

Intellectual Property Constituency (IPC) Statement on Whois Task Force 1/2 Recommendation: Improving Notification and Consent for the Use of Contact Data in the Whois System

This statement responds to the request for constituency input on the Whois Task Force 1/2 recommendations regarding improving notice and consent for the use of contact data in the Whois database. See Call for constituency statements on Whois tf 1/2 recommendations, available at <http://gns0.icann.org/mailing-lists/archives/dow1-2tf/msg00191.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.

I. Constituency Position

This set of recommendations, see <http://gns0.icann.org/issues/whois-privacy/whois-notification-30nov04.pdf>, is the first of two that have been put forward by the joint task force. The second set of recommendations, available at <http://gns0.icann.org/issues/whois-privacy/whois-tf-conflict-30nov04.pdf>, has not yet been formally offered to the GSNO constituencies for comment. The notification and consent recommendations are based on a similar recommendation from the previous Task Force 2, tasked with reviewing issues surrounding the data collected and displayed in the Whois database. At the outset of the work of that earlier Task Force (April 2004), IPC submitted a constituency statement on the purposes of the task force, which stated in relevant part:

Based on the limited data which has been collected so far, IPC believes that the effectiveness of notification to domain name registrants, and the obtaining of their consent as required by the RAA Secs. 3.7.7.4, 3.7.7.5, generally need improvement.

For example, obtaining specific consent on this issue from the registrant during the registration process, separate from obtaining agreement to extensive terms and conditions for the registration in general, should be encouraged. Similarly, some registrars should be more specific and forthright in communicating to registrants about the circumstances under which Whois data is available to third parties.

ICANN should:

- incorporate compliance with the notification and consent requirement as part of its overall plan to improve registrar compliance with the RAA. (See Memorandum of Understanding Amendment II.C.14.d, available at <http://www.icann.org/general/amend6-jpamou-17sep03.htm>).
- issue an advisory reminding registrars of the importance of compliance with this contractual requirement, even registrars operating primarily in countries in which local law apparently does not require registrant consent to be obtained.

IPC believes that registrars should take the lead in developing best practices, with input from other interested constituencies, that will improve the effectiveness of giving notice to, and obtaining consent from, domain name registrants with regard to uses of registrant contact data. IPC would be glad to participate in such an effort.

IPC Constituency Statement on Whois Task Force 2 (April 13, 2004) *available at* <http://www.gnso.icann.org/mailing-lists/archives/dow2tf/msg00191.html>.

In IPC's view, the current set of recommendations is responsive to the concerns voiced in our earlier constituency statement. Their implementation should help to address the problems identified and to increase the likelihood that registrants are providing fully informed consent.

IPC continues to believe that its two suggestions bulleted in the April 2004 statement should be implemented, but we recognize that these suggestions may fall outside the scope of the current Policy Development Process. In any case, we do not perceive any inconsistency between these suggestions and the recommendation currently under consideration. We also renew our offer to work with interested registrars to help develop best practices in this area.

We find the recommendations ambiguous in some respects and suggest a few drafting changes to clarify these points.

Recommendation 1 states that “[l]inking to an external web page is not sufficient” to provide the required disclosure. It is unclear to us what an “external” (or “internal” for that matter) web page is. Perhaps this sentence could be amended to read: “Linking to a web page is not sufficient.”

Recommendation 2 states that disclosures must be “set aside” from other provisions of the registration agreement if the disclosure is presented as part of the agreement. It is unclear what “set aside” means. Furthermore, Recommendation 2 allows as an alternative that disclosures may be presented “separate from the registration agreement.” This might be viewed as inconsistent with the requirement in Recommendation 1 that the disclosure be provided “during the registration process.” As such, Recommendation 2 could be amended as follows: “Such disclosures must be displayed prominently and conspicuously prior to the agreement being executed by the registrant, regardless of whether they appear as a term of the agreement or separate from the agreement.”

IPC also suggests that the recommendations include notice to registrants of the consequences of providing false or inaccurate Whois data during the registration process. The text of such a notice could be similar to what registrars provide registrants pursuant to the Whois Data Reminder Policy. *See* <http://www.icann.org/registrars/wdrp.htm>.

We also identify two very minor typographical errors that should be corrected. In the title, the word “of” should appear between “Use” and “Contact.” In the first line of Recommendation 3, the second “registrars” should be changed to “registrants.”

In general, IPC supports the recommendation put forward by the Task Force, and commends it for its hard work and its success at coming to consensus. We hope that similar consensus can be reached as the Task Force examines other policy issues surrounding the Whois database. IPC believes this recommendation will have a positive effect for Internet stakeholders as a whole, not just registrants. The more clearly the Whois policy is disclosed to registrants, the more effective their stated consent to this policy will be. In addition to giving registrants the information they need to make informed choices, implementation of this policy may very well result in general improvements to the Whois database as a whole.

II. Methodology for Reaching Agreement on IPC Position

IPC drafted and circulated via email a constituency statement, soliciting input from its members. IPC members suggested edits and additions to the draft which were subsequently incorporated into the finalized constituency statement.

III. Impact on Constituency

This recommendation will have a positive impact on IPC by potentially enhancing the utility of the Whois database, a vital tool for protecting intellectual property rights in the online environment. IPC does not anticipate any direct financial impact on the constituency as a result of this policy. We think any costs associated with this policy will be minimal; if there are any, those costs will most likely be initially borne by registrars, and ultimately passed onto registrants, including IPC members, many of whom hold registrations for literally thousands of domain names.

IV. Time Period Necessary to Complete Implementation

We would not anticipate that an extensive time period would be necessary to implement this policy, as it would apply only to new registrations or renewals and would not require new contracts with existing registrants.