

IPC Constituency Statement (10/4/07)

Pursuant to item 2 of the GNSO Council resolution of September 6, 2007, the Intellectual Property Interests Constituency (IPC) provides the following update of its previous (January 2007) constituency statement on Whois. See <http://gns0.icann.org/issues/whois-privacy/whois-services-final-tf-report-12mar07.htm#IPC>.

Items (i) through (iii): The issue was discussed when the constituency met by teleconference on September 5, 2007. A draft statement was circulated to all IPC members. The statement below reflects changes suggested by IPC members.

Item (iv)

Re: Motion #1

In its January 2007 statement, the IPC identified several critical questions about the OPOC proposal, in particular the roles and responsibilities of the new Operational Point of Contact. It also stated at that time: “Since the two proposals before the Task Force [OPOC and Special Circumstances] 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.”

The Working Group formed by the GNSO Council after the Lisbon ICANN meeting was charged with addressing questions which paralleled some of the concerns raised by the IPC. IPC representatives participated actively in the Working Group. In our view, some progress was made in defining the roles and responsibilities of the OPOC. Much less progress was made on the crucial question of developing the alternative access mechanism that is needed. In neither area was general agreement achieved on answers to the questions posed by the GNSO Council.

If Motion #1 were adopted, IPC members would be adversely affected. 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, more opaque and less reliable than it is today. The benefits for all parties of quick contact and prompt resolution of a wide range of disputes (including but not limited to those involving questions of infringement of intellectual property rights) 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. A particular concern is that no alternative mechanism exists (or is even proposed) for obtaining more complete contact information on registrants in case of a legitimate need which may be extremely pressing.

Accordingly, IPC opposes Motion #1, which “supports the OPOC recommendation as contained in the Task Force report.”

Motion #2

If Motion #2 were adopted, the impact on IPC members would probably be positive. In the long run, development of a stronger factual basis for any policy changes regarding Whois is likely to result in better decision-making. At a minimum, the practical impacts of different policy alternatives would be better understood.

IPC supports Motion #2. We agree that there is not “an adequate basis for any implementation of the OPOC proposal,” and that future policymaking in this area would benefit greatly from “a comprehensive, objective study ... of key factual issues regarding the Whois system, which has never been undertaken.” The completion of such a study would provide a solid basis for the next steps in Whois policy development.

Motion #3

If Motion #3 were adopted, the impact on IPC members would be decidedly negative. Their ability to contact registrants (for the many legitimate reasons spelled out in many previous submissions) would become completely unpredictable, and could vary wildly depending on the registry or registrar involved. It can be envisioned that registries or registrars would exercise their unrestricted control over registrant contact information by demanding extortionate prices for this data and imposing other onerous terms and conditions. There is also a risk that expensive and protracted litigation would ensue among registrants, registrars, registries, and requesters (including IPC members) over the various inconsistent policies that would be put into place. The likelihood of direct intervention by one or more governments into the process would increase significantly, in the absence of consistent self-regulatory practices. In their role as domain name registrants, IPC members would also face greater uncertainty about how their personal data would be handled by registrars or registries.

IPC opposes Motion #3. We disagree with the statement that the current Whois policies “cannot be reasonably implemented or enforced,” and note that ICANN has repeatedly committed to do just that. We oppose the “sunsetting” of the Whois contractual provisions that have been in place, with minimal modifications, throughout nearly all of ICANN’s history. We believe that the current system can and should be improved, including through policy changes that are based on a strong factual record about the uses and abuses of Whois data. To simply discard the current system, and let each ICANN registrar or registry follow its own wishes about access to, trafficking in, or accuracy of registrant contact data, would risk serious damage to the stability and security of the domain name system, and would not be in the best interests of any current participant in that system, including but not limited to the constituency IPC represents.

Item (v)

IPC has no idea how long it would take to implement Motion #1.

By its terms, the first step of Motion #2 (presentation of draft RFP, budget and timeline and methodology for outreach) would be implemented within 90 days. Full implementation (completion of the study) could probably be achieved within a 12-18 month period.

By its terms, Motion #3 would be fully implemented by the end of the 2008 ICANN Annual General Meeting.