Goran Marby, Esq.

President and CEO, Internet Corporation for Assigned Names and Numbers

The ICANN Board

Via e-mail: goran.marby@icann.org

22nd October, 2018

Dear Mr. Marby,

Importance of Access to WHOIS Data Post-GDPR

MARQUES is the European association representing brand owners' interests. More information about **MARQUES** is included at the end of this letter.

We write to you regarding the importance for brand owners, and for the wider public, of an effective mechanism to provide continued access to the elements of WHOIS data which have been redacted from the public WHOIS record as a result of ICANN's Temporary Specification for gTLD Registration Data (the Temp Spec). In this regard, we would urge you to continue gathering input on an accredited access model, and give serious consideration to a solution which sees ICANN Org as the responsible controller of this data.

The GDPR aims to protect the legitimate privacy rights of individuals – in the case of WHOIS, the natural person registrant. However, the GDPR also acknowledges that this right to protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

The WHOIS is a key tool used by law enforcement, intellectual property owners, and others in their efforts to protect the public against consumer deception, fraud, counterfeiting, piracy and other intellectual property infringement, as well as to guard against phishing, pharming, malware, and other cyberattacks. As such, there is also a strong public interest in WHOIS data being available for those purposes. The interest in protecting the privacy and data of natural persons must therefore be balanced against these legitimate competing interests in access, and any measures introduced for the protection of privacy must be necessary and proportionate.

In the domain name world and in particular in view of ICANN's mission, the collection and transfer of personal information is based, on the one hand, on the necessity for the registrar to perform the registration contract and, on the other hand, on the legitimate interest of the controller (ICANN for example) and third parties to establish and operate an effective RDDS system and to meet the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data.

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We are aware of the GNSO's Expedited Policy Development Process (ePDP), a multi-stakeholder initiative which has now been chartered to determine if the Temp Spec should become an ICANN Consensus Policy, as is or with modifications, while complying with the GDPR and other relevant privacy and data protection law. Marques supports this ePDP and will be following the deliberations of the working group with interest.

The question of access to the full WHOIS data remains an issue of great concern. As stated above, this data is necessary to properly investigate and take action against infringing, fraudulent and criminal online activity, in order to safeguard members of the public, who otherwise are at risk of deception, loss and damage. The current provisions in the Temp Spec relating to access require Registrars and Registry Operator to provide "reasonable access to Personal Data in Registration Data to third parties on the basis of legitimate interests pursued by the third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the Registered Name Holder or data subject pursuant to Article 6(1)(f) GDPR". It is left to individual Registries and Registrars to make their own assessment of what constitutes "reasonable access" in these circumstances, leading to a fragmented and inconsistent approach to the provision of the non-public data. The current provisions of the Temporary Specification, by failing to adequately address the question of access, do not achieve the appropriate balance and proportionality required under the GDPR.

We understand from the Charter for the ePDP that one of its expected deliverables will be a Report outlining a proposed model of a system for providing accredited access to non-public Registration Data. We also understand that the working group will not commence work on this until all the gating questions in the Charter have been answered, and that finalising the recommendations relating to the Temp Spec should not be delayed by this work on access.

Finding a sustainable and workable access solution is a high priority. In view of this, ICANN Org can assist the ePDP process by continuing to gather input on the framework for an accredited access model and to develop a strawperson accredited access model which could be provided as an input to the ePDP, for the working group members to consider when they reach the appropriate point in their deliberations. In particular, Marques encourages ICANN to actively investigate a unified WHOIS for all gTLDs which is operated by ICANN, whereby ICANN is the sole controller, with registries and registrars acting as processors on ICANN's behalf for the data fulfilling requirements of Thick Whois.

A centralized model would allow ICANN to align its current supervisory role with a practical role as the manager of the central RDDS system. The model would mitigate a differentiated approach towards the collection and transfer of, access to, and disclosure of, registration data. We assume there would be considerable support for this idea amongst the Registry and Registrar stakeholder community.

It would also significantly reduce complexities related to authenticated and reasonable access to non-public registration data, as a single standardized access process can be established by ICANN in relation to all access requests.

While this would require a change in policy, which would be within the remit of the GNSO, we believe that many in the community would be supportive of this if it were made clear to the community that ICANN is willing to take on this role. This would also be supported by ICANN's Bylaws, which require you to "work with Supporting Organizations and Advisory Committees to explore structural changes to improve accuracy and access to generic top-level domain registration data, as well as consider safeguards for protecting such data".

To reiterate, this suggestion is not intended to undermine the remit of the GNSO or the work of the current ePDP, which must proceed under an extremely challenging timeframe in order to maintain some stability. Rather, it is intended to assist that effort, and any subsequent efforts looking to find a sustainable, long-term solution to the "problem" of WHOIS.

We thank you for your kind consideration of the above comments and we remain at disposal for further discussion.

Yours sincerely,

On behalf of **MARQUES**

Nick Wood, **MARQUES** Council member and Vice-Chair of **MARQUES** Cyberspace Team

About MARQUES

MARQUES is the European association representing brand owners' interests. The **MARQUES** mission is to be the trusted voice for brand owners. **MARQUES** unites European and international brand owners across all product sectors to address issues associated with the use, protection and value of IP rights, as these are vital to innovation, growth and job creation, which ultimately enhance internal markets.

MARQUES membership crosses all industry lines and includes brand owners and trademark professionals in more than 80 countries representing billions of dollars of trade annually. The trade mark owners and practitioners represented by **MARQUES**, together, own more than three million domain names and advise organisations of all sizes on rights protection in the domain name system. These domain names are relied upon by consumers across Europe as signposts of genuine goods and services.

More information about **MARQUES** and its initiatives is available at www.marques.org.