

January 29, 2018

Re: WIPO Arbitration and Mediation Center observations on ICANN's request for feedback on *Proposed Interim Models for Compliance with ICANN Agreements and Policies in Relation to the GDPR*

The WIPO Arbitration and Mediation Center submits the following comments as a UDRP provider.

With commercial transactions increasingly taking place online, it is important that consumers know in whom they are investing their trust. This relates to ICANN's mission to ensure DNS security and stability, and to Intellectual Property owners' ability to monitor for and address abuses of their rights – which in turn protects consumers; in GDPR parlance, these are legitimate interests.

To help minimize the impact and unintended consequences both on registrars/registries collecting/maintaining data, and on users of today's WHOIS system, it is appropriate that ICANN's approach seeks to "identify the appropriate balance for a path forward to ensure compliance with the GDPR while maintaining the existing WHOIS system to the greatest extent possible." ICANN's Models 2 and 3 clearly do not meet this goal.

ICANN's Processes and Determinations

While there may be different ways to achieve compliance with both the GDPR and ICANN Agreements and Policies, ICANN should aim to facilitate use of a single model, both on an interim, and final basis. (This mirrors the concept behind the UDRP, namely to provide a single dispute resolution process across all TLDs, as opposed to a piecemeal approach.)

More specifically, we wish to suggest that ICANN's approach take the following into consideration:

Public vs Layered/Tiered Access

Whatever data ICANN decides should be non-public, **UDRP (and other RPM) providers must have access to sufficient data to meet their due process obligations under the UDRP Rules.**¹

¹ The "ECO GDPR Domain Industry Playbook v.061" states that data for a UDRP proceeding "may be disclosed on the basis of Art. 6(1)(b)." Note also that many global ccTLD policies require similar notification/due process as in the UDRP.

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Practically speaking, this means providing all information to UDRP providers marked as “do not display” in the three ICANN models, except for the “Registry Registrant ID”.

Consumer and IP protection call for the registrant email address to be publicly available. If it is only available on request, safeguards should be in place for the event the registrar/registry and registrant may be acting in concert.²

We also note that separate from the question of whether such data should be public or provided only on request, to make such requests meaningful, registrars and registries should be required to gather the most complete permitted amount of data in the first place.

Data Accuracy

Much registration data in today's WHOIS system is believed to be false or inaccurate. The GDPR demands data accuracy, including requiring that “every reasonable step must be taken to ensure that personal data [...] are rectified without delay.”

Simply relying on the current ICANN-maintained WHOIS Inaccuracy Complaint Form would arguably not be enough to meet this GDPR requirement.

Data Retention

All three ICANN models propose data retention practices that risk harming legitimate IP investigations. ICANN may wish to look to other industries to ascertain best practices. (Merely for example, some sources in the accounting and legal industries point to 7 years as a guide.³)

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We appreciate that ICANN is working towards an interim solution, and would be pleased to contribute to further community discussions.

These observations are posted on the WIPO website at:
www.wipo.int/amc/en/domains/resources/icann.

Yours sincerely,



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² See e.g., www.wipo.int/amc/en/docs/icann160408.pdf (at “Issue 8”), www.wipo.int/amc/en/docs/icann090409.pdf, and www.wipo.int/amc/en/docs/icann111209.pdf

³ See e.g., www.sec.gov/rules/final/33-8180.htm, and www.vantageinsurance.co.uk/assets/files/atrisk/September%202011.pdf.