



Comments of Intellectual Property Constituency

On .cat Whois Proposed Changes

<http://www.icann.org/en/public-comment/cat-whois-changes-18jan12-en.htm>

February 10, 2012

The Intellectual Property Constituency (IPC) appreciates this opportunity to comment on the request by the operator of the .cat registry (Fundacio puntCAT) to substantially restrict public access to Whois data on some .cat registrations. See <http://www.icann.org/en/public-comment/cat-whois-changes-18jan12-en.htm>.

IPC urges that this request be denied, mainly for the following reasons:

(1) There is no conflict between the registry's contractual obligations to ICANN and its legal obligations under national law. The compatibility of the current .cat Whois policy with applicable national data protection law is not in doubt. The registry sought and received an opinion from the Spanish Data Protection Agency, which states unequivocally that the registry's current policy of unrestricted public access to Whois data, as required by its registry agreement with ICANN, "is not contrary" to Spain's data protection law and "does not violate" that law or its implementing regulations. Thus, there is no basis for arguing that the registry's contractual obligations to ICANN and its legal responsibilities as a Spanish legal entity are in conflict. This starkly contrasts with the two previous occasions in which gTLD registries were allowed by ICANN to reduce public access to Whois.

(2) Approval of the proposal would raise serious questions about ICANN's compliance with the Affirmation of Commitments, and would reflect unsound policy. The change sought by the Registry extends far beyond the changes approved in the previous two cases, and would in effect eliminate public access to registrant contact data on any .cat registrant who chose to cloak that data in secrecy. This is precisely the opposite of the policy ICANN pledged to follow in the Affirmation of Commitments. Especially in the absence of any legal compulsion to do so, ICANN should not permit gTLD registries to flagrantly deviate from long-standing policy, in a way that will compromise the important public interest value served by public access to Whois data.

Background

Currently, like all other gTLD registries operated under agreement with ICANN, the .cat Whois policy provides for free, real-time public access to a range of contact data regarding all

registrants of .cat domains. See <http://www.icann.org/en/tlds/agreements/cat/cat-appendixS-22mar06.htm>, part VI. The registry operator now proposes a drastic alteration of that policy. Under the .cat Whois proposal, which was first surfaced as a request under ICANN's Registry Services Evaluation Process last October, and which was posted for public comment on January 18, any .cat registrant who unilaterally identifies himself or herself as "a human being, perceptible through the senses and subject to physical laws," may opt out of having any contact data regarding the registration accessible to the public at all.¹ This opt out would be available even if the domain were used for commercial purposes. Anyone seeking contact information (that of the registrant, or of the administrative or technical contact) regarding a registration for which an "opt out" had been exercised would have to fill out a form on the registry's website. This form would include full contact information on the requester, as well as the reasons for requesting the contact information,. The registry's sole obligation would be to forward this form to the registrant. There would be no recourse for the requester if the registrant chose not to respond.

The IPC has participated actively in years of debate on Whois policy. We believe that the value of unrestricted public access to Whois data – the value to law enforcement, to consumers, to parents, to all Internet users, not only to the holders of intellectual property rights – has been amply demonstrated. Public access to complete, accurate and up-to-date WHOIS data has been a central responsibility of ICANN since its creation. Not only was this responsibility outlined in the original Memorandum of Understanding, as amended, it has been restated in the Affirmation of Commitments (AOC).² The IPC also considers a properly functioning and reliable WHOIS system a core part of ICANN's responsibility. We have engaged actively in the discussion regarding previous attempts to permit gTLD registries to deviate from this responsibility, and believe it is our obligation to do so again.

Compliance with Data Protection Law

The ICANN Board has approved changes to the public Whois access policies for two gTLD registries in the past: for .name (see Resolution 02.142, at <http://www.icann.org/en/minutes/minutes-02dec02.htm>), and for .tel (See Resolution _____.2007 [sic], at <http://www.icann.org/en/minutes/minutes-18dec07.htm>). Both those changes were far less drastic than what .cat proposes, and there is at least a plausible argument that in both cases the resulting Whois regimes were consistent with long-standing ICANN policy.³ But there is

¹ See proposed amendments to Appendix S, Part VI, <http://www.icann.org/en/tlds/agreements/cat/appendix-s-vi-redline-18jan12-en.pdf>, at page 1.

² See <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>, at section 9.3.1.

³ See memo of Louis Touton, ICANN General Counsel, to the Board, 26 November 2002 , at <http://www.icann.org/en/minutes/report-gnr-whois-26nov02.htm> ("GNR's proposal does not materially alter the existing Whois policy registry operators must follow, since all the elements of Whois data currently available for .name would continue to be available.... Rather than deviate from the basic Whois policy, GNR's proposal simply revises the mechanism through which its obligation to provide Whois data is fulfilled.") The .cat registry was incorrect to identify the .name and .tel changes as "similar in substance or effect" to the change sought for .cat (see page 7 of the RSEP form).

also another critical difference which should dictate a different outcome for this request – the complete absence of any conflict between the registry’s contractual obligation to ICANN and its duty to obey applicable national law.

Both .name and .tel argued that they needed to change their Whois policies in order to comply with privacy (data protection) law in the jurisdiction (in both cases, the UK) in which the registry was located. In the case of .cat, this is demonstrably not the case. In fact, the opposite is true: the data protection authority in Spain (where the .cat registry is located) has clearly stated that .cat’s current Whois policies are in full compliance with Spanish data protection law. There is no foundation for the registry’s statement, on page 6 of its October 5, 2011 RSEP request form, that the changes are needed “in order to comply with the provisions of Spain and EU legislation.”

The 2002 and 2007 Board resolutions approving the .name and .tel contract changes speak obliquely of “the unique legal and business circumstances” faced by each registry as justification for the contract amendments. But there is no doubt that, in each case, the registry asserted that the status quo – compliance with the unmodified registry agreement with regard to Whois – would expose it to liability under the UK data protection law. Regardless of the merits of the assertion of conflict between contractual obligations and national legal requirements in these two cases, it is clear that the risk of such a conflict was both the main motivator of the registry request, and a significant factor in the Board’s decision to approve minor changes in each registry’s Whois policies.⁴

In the case of .cat, however, no such risk exists. We know this because the registry sought an opinion from the Spanish Data Protection Agency, and received a response dated September 4, 2009, which was included in the materials submitted in the RSEP process.⁵ The request from the puntCAT foundation asked for an opinion on “the impact that the current situation of the ‘whois’ directory of those who have a registered .cat domain has on personal data protection regulations, consisting of Organic Law 15/1999, dated 13 December, on the Protection of Personal Data, and its implementation directive.” The Data Protection Agency responded as follows: “*The processing currently being carried out by the inquirer [the registry] and by the registrars applying for domain name registration in favor of the applicant is not*

⁴ See Letter from J. Beckwith Burr to Louis Touton Regarding Amendment to Whois Provisions of .name Registry Agreement (9 November 2002), at <http://www.icann.org/en/correspondence/burr-letter-to-touton-09nov02.htm> (counsel to .name registry states that “the changes sought by Global Name Registry are intended to ensure that its operation of .name complies with the [Data Protection] Act.”); see also memo of Louis Touton, ICANN General Counsel, to the Board (noting registry’s “desire to provide heightened confidence that its Whois service lies with the United Kingdom Data Protection Act of 1998,” and concluding that “the proposed mechanism also gives a higher level of confidence that GNR’s Whois service fully meets the requirements of the UK data-protection law,” at <http://www.icann.org/en/minutes/report-gnr-whois-26nov02.htm>); see also <http://www.icann.org/en/minutes/minutes-20nov07.htm> (minutes reflecting representation by Kurt Pritz to the Board that “the UK Privacy Commissioner’s Office had clearly indicated to ICANN Staff that they believed it was necessary to change existing ICANN contractual provisions for .TEL registry”).

⁵ See <http://www.icann.org/en/registries/rsep/puntcat-cat-request-05oct11-en.pdf>, at pages 24-31.

contrary to Organic Law 15/1999 in terms of the information collected and processed by them.” The opinion letter goes on to discuss two grounds under that law for authorizing the processing of Whois data (consent, and fulfillment of a contract) and appears to endorse both of these as applicable to .cat Whois policies. Of particular importance here, this portion of the Agency’s opinion letter states:

“The inquiry states that the inquirer obtains consent from the interested parties for inclusion of their data in “whois” directories, available to the public wishing to access such data. Although the specific clauses on which this consent is based are not included in the inquiry, the current situation, in which the directories include the personal data detailed in the inquiry, could be considered legally valid provided that the clauses in question make clear the access conditions of the aforementioned directories in the terms established in Article 5.1 of the Organic Law.”

(Of course, all .cat registrations must be made through ICANN-accredited registrars. All of these registrars are subject to the requirement (set out in Section 3.7.7.4 and 3.7.7.5 of the Registrar Accreditation Agreement, see <http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm#3>) to disclose to every registrant the purposes for which registrant contact data is collected and the recipients of such data, and to obtain the consent of the registrant to such uses. This disposes of the disclosure issue raised in the proviso to the Data Protection Authority’s opinion quoted above.)

The Agency’s letter concludes flatly and unequivocally, *“the current situation does not involve a violation of the data protection regulations by the inquirer.”*

The letter goes on to say that the Agency does not view the status quo as “optimal,” and that it believes the registry’s proposed changes to Whois policies are “more appropriate than that which currently exists.” But those policy preferences (as contrasted with legal opinions) are completely beside the point.⁶ Acknowledging that the Authority’s letter contains a boilerplate preface that “the Law does not provide for the provision of binding inquiries,” nevertheless it appears beyond doubt that the risk of conflict between the .cat registry’s current Whois obligations under its contract with ICANN, and its legal responsibilities under the Spanish Data Protection Act, is close to zero. This alone is sufficient justification for rejecting the registry’s proposal to deviate drastically from long-standing ICANN policies.

The Proposed Changes, the Affirmation of Commitments, and the Policy Merits

The .cat proposal is not a mere tweak in ICANN’s long-standing Whois policies, nor the interpolation of a “speed bump” to guard against abuse of public access to Whois data. Instead, it turns the policy of public access to registrant contact data – which has been in effect since long before ICANN became the steward of the domain name system – on its head. As the

⁶ Also beside the point is the correspondence (on pages 20-21 of the RSEP packet) between a .cat registry official and the Deputy Head of the Data Protection Unit of the European Commission. Neither that unit, nor the Article 29 Working Party whose views are discussed in this correspondence, has any responsibility for enforcing the Spanish Data Protection Act, nor any other law directly applicable to the activities of .cat.

Affirmation of Commitments states in section 9.3.1, “ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information.” Under the .cat proposal, access to Whois information on those .cat registrants who opt out would be neither timely, unrestricted, nor public. Since there is nothing in “applicable law” to require any change in .cat’s current Whois practices, granting the registry’s request would seem to flagrantly violate the commitments ICANN made three years ago in the Affirmation of Commitments. On this ground as well the request should be denied.

Finally, even if there were some documented inconsistency between the status quo and applicable national law, and even if the Affirmation of Commitments did not clearly bar approval of the registry request, the notion of allowing any and all registrants in a gTLD registry to prevent the registry from disclosing their contact information, or that of their administrative or technical contacts, to any third party requester, is simply a bad idea for the domain name system and for the public whose interest ICANN is pledged to serve. To date, IPC is unaware of any substantial abuses occurring with respect to .cat domain names or the Internet resources associated with them, whether with regard to violations of trademark or copyright, or with regard to consumer scams, trafficking in malware, violations of child protection norms, or similar malicious or criminal behaviors. We recognize that, as a sponsored TLD catering to speakers of the Catalan language, .cat is at a reduced risk of becoming the venue for such conduct, in comparison to another gTLD that does not impose any restrictions on who may register a domain name and for what purpose. We are confident, however, that if the .cat registry proposal were accepted by ICANN, the risk of such activities occurring in .cat would increase dramatically. The possibility to operate a website and other Internet resources in virtually complete anonymity would provide a powerful incentive for wrong-doers to game any registration restrictions the registry imposes.

While the materials submitted by the registry make some reference to recourse mechanisms that might be available to law enforcement or trademark owners, no details are provided.⁷ IPC (for its part) is unaware of any arrangement that has been made to allow for access by intellectual property owners to the Whois data of .cat registrants who, in the future, choose to “opt out” of public access to Whois. This is not surprising, since the registry operator chose not to engage in any consultations with either the IPC or any other ICANN constituency or stakeholder group before submitting its request.⁸

⁷ In the proposed amendment to Appendix S- Part VI of the Registry Agreement, it is stated that “the Registry will offer access to the full data of individuals that have chose [sic] non disclosure to law enforcement agencies .” Elsewhere in the materials, the “Functional Description” of the service refers to a “white list of IP addresses” from which Whois queries will continue to be honored, and that such privileged users, to include “law enforcement agencies and trademark protection agencies,” will be “accredited by puntCAT on demand.” (RSEP package, page 13). However, this document is explicitly marked as a draft, subject to change. (We also note that the very first sentence of this document completely misstates the opinion of the Spanish Data Protection Agency.) In neither instance are any details provided about who would be able to access full data despite the opt out, under what circumstances, or using what procedure.

⁸ See the RSEP form, <http://www.icann.org/en/registries/rsep/puntcat-cat-request-05oct11-en.pdf>, at page 4.

For the foregoing reasons, IPC urges ICANN not to accept the registry contract changes proposed for .cat.

Respectfully submitted,

Steve Metalitz, IPC president, on behalf of the Intellectual Property Constituency