

Mr. Cherine Chalaby
Chairman of the Board
ICANN

Mr. Goran Marby
CEO
ICANN

Madrid, 1 st of March 2018

Dear Messrs. Chalaby and Marby:

This letter is written on behalf of **La Coalición de creadores e industrias de contenidos**, it 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.

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.

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

All of us are concerned about the direction ICANN appears to be heading in terms of modifying the WHOIS/domain registrant directory in response to the pending implementation of the EU General Data Protection Regulation (“GDPR”). While we appreciate that ICANN has received guidance from the Article 29 Data Protection Working Party in a letter dated December 11, 2017 that “the unlimited publication of personal data of individual domain name holders raises serious concerns regarding the lawfulness of such practice,” it currently appears that ICANN is on a course to over-correct for that issue and disregard appropriate considerations involving proportionality, accountability and transparency.

We are particularly concerned about two critical aspects of such over-correction and the apparent failure to balance the public interests and legitimate third-party interests at stake with the privacy interest of domain name registrants. First, ICANN appears poised to adopt a WHOIS model whereby no personal data whatsoever of a domain name registrant would be made publicly available without appropriate consideration or balancing of the countervailing interests in public disclosure of a limited amount of such data. Second, ICANN is making no distinction between domain name registrants that are natural persons versus those that are legal entities and has indicated that it will treat all registrants as if their data is subject to the GDPR, despite the fact that the GDPR explicitly by its terms applies only to data “relating to an identified or identifiable natural person” (emphasis added; See Article 4 of GDPR).

This approach will have significant adverse implications for the rule of law in the online environment, including with regard to enforcement against online criminal activity, cybersecurity, intellectual property theft and the continued ability to use the internet to safely communicate and transact.

As further explained below, we strongly urge that European government authorities, including the Article 29 Data Protection Working Party and national Data Protection Authorities, provide appropriate guidance to ICANN as follows:

1. Assuming that the public and legitimate third-party interests and purposes are clearly articulated and communicated when personal data is collected from a domain name registrant, the continued inclusion of a natural person registrant’s e-mail address in a publicly accessible WHOIS directory does not run afoul of the GDPR; and

2. A distinction should be made between natural persons and legal entities with respect to domain name registrants, and the data of legal entities should remain publicly available unless a particular data element, other than the registrant's e-mail address (which per 1. above should always be publicly accessible), contains data or information relating to an identified or identifiable natural person. While registrars and registries may wish, for the sake of convenience, to adopt a uniform approach that treats all registrant information the same way, the reduction of perceived administrative burdens on these services does not justify the resultant risk to the public interest that will follow if public access to WHOIS information is suppressed beyond what the GDPR requires. ¹

Registrant E-mail Address

ICANN appears to be embracing a WHOIS model intended to comply with the GDPR in which only the province/state and country of a domain name registrant would continue to be made publicly accessible. In the discussions and correspondence about ICANN's impending plans to modify the WHOIS system, an array of public and private parties have gone to great lengths to emphasize the importance of publicly accessible WHOIS data for purposes such as finding the source of cyber-attacks, assisting law enforcement investigations, countering intellectual property infringements, and protecting consumers. Indeed, in its January 29, 2018 letter to Goran Marby, CEO & President of ICANN, the European Commission noted, "We would like to underline the importance of these objectives and the corresponding need to preserve WHOIS functionality and access to its information."² Similarly, the Government Advisory Committee of ICANN, which represents 174 national governments and distinct economies recognized in international fora (including the European Commission and all EU Member States), advised ICANN of its consensus view that in considering how to comply with the GDPR, ICANN should be:

"1. Keeping WHOIS quickly accessible for security and stability purposes, for consumer protection and law enforcement investigations, and for crime prevention efforts, through user-friendly and easy access to comprehensive information to facilitate timely action.

2. Keeping WHOIS quickly accessible to the public (including businesses and other organizations) for legitimate purposes, including to combat fraud and deceptive conduct, to combat infringement and misuse of intellectual property, and to engage in due diligence for online transactions and communications." (See GAC Communique of November 1, 2017, pp. 11-13)³

We recognize that a layered access approach to some of the personal data currently contained in publicly accessible WHOIS directories will be appropriate to achieve full GDPR compliance. Nevertheless, we strongly believe that the continued public availability of the registrant's e-mail address—specifically the e-mail address that the registrant supplies to the registrar at the time the

¹ There are a number of approaches to explore that could assist in reducing burdens to registrars and registries, while still maintaining WHOIS, such as recognizing the ability of registrants to self-certify their status as natural or legal persons.

² <https://www.icann.org/en/system/files/correspondence/avramopoulos-et-al-to-marby-29jan18-en.pdf>

³ <https://gac.icann.org/advice/itemized/2017-11-01-gdpr-whois>

domain name is purchased and which e-mail address the registrar is required to validate--is critical for several reasons. First, it is the data element that is typically the most important to have readily available for law enforcement, consumer protection, particularly child protection, intellectual property enforcement and cybersecurity/anti-malware purposes. Second, the public accessibility of the registrant's e-mail address permits a broad array of threats and illegal activities to be addressed quickly and the damage from such threats mitigated and contained in a timely manner, particularly where the abusive/illegal activity may be spawned from a variety of different domain names on different generic Top Level Domains. Finally, because a variety of abusive activity, such as phishing and the publication of child abuse images, is performed via compromised domains, having the registrant's e-mail address publicly available allows for the registrant to be contacted quickly in order to make the registrant aware that his or her domain name has been hijacked for nefarious purposes. For a more thorough explanation as to the critical importance of keeping the registrant's e-mail address publicly accessible, please see the memo submitted by the Coalition for Online Accountability to ICANN dated February 16, 2018 and available at <https://www.icann.org/en/system/files/files/gdpr-comments-coa-icann-proposed-compliance-models-16feb18-en.pdf>. For a description of the various important and legitimate purposes served by the ready accessibility of WHOIS data, please see ICANN's Intellectual Property and Business Constituencies' memo to the Article 29 Working Party dated February 1, 2018 available at <https://www.icann.org/en/system/files/files/gdpr-comments-ipc-bc-article-29-wp-whois-01feb18-en.pdf>

In addition to these specific factual reasons, keeping the registrant's e-mail address publicly accessible comports with the transparency and consumer confidence imperatives enshrined in the E-Commerce Directive ("ECD"). Indeed, the GDPR specifically states in Recital 21 that it is without prejudice to the application of the ECD and Article 5 ECD embodies the elementary principle of both physical commerce and e-commerce that service providers should identify themselves. More specifically, Art. 5.1(c) ECD, prescribes that service providers shall render easily, directly and permanently accessible *"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"*. While WHOIS data is not the only means by which websites can disclose the information required by Article 5 ECD, in practice, it is typically the only way to identify service providers of websites that engage in significant infringing or other illegal behavior. In any event, since email addresses of website operators have to be public in light of Article 5.1(c) ECD, there is no legitimate justification to discontinue public availability of the registrant's e-mail address in the WHOIS directory and especially not in light of other legitimate purposes (see next paragraph).

As the European Commission noted in its recent Technical input on proposed WHOIS Models on behalf of the European Union of February 7, 2018 "the Article 29 Working Party . . . does not exclude a possible publication of some personal data, as long as this is justified in light of the legitimate purposes pursued with the WHOIS directory[.]"⁴ The undersigned organizations represent a diverse and wide range of legitimate purposes, for example and as already mentioned, online fraud, intellectual property enforcement, for which access to WHOIS information is vital. We all urge that the appropriate and proportional balance between these important purposes and the privacy interests of natural

⁴ <https://www.icann.org/en/system/files/files/gdpr-comments-european-commission-union-icann-proposed-compliance-models-07feb18-en.pdf> pp. 3-4

person registrants under the GDPR result in the continued public availability of the registrant's e-mail address.

Distinction between Natural Person and Legal Person Registrants

The European Commission has made clear that “the GDPR only applies to personal data of natural persons and therefore does not regulate the processing of the data of legal persons (unless such data also relates to an identified or identifiable natural person).” Thus, the Commission explicitly stated that it “welcomes the distinction between personal data and other data (about legal persons).”⁵ Given that ICANN’s stated goal in modifying the WHOIS system is to ensure compliance with the GDPR while maintaining access to WHOIS data to the greatest extent possible, the failure to make distinctions between natural person and legal person registrants thwarts the stated goal and furthermore is neither necessary nor warranted for purposes of GDPR compliance.

Because greater public accessibility of WHOIS data serves a broad range of public and private legitimate third-party interests and purposes, we believe that failing to make a distinction between natural person and legal person registrants undermines these interests and purposes while doing nothing to advance the privacy interests defined in and protected by the GDPR. We therefore urge that ICANN be given appropriate guidance as to the importance of maintaining a distinction between natural person and legal person registrants and keeping as much data about legal person domain name registrants as publicly accessible as possible.



Sincerely,

Coalición de Creadores e Industrias de Contenidos is integrated by:



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⁵ <https://www.icann.org/en/system/files/files/gdpr-comments-european-commission-union-icann-proposed-compliance-models-07feb18-en.pdf> p. 3