois purposes, pursuant to the ICANN contract, is not likely to be in conflict with local or national laws. Accordingly, the ISPCP believes that once registrants receive notice of the intended uses of their registration data as it relates to the Whois database, there is little reason for future use in accordance with the contract terms to somehow come in conflict with applicable privacy laws. The likelihood of a conflict is further reduced once the more conspicuous notice requirements go into affect, and registrants are better alerted to the possible uses of the personally identifiable registration data they provide.

Nevertheless, if a scenario arises whereby such conflict does arise, the ISPCP strongly favors the implementation of a process, clearly defined and transparent, that sets forth the steps in resolving any possible conflict. In reviewing the proposal set forth by the Whois task force, the ISPCP finds it to be well thought out, neutral and respectful of the needs and interests of the ICANN community and the registry/registrar organizations. Our constituency believes that no organization should be placed in a situation where it must choose between breaking its contractual obligations or violate applicable law, and we do not believe that any of the ICANN RAA terms are likely to do that.

Based upon the forgoing values, we strongly urge the Whois task force to consider the following concepts prior to finalizing its policy recommendations related to conflict of law issues.

- Transparency is paramount. It is not only a major tenet of the ICANN policy development process, it is

also an implicit aspect of most privacy laws. Without full disclosure and transparency in the manner that information is collected and used, there can hardly be a viable notion of privacy protection. While confidentiality of actions, negotiations and discussions may be necessary in some instances, it is not always a requirement or the most useful manner in which to resolve conflict. Thus, the ISPCP believes that to the extent possible, the ICANN community be notified when the resolution process is begun and as much as possible throughout the process as well.

- Outcomes should be uniform. Some have indicated that legal obstacles will be used by registries or registrars to obtain competitive advantages, resulting in forum shopping. The ISPCP has not seen any evidence that this is in fact reality. Nevertheless, in order to remove the perception that this may be happening, the recommendation should emphasize the importance of uniformity and consistency of handling conflicts should they arise.
 - It is worthy to note that transparency of the process will inevitably lead to more uniformity and better consistency among conflicts that do arise.
- Review should be ongoing. Finally, the ISPCP believes that there will be some lessons learned from the first instance where this process is implemented. With substantial input from the relevant registry or registrar, together with all constituencies, there should be a review of the pros and cons of how the process worked, and the development of revisions designed to make the process better and more efficient, should the need arise again at some point in the future.
 - Again, we'd like to highlight the fact that this goal will be easier met when there is transparency and uniformity throughout the process.

Conclusion

The ISPCP hereby thanks the task force for its work in this matter and looks forward to seeing a better Whois

experience for all stakeholders who develop, populate, oversee and use the Whois databases.