



Submitted to: [gdpr@icann.org](mailto:gdpr@icann.org)

April 20, 2018

Mr. Goran Marby  
President and Chief Executive Officer  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

Re: Art 29 WP Advice Issued on April 11, 2018

Dear Mr. Marby:

It is our understanding that ICANN will be meeting with the Article 29 Working Party (“Art. 29 WP”) Technology Subgroup (“Tech Subgroup”) to discuss the advice issued on April 11, 2018 regarding ICANN’s Proposed Interim Model for GDPR Compliance referred to as the “Final Interim Model”. We are pleased to see this ongoing effort to avoid the disabling of the WHOIS system as the continued availability of accurate WHOIS data is vital to safeguarding internet users from such dangers as counterfeit medicine, phishing and fraud scams.

INTA and ICANN are allied in determining the interplay between privacy rights and the rights of internet users to enjoy a stable and safe environment. We understand the need for the correct balance and proportionate response to the multiplicity of harms that we are trying to address through individual privacy protection, consumer protection and law enforcement. After reading the April 11, 2019 advice, INTA has questions and concerns regarding some of the details of the letter. We are requesting that you raise these concerns with the WP.

#### 1. Purpose Specification

The letter cautions that ICANN should not conflate its own purposes with the purposes of 3<sup>rd</sup> parties. This statement does not recognize the foundational underpinnings of ICANN as a multistakeholder organization nor does it accurately describe ICANN’s purpose. ICANN’s function, purpose and means of operation are inherently multistakeholder in nature. Every sector of society has a place at the table at ICANN and an interest in developing practical, workable policies by consensus. This is certainly true when it comes to developing functionality and policies around the WHOIS system. There is a very clear indication of interest in ICANN’s representative constituencies in the WHOIS framework, both in terms of purpose and structure.

## 2. Access to Non-Public WHOIS Data

The Art. 29 WP welcomes the reduction in published information and notes that not enough details are in the interim plan to comment. Most notably, they caution that any layered access plan should minimize the risk of unauthorized access and use by enabling access based on specific queries only. The advice specifically mentions bulk transfers, reverse directory services and restricting access only to necessary fields to achieve the legitimate purpose.

INTA is concerned that the objective of proportionality will be missed if the access described in the advice is to be curtailed. Denying spammers access to registrant's data is certainly in line with the objectives of GDPR. However, there is a glaring omission as to the counterbalance of allowing trusted, credentialed entities automated access to WHOIS directories. Such access is crucial to identifying patterns and trends that lead to the take down of domain names that are used exactly for the illegal activities that give rise to privacy concerns in the first place. A common tactic for spammers and phishers is to purchase large numbers of domains and mask them as if they were legitimate sites when, in fact, they are being used to steal valuable data from unsuspecting consumers. It is impossible to identify such clusters of abuse without access to multiple data sets and the ability to analyze trends across them.

Further, it appears that the advice may be so narrow as to require that each data request must point to a specific field and purpose rather than to an entire record. Tying a legal basis and purpose to each point of data rather than a full record will create an unwieldy and unworkable system. Clarity on this point would be most welcome.

## 3. Jurisdictional Reach of GDPR

The advice is silent regarding the jurisdictional reach of GDPR. Although ICANN seeks a global solution for WHOIS, the reality is that GDPR protections are limited to natural persons and GDPR compliance is directed at processing data with an EU-nexus. This is not considered anywhere in the advice. A GDPR compliant WHOIS model should focus on EU jurisdictional reach and not blanket global application.

## 4. Forbearance

The advice is silent regarding forbearance. ICANN has requested forbearance of GDPR enforcement until a workable model can be developed and implemented under ICANN's multistakeholder process. It was not long ago that the world was clamoring for independence from the oversight of any particular government. The aspiration became a reality in October 2016 with the IANA Transition. The EU was a champion for the transition. It is now time to allow ICANN's multistakeholder process to work as it was intended. Forbearance is the means to achieving the optimal end which is a plan that can be affordably implemented by ICANN's contracted parties. It lifts the threat of a WHOIS blackout on May 25 which will result in a field day for bad actors to purchase and misuse domain names at the public's expense.

As has been noted many times, the original WHOIS system was a stack of notecards managed by single individual. Over the course of time, as the domain system evolved and commercial uses exploded, it was recognized that a more robust, automated system must be put in place. The exact specifications and uses of WHOIS have been under debate since before ICANN was established. What is not in debate is that the evolution of the domain name system has required an evolution in thinking and that the purposes of the WHOIS system have evolved as

surely as the internet has evolved. Rather than stifle proven, legitimate uses, it is vital that we accommodate them and secure them with reasonable and proportional responses to the demands of today's interconnected world which is what GDPR purports to do.

Thank you for the consideration of our concerns and we appreciate that you will be raising them with the Tech Subgroup. Should you have any questions about our comments, please do not hesitate to contact me.

Sincerely,



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cc: Dr. Andrea Jelinek, Chair, Article 29 Working Party (dsb@dsb.gv.at)

### **About INTA and the Internet Committee**

Founded in 1848, INTA is a global not-for-profit association with more than 5,700 member organizations from over 190 countries. One of INTA's goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last two decades, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA's Internet Committee is a group of over 150 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.