IPC COMMENTS - PROPOSED ICANN UNIFIED ACCESS MODEL (UAM)

The Intellectual Property Constituency (IPC) of the Generic Names Supporting Organization (GNSO) appreciates the opportunity to comment on the Unified Access Model (UAM).

Executive Summary

These comments will focus on specific recommendations relevant to IPC. In general, the IPC applauds the draft framework for a possible Unified Access Model (UAM) for continued access to full WHOIS data, including non-public data. We also support the overall approach suggested by the ICANN organization in connection with establishing a standardized access method for such data by third parties with legitimate interests in such data. In conjunction with further direction from European data protection authorities, the IPC supports: (1) eligible user groups may apply to become accredited by an appropriate independent accrediting body that will enable those accredited users to access non-public WHOIS data, subject to a defined code of conduct; (2) the act of accreditation confirms that the accredited user has a legitimate interest in accessing the additional non-public data such that individual query-per-query review of such interests is not necessary. The specific comments of the IPC as to each section of the UAM draft framework are provided below.

While it is appreciated that ICANN Org has introduced a draft access framework for discussion, the need for access has become more acute since May 2018 and necessitates rapid action instead of slow-paced discussion. The IPC therefore underlines that ICANN should act in the public interest by expeditiously advocating for a temporary unified access solution for security, law enforcement, consumer protection and intellectual property needs, while the community works to develop a permanent solution via the EPDP. The IPC regards the approaching 25 May 2019 deadline for the Temp Spec; it is therefore critical that ICANN prioritize this matter more highly in Phase 2 of the EPDP, including facilitation of a more detailed community process to move the model forward, production of developmental milestones and a timeline for reaching agreement, and adoption of a temporary specification to implement it.

Specific Comments

Section A: Introduction

The IPC concurs that this paper represents a working draft that represents a high-level framework of a unified access model intended to further discussions on the subject within the ICANN community. While the IPC appreciates a working draft, the emphasis now must be on actionable work in Phase 2 of the EPDP to arrive at a defined outcome.

Section B: Brief Summary of the Framework for Possible Unified Access Model

The IPC agrees that an Accredited Party will provide a legitimate purpose and agree to comply with appropriate Terms of Use in order to access full WHOIS data based on a query through an RDAP-based interface. Note that it would be over-burdensome to make purpose specification mandatory for each individual record. There will be times when efficiency must prevail, allowing users to specify a purpose for the lookup of multiple records at once. Accordingly, the query should support a single or bulk data request. Each Registry and Registrar must be required to provide full WHOIS files that consists of verified and validated data elements on a commercially reasonable basis to the centralized system. Registry and Registrar WHOIS data should be submitted every 24 hours to ensure the contents remain current.

Section C: Background

The IPC seeks to further understand and clarify the mechanisms that ensure the data is accurate and current if a separate system is created to consolidate the WHOIS data collected by the sponsoring Registrar and Registry Operator.

Section D: Important Note about Terminology

In regards to defined term #3, Non-Public WHOIS Data "includes personal data included in registration data elements required to be redacted from data publicly available in WHOIS, including the name and email address of the registrant." The IPC would like to clarify that when an accredited user queries the unified access system, the data provided should be the unmasked data of the beneficial registrant even if the registration is associated with either a proxy or privacy service. This is because the process of accreditation would meet the intention of the requirements envisioned under ICANN's approved Privacy and Proxy policies with regard to access for Law Enforcement, Trademark Owners and Copyright Owners. Such data should also be compliant with the validation and verification requirements outlined in the 20133 RAA WHOIS Accuracy Specification.

Section E: Community Views About High Level Elements of a Unified Access Model

Section E provides a summary of the key elements of a potential UAM. The IPC supports a number of these elements, including: (1) using RDAP as the technical protocol supporting the UAM, (2) ensuring proper safeguards are being implemented regarding the handling of data processed in connection with the UAM, and (3) implementing a decentralized process for user authentication.   As it pertains to current competing views regarding the legal requirements of GDPR vis-a-vis the UAM, the IPC supports the following:

1. Whether or not an authenticated user requesting access to non-public WHOIS data must provide its legitimate interest for each individual query/request;
    a. In order to ensure a positive user experience, the user could specify their specific purpose as part of the application process for accreditation and would not then need to provide the same purpose statement / legitimate interest explanation on an ad-hoc basis for each query. This would relieve the necessity of an over-burdensome purpose specification for each individual record.
2. Whether or not full WHOIS data must be returned when an authenticated user performs a query;
    a. The IPC supports the full record being provided for every query. The full record should provide the unmasked data if associated with a privacy or proxy registration for the reasons expressed in Section D above and as described in the draft agreement for Privacy and Proxy Accreditation Program.
3. Whether or not a log of query activities concerning non-public data must be available to the registrant upon request except if prohibited by a relevant court order or legal requirement.
    a. The IPC urges ICANN to further consider the benefit of log disclosure vs. potential negative impacts of doing so. The IPC is concerned in particular about the possible negative consequences of disclosing query logs to registrants and the possibility of tipping off a registrant to ongoing criminal, cybersecurity, or IP infringement investigations, which could potentially stymie anti-abuse or law enforcement efforts.
4. Whether or not both registrars and registry operators must be required to provide access to non-public registration data;
    a. To reduce the risk of single point of failure, the IPC supports access to non-public registration data from both the registrar and registry operator upon request. There have been instances in the past where WHOIS data has become unavailable upon Registrar failover. Registrar data should be the primary data set, with registry data being collected but only delivered in response to a query in the event that the registrar data cannot be returned for any reason. We also find value in the idea of an RDAP portal operated by ICANN that can vet and handle requests.
5. Whether or not there should be a fee imposed for accessing non-public WHOIS data
    a. Although the IPC does not generally favor fees for data access, the IPC could support, in principle, fees for such access only if modeled on a cost recovery basis. Each accreditation fee would be paid on annual basis and apply to a twelve (12) month calendar period. The IPC does not favor per-record fees for access.

6. Whether or not there should be a centralized portal operated by ICANN from which authenticated users are able to perform queries of non-public WHOIS data.
    a. The IPC supports a centralized portal operated by ICANN from which authenticated users are able to perform queries of non-public WHOIS data, consistent with appropriate policy and technical safeguards to ensure such a system is secure, stable, and resilient, and consistent with GDPR per definitive guidance from the European Union Data Protection Board, or which is otherwise enshrined in EU Member State law recognizing the public interest in having such a system. As reflected in prior IPC comments, while this process is underway, the IPC urges ICANN to work with contracted parties and other community stakeholders to improve and clarify the requirements for the "reasonable access" framework for obtaining access to non-public WHOIS data as currently enshrined in the Temporary Specification on gTLD Registration Data.

Section F: Summary Description of Framework for a Possible Unified Access Model

1. Who would be eligible for continued access for WHOIS data via a unified access model?
    a. IPC supports the eligibility of the specific user groups outlined in the Accreditation and Access Model, specifically including legitimate intellectual property owners and their agents, although there may be additional user groups whose eligibility the IPC would support. User groups should be given the latitude to self-define, present legitimate purposes and request access. A user group need not wait to be identified and validated by a third party -- should it have legitimate purposes for access to WHOIS data, it should approach the accreditation authority for access. ICANN should define appropriate measures to ensure safeguards of personal data disclosed through the UAM to such users.

2. Who would determine eligibility?
    a. An expedited cross-community working group could be formed, with representation from all ICANN SO/AC/SG/C groups with the specific limited mission to define UAM user eligibility criteria. The IPC does not agree it should be sole discretion of the GAC (which "does not envision an operational role in designing and implementing the proposed accreditation programs…"[1]) to determine defined criteria for Eligible User Groups, although GAC should certainly be involved in the development of eligibility criteria, especially in relation to law enforcement users and other potential user groups associated with governmental agency/authority.
3. How would authentication requirements for legitimate users be developed?
    a. The IPC supports assigning this responsibility to individual authenticating bodies with expertise in appropriate subject matters.
4. Who would be required to provide access to non-public WHOIS data?

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[1] https://gac.icann.org/contentMigrated/icann61-san-juan-communique

a. The IPC supports the following statement: 'Both registry operators and registrars would be required to provide access to non-public WHOIS data under a unified access model'. As noted above, this requirement ensures continuity of data in the event registrar data is unavailable for any reason.

5. What would be the overall process for authenticating legitimate users for access (*sic*) non-public WHOIS data under unified access model?

   a. The IPC generally supports the process description contained within this section, with a couple of clarifications. First, in the event a centralized system operated by ICANN is implemented, the credentials provided to a user by an Authenticating Body would be presented to ICANN via this centralized portal, as opposed to a registrar or registry operator directly. Second, consistent with comments above, an accredited user making a query should not be required to provide individual legitimate purpose statements for each query, but rather the legitimate purpose would be assumed or automatically identified based on the user having obtained accreditation (defining the user's legitimate purposes would be part of the accreditation process). General terms of use could apply to the user as part of the query, as currently exists with general WHOIS database queries.

   b. The IPC would suggest that the World Intellectual Property Organization (WIPO) be considered a possible Authenticating Body for the proposed eligible user group composed of intellectual property owners and their agents.

6. What scope of data would be available to authenticated users?

   a. Given the legitimate purpose of an accredited user, the full WHOIS data set should be returned for each query. However, in the event ICANN and the community deem it necessary to limit access in any way for otherwise accredited users, then the IPC looks forward to discussing the in greater detail the methodology for determining what limitations should exist for what non-public data is returned for queries by accredited users.

7. Would registry operators and registrars be required to provide access to non-public WHOIS data to all authenticated users?

   a. The IPC supports the current answer to Question 7.

8. Would a unified access model incorporate transparency requirements?

   a. The IPC supports the proposed transparency and reporting requirements, subject to our prior comments relating to considerations around registrant access to query logs. The IPC also supports periodic review of the UAM for the purposes of ensuring transparency.

9. Would there be any fees as part of the unified access model?

   a. As previously stated in Section E, Question #5, the IPC does not oppose all fees in principle, but would want to ensure that accreditation application and renewal fees should be modeled on a cost recovery basis only, and should not be a per-record query fee. Each accreditation fee should be paid on annual basis and shall apply to a twelve (12) month calendar period.

10. Would there be a process to review the effectiveness of a unified access model?

   a. The IPC supports a formal review of the UAM one year after completing its full implementation, and then every five years after completion of the initial review to ensure ongoing effectiveness. Such reviews should be implementation-oriented and not subject to a full community-based

policy review. Any such policy-style review should take place only if the need for same is identified by the GNSO Council, as managers of the gTLD policy process, and a specific policy development process focused on reviewing the policy surrounding the UAM is chartered by that body.

11. Would there be a central repository of WHOIS data from which access would be granted to authenticated users?
    a. In order to avoid a single point of failure, the IPC supports registrars and registry operators continuing to maintain and operate individual WHOIS databases based on their current contractual requirements; however, the IPC generally supports the notion of a centralized repository and centralized portal for accessing all WHOIS data, managed by ICANN.

12. What technical method would be required to provide access to non-public WHOIS data?
    a. The IPC supports Registration Data Access Protocol (RDAP) as the method used to access WHOIS data (ultimately both public and non-public registration data should migrate to this protocol).

13. What technical method would be used to authenticate users?
    a. The IPC supports a system of credentials to authenticate accredited users and allowing them to access non-public data through the UAM. These credentials should be appropriately secure, scalable and easy to use.

14. What would be the role of Terms of Use in a unified access model?
    a. The IPC encourages ICANN org and the community to develop proposed Terms of Use governing UAM users' access to non-public WHOIS data delivered through the UAM. We agree that Terms of Use should be developed and implemented, integrating appropriate data safeguards (among other relevant key terms). This is akin to historical governance of WHOIS queries when the full set of WHOIS data elements was publicly available, plus any additional terms to satisfy the specific requirements of GDPR.

15. Would there be multiple Terms of Use?
    a. Ideally, there would be a single uniform Terms of Use applicable to the UAM and all accredited users thereof, unless a compelling case can be presented as to why differentiated Terms would be necessary. That said, the IPC does not oppose the development of specific terms applicable only to certain user groups, tied to the specific needs or characteristics of such groups.

16. How would the Terms of Use be developed?
    a. The IPC encourages ICANN org and the Community (not merely the GAC and/or members of the EPDP) to work together to develop proposed Terms of Use for various use cases. This could be done through the previously-proposed cross-community working group (or a specific legal sub-team thereof, potentially in conjunction with ICANN staff/ICANN legal). The IPC agrees that these Terms could be developed with input from the EDPB, as well as the individual Accrediting Bodies.

17. What types of safeguards would be included in the Terms of Use?
    a. The IPC supports the types of Safeguards outlined in this section with the exception of potential rate limitations of queries. The IPC acknowledges limitations may need to be imposed in order to ensure service level response times and avoid automated/spam-oriented query efforts; however, any such rate limitations should not negatively impede on the ability of accredited users to achieve the legitimate purposes for which they became accredited and approved to

obtain non-public WHOIS data, which could include the need for fairly high-volume aggregated data.

18. What mechanism would be used to require compliance with the Terms of Use?
    a. The IPC agrees with the proposed approach in response to this question.

19. Who would monitor and enforce compliance with Terms of Use?
    a. The IPC looks forward to further discussion within the community to better understanding the contents of each Terms of Use in order to determine the appropriate party or parties to monitor and enforce compliance. That said, we agree that the registry and registrar obligations associated with implementing a UAM should be incorporated into the respective agreements with ICANN and enforced through the usual Contractual Compliance process. Third-parties' adherence to UAM Terms of Use, however, should require a separate consideration of compliance and enforcement. The IPC would be receptive to a possible third-party arbitral mechanism for disputes arising under these Terms, or otherwise relying on existing mechanisms under applicable law for resolving any disputes concerning possible violations of UAM Terms of Use.

In conclusion, the IPC encourages ICANN to continue its engagement with the community to finalize a UAM in Phase 2 of the EPDP's work, convene an appropriate formal community structure to finalize policy and implementation details of the UAM (including to channel input from the EDPB, possible Accrediting Bodies, and other relevant stakeholders outside the ICANN community itself), and work as quickly as possible to implement a UAM. As the envisaged data controller of the proposed centralized portal, ICANN must be prepared to accept the associated legal risks and implement a temporary unified access system in the very near term that will be the authoritative WHOIS data collection entity until the EPDP reaches a conclusion that is also impermissible under GDPR. This centralized system shall enable efficient access, with minimal aspects requiring in-depth case-by-case information or analysis as a step for providing individual non-public records. Many similarly-situated eligible user groups will access the system on a daily basis to perform legitimate data requests for a specific, delimited set of appropriate purposes, such as intellectual property enforcement and consumer protection. Therefore it is important that time to market and ease of use is not overtaken by overburdened testing or validation, pending completion of a more permanent unified access system solution.

Respectfully submitted,

Intellectual Property Constituency