

LA COALICION DE CREADORES E INDUSTRIAS DE CONTENIDOS AUDIOVISUALES (The Coalition), with CIF nº CIF: G-85413784, sited in Madrid-28004, C/ José Abascal, nº 44-4º, write to ICANN to says:

1º La Coalición de creadores e industrias de contenidos is an association which was founded in 2008 and represents a major part of the Spanish cultural and entertainment sector, grouping musical, publishing, videogames and audiovisual's industries, from the film industry to the television series' thematic channels, with the main goal of promoting measures to stop intellectual property rights violations in the Internet.

On behalf of the members of The Coalition, who are:

AEVI, Asociación Española de Videojuegos (Spanish Association of Videogames) groups together the most important national and international videogames manufacturers, representing 80% of revenue in Spain in this sector. The Association aims to represent every involved agent in the videogame chain of value -developers, editors, retailers, etc. - in a common association that appears with the firm commitment of strengthening and defend the interest of one of the industries with best prospects for the future in our country.

AIE, Artistas, Intérpretes y Ejecutantes, Sociedad de Gestión, Spanish Society of Performing and Executing Artists is a collective society, nonprofit, democratic and solidary entity, with more than 20.000 affiliates, that manages and protects the artist's rights.

CEDRO, Centro Español de Derechos Reprográficos. A non-profit association of authors and publishers of books, magazines, journals, newspapers and sheet music, published in any format. It manages and protect their collective patrimonial intellectual property rights. Currently, it counts with more 20.200 authors and 1.900 publishers as members.

EGEDA, Entidad de Gestión de Derechos de Productores Audiovisuales (Collecting Society of Audiovisual Producers Rights), it is the collection society that represents and defends the interests of audiovisual producers of films, short films, TV series, etc. And it also represents national and foreign right owners of films and any other audiovisual works

FAP, Federación para la Defensa de la Propiedad Intelectual (Federation for defense of Intellectual Property) is a nonprofit private entity established to raise public awareness in authorities and society about the consequences of the infringements against intellectual property, promoting accurate protection of works and encouraging its enforcement.

FEDICINE, Federación De Distribuidores Cinematográficos (Federation of film distributors). It represents and defends the interests of the sector before administration and other associations. Fedicine members as a whole represente 90% of the Spanish distribution.

PROMUSICAE, Productores de Música de España represents and defends the interests of music producers. Currently it brings together 113 members that, as a whole, represent 90% of the national and international activity of the music recording sector in Spain.

SGAE, Sociedad General de Autores y Editores, Sociedad General de Autores y editores (General Society of Authors and Editors) is a private entity devoted to the protection and distribution of royalties among its members according to the use of the works and the management of licenses among clients for its use.

UVE, Unión Videográfica Española (Spanish Videographic Association) brings together 95% of video distributors in Spain, many of them are producers too. Indirectly, it represents the Spanish Videoclubs, 98% of them are family businesses.

Allies with LaLiga (Spanish Football Professional League) and CONECTA (Association of thematic channels) for digital antipiracy policies.

2º.- The Coalition has had knowledge of the next entry into force of the General Regulation of Protection Of Information (RGPD), which is going to suppose changes in WHOIS's database that they might concern the utilization of the same one for activities of fight against the piracy.

As part of the preparations for the General Regulation of Protection Of Information, the ICANN is valuing the actions that can they carry out to insure itself that the data processing for the ends of the system WHOIS expires with the RGPD. In November, 2017, the ICANN announced that it was trying to adopt a transitory solution while he finds the definitive solution.

On January 12, 2018 like that, the ICANN published three model offers for WHOIS who might be adopted as transitory solutions while one finds the definitive solution, for what it is crucial that the solution that is adopted is ideal to protect also the interests of the holders of rights.

The ICANN has requested comments the models and has demonstrated his intention of publishing the model chosen on January 31.

It is a question as a fact that it affects directly the rights of the citizens and the creators of audio-visual contents, and that can have affectation for the procedures that they chase to clarify the responsibility in the infraction of the rights of intellectual property in Internet, phenomenon known popularly as " digital piracy ". In consequence, the Coalition shows an essential interest in the regular matter.

The Coalition comes supporting in the time essential demands for the content of the RGPD and the transposition of the European regulation and that also has had the opportunity to present his allegations and observations in the last steps of public consultation, IT REQUESTS the ICANN that grants the hearing to it, to be able to formulate the observations with regard to the proposed MODELS and take the following allegations in consideration, since that they could contribute in the best development of its function and the ICANN itself.

It is for all this that we feel the maximum interest to support the following observations:

- I. **All the members of the Coalition consider that Model 1 should be adopted with some changes. Failing that, Model 2 would be workable if adopted with the changes we propose below (but only if modified as we propose below). Model 3 is completely unworkable and is unacceptable.**
- II. We support the purpose statement for WHOIS described by ICANN in its document (this applies to all three models), which includes *“supporting a framework to address issues involving... Intellectual property protection.”*
- III. We also note that none of the models requires registrars to ensure the accuracy of the data submitted to WHOIS. We would like to include an obligation upon registrars to use commercially reasonable efforts to ensure the accuracy of the data.

MODEL 1

Our preference is for ICANN to adopt Model 1. **Changes that would be required to make Model 1 adequate:**

- The **email address of the domain registrant** is a vital piece of data and should be included in the publicly available data set. Not only do we need to be able to contact domain registrant’s quickly, but the email address is important from a consumer safety and confidence perspective.
- Model 1 would shield other WHOIS data from public view with access to it based on what ICANN describes in the model as “self-certification”. In practice the Model 1 does not provide for self-certification, but would require registrars to consider each request for data “taking into account the required balancing of interests under the GDPR”. This would be extremely burdensome on registrars and users, and would result in substantial delays to accessing data. Instead, we propose a true self-certification process, whereby the user certifies that they need access to the data for one of the purposes set out in Model 1 (which include “intellectual property protection” – see page 6 of the ICANN document) and is given access automatically. This was proposed in the COA Model, to which we drew your attention in our previous paper¹.
- Although the 2 year data retention period under Model 1 is the longest of the three models, we would like this period to be extended to 3 years for the reasons described above.

¹ <https://www.icann.org/en/system/files/files/gdpr-cm2-coa-working-draft-compliant-whois-21dec17-en.pdf>

MODEL 2 (MODELS 2A Y 2B)

Unless the registrant consents, Model 2 provides for **no publication in the WHOIS database of any contact information for the registrant** (whether natural or legal person). The only contact details that would be published are the email addresses of the technical and administrative contacts.

The only difference between Models 2A and 2B is the scope of the changes proposed – Model 2A would apply to the processing of the data of natural and legal persons to the extent that the processing activities fall within the scope of the GDPR. Model 2B would apply to the processing of the data of natural and legal persons globally.

Access to data not published in the WHOIS database would be by way of accreditation, but there are no details of how this would work. Recognising the short amount of time left before GDPR comes into force, ICANN proposes that an interim solution could be implemented while a formal accreditation system is designed, and calls for comments on what that interim solution could be, with the “self-certification” system in Model 1 proposed as an option.

Changes that would be required to make Model 2 adequate:

- There is no justification for excluding the data of legal persons from the publicly available data set, and this data should be included.
- We prefer the scope of model 2A over 2B – the GDPR should not take precedent over other laws and apply on a global basis.
- At a minimum, the publicly available WHOIS database should also include the email address of the registrant, for the reasons described above.
- Self-certification as an interim solution would be acceptable, but only if a true self-certification process is implemented, as described in relation to Model 1.
- If Model 2 is adopted, we support the implementation as quickly as possible of an accreditation system, and expect ICANN to consult the GAC and all stakeholders, including intellectual property right holders and their representatives in designing that system.
- Model 2 would only allow for the retention of data for 1 year. This is inadequate and we request a 3 year retention period.

MODEL 3

Model 3 is the most restrictive and we strongly oppose its adoption.

This proposal is clearly unworkable, would place a huge time and cost burden on those seeking access to WHOIS data and placing a substantial burden on judicial systems.

Model 3 is also inconsistent with the GAC's advice to ICANN, and ICANN's own stated intention of keeping WHOIS as close as possible to the existing system.

Conclusions

- Model 1 provides the most public access to data, but also has flaws. The email address of the registrant should be publicly available. In addition, the tiered access to non-public data should be a true self certification model, not a “case by case” analysis that will lead to arbitrary results, undue burdens on registrars and users, and would result in substantial delays to accessing WHOIS data.
- Model 2, which provides for tiered access to data, should only apply to data covered by the GDPR. It should not include legal persons and not extend to data processing activities not within the scope of GDPR. It should provide for a true self certification model to obtain expeditious access to data.
- Models 1 and 2 should call for a 3 year data retention.
- Models 1 and 2 should require registrars to use reasonable commercial efforts to ensure the accuracy of the data included in WHOIS.
- Given the above, we think the most practical approach would be model 1 (with modifications, or Model 2A, with modifications including true self-certification for expeditious access to data. We encourage GAC representatives to look at the COA model for what this might look like. We believe either of these 2 approaches strikes the right balance between the competing interests at play.
- If GAC representatives would like greater understanding of how we use WHOIS data and why access to it is so important, the Annex to this document explains our uses of WHOIS data in more detail.
- We also note the inconsistencies between the ICANN Models and the obligations upon information society services in the E-Commerce Directive, and ask you please to draw the attention of the GAC to the obligations in Article 5 thereof. It would be a perverse result that a website operator (even if not all websites are information society services) is obliged to publish his/her email address and other personal data on his website, but the GDPR precludes that same data from being included in WHOIS.

“Article 5

General information to be provided

*1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render **easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:***

- (a) the **name of the service provider**;
(b) the **geographic address** at which the service provider is established;
(c) the details of the service provider, including **his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner**;
....”

Madrid, 25 of January of 2018,

La Coalición de Creadores e Industrias de Contenidos.



*La Coalición de Creadores e Industrias de Contenidos está integrada por la Asociación Española de Videojuegos (AEVI), el Centro Español de Derechos Reprográficos (CEDRO), la Sociedad de Artistas Intérpretes Ejecutantes de España (AIE), la Asociación de Canales Temáticos (CONNECTA), la Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), la Federación para la Protección de la Propiedad Intelectual (FAP), la Federación de Distribuidores Cinematográficos (FEDICINE), los Productores de Música de España (PROMUSICAE), la Sociedad General de Autores y Editores (SGAE) y la Unión Videográfica Española (UVE).

Contact with Carlota Navarrete Barreiro

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ANNEX

Uses of WHOIS data for investigating intellectual property infringements

1. To be able to identify the responsible party behind a domain name concerned with IPR infringement:
 - a. so that they may receive correspondence from IFPI primarily in relation to infringements on a domain name;
 - b. so that this information may be disseminated to a law enforcement body, both inside and outside the EU, to facilitate a prompt and effective investigation;
 - c. so that this information may be disseminated by IFPI to external legal counsel, both inside and outside the EU, the purposes of civil proceedings; and
 - d. so that this information may be disseminated to other content protection organisations in connection with existing cases where IFPI is not the primary case controller.
2. To investigate linkages between domains based upon data points held within the WHOIS data.
3. To discount a registrant and / or domain name from an existing case.
4. To ascertain if a domain has been registered to a licensed party and/or entity.
5. Nameserver information contained within the WHOIS record is used in the course of investigations.
6. Registrar information is used to identify possible rogue actors within the domain space.
7. Key dates contained within the WHOIS information are used to ascertain if there is active engagement by the registrant.