



Contribution of the European Commission to the general discussion on the Whois database raised by the Reports produced by the ICANN Whois Task Force

The European Commission has read the reports of the ICANN Whois Task Force with great interest and would like to comment on a number of issues raised by these reports and in particular by the one presented in Bucharest in June last year. These comments should be seen as a follow-up to both the letter sent to ICANN in April 1999¹ and the discussion paper that the Commission provided to ICANN/GAC in 2001² presenting a number of issues for consideration.

- In the first place, the European Commission would like to note that the Bucharest report should be seen as an interesting source of information concerning the views, opinions and wishes of some users regarding the Whois database but can in no way be seen as a survey of scientific nature. While the opinions stated by the users who have answered the survey are certainly an interesting indication, they should not be considered as representative for the whole of the users. Bearing this consideration in mind, any conclusions to be taken should not solely be based on the results of this survey.
- This report attaches great importance to the wishes stated by the users that have answered to the survey. The European Commission obviously attributes great importance to the wishes of the users but would like to recall that the existing legal framework imposes a number of legal requirements and obligations that should not be disregarded.
- The purpose of the Whois database has traditionally been considered as being of a technical and operational nature. This was however not even mentioned in the list of possible uses proposed to the respondents under question 4 of the survey. From the data protection viewpoint it is essential to determine in very clear terms what is the purpose of the Whois database and which purpose(s) can be considered as legitimate and compatible to the original purpose. This report fails to address these questions.

¹ Text published at:
http://www.europa.eu.int/information_society/topics/telecoms/internet/organisation/page2/mroberts-3004.doc

² Working Paper of the European Commission, ICANN DNSO Whois Survey: Issues for consideration, dated 8 November 2001.

In that context the European Commission would like to reiterate some of the comments presented in its previous discussion paper concerning the availability of the Whois data for trademarks and copyright purposes.

- It should be possible to check registration data for the purpose of identifying possible trademark infringement, and this could be justified either in terms of respecting the “rights and freedoms of others”³ or in the description of the initial purpose: for example by determining it as registration of domain names in full respect of trademarks.

Furthermore, the European Commission had already proposed to WIPO a two-level approach: publish that part of registration data relevant for technical functioning of the domain name system through access via Whois, but give access to other data relevant for trade mark defence only on a case by case basis if interest was justified

- The extension of use of registration data through Whois queries to the private policing of the Internet for allegedly infringing content is problematic for two main reasons:

First, the scope of ICANN should be circumscribed and limited. In particular, ICANN does not have any role or responsibility regarding Internet content. If registration data is used for such purposes then we might expect ICANN to be drawn inexorably into the regulation of Internet content, first copyright and eventually other aspects as well.

Again, under European law, the initial purpose for which the data is collected is the test. This clearly does not include the private policing of content Accordingly, if rights holders wish to control that only “authorised” persons are using their works and thus discourage on-line piracy through Whois queries, then that would require a distinct legal base, at least in the European Union.

Secondly, we may have some doubts as to how the data could be used (e.g. telephone numbers), particularly with regard to members of the public that are considered by certain rights holders to be infringing their rights.⁴

The publication of the private telephone number of individuals would be a problem for several data protection authorities.

- One of the issues raised in this report relates to the question of the uniformity of the data. It is important to stress in that respect the European Data Protection Directive imposes clear limitations concerning the collection and processing of personal data meaning that data should be relevant and not excessive for the specific purpose. In

³ Article 13 (1) g of the Directive.

⁴ In this context the European Commission has already been petitioned by a citizen who clearly fears this kind of policing either by private or public entities if his personal data are published in the Whois). This citizen considers that his fundamental rights and freedoms, notably freedom of expression and privacy, are unduly limited if such “threat” is the consequence of going onto the “web”.

that light it would be important to limit the amount of personal data to be collected and processed.

- The Commission would welcome the use of Trusted Third Parties or other similar solutions in this field. It would also like to encourage ICANN to study the possibilities of limiting access to the general public while still offering access to those with a legitimate purpose, probably in combination with some kind of *a posteriori* check. In the light of the proportionality principle, it would necessary to look for less intrusive methods that would still serve the purpose of the Whois database without having all data available to everybody.
- Concerning the final conclusions of the report, the Commission wishes to state its support for the proposals concerning accuracy of the data (which is also one of the principles of the European Data Protection Directive) and limitation of bulk access for direct marketing issues. We would like to point out however that the new electronic communications directive⁵ includes provisions imposing opt-in for unsolicited commercial e-mail which are relevant for the discussion on bulk access. Any bulk access to e-mail addresses for direct marketing must be based on opt-in only. Offering an opt-out will not be enough in the light of this new directive. Furthermore, concerning the general issue of bulk access, the Commission would like to stress the fact that bulk access, for any purpose (not only for direct marketing), is in principle unacceptable.
- On the contrary, the Commission does not support the proposals concerning uniformity and more searchable Whois facilities. In that context it would like to mention the paper approved by the Data Protection Article 29 Working Party in 2000: Opinion 5/2000 on The Use of Public Directories for Reverse or Multi-criteria Searching Services (Reverse Directories)⁶.

The European Commission would welcome the opportunity to discuss these matters more in detail with ICANN representatives in the near future.

⁵ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

⁶ http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wpdocs_2k.htm