

# AIPLA

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AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

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Comments of the American Intellectual Property Law Association  
On the Request for Comments Regarding The Combined WHOIS Task Force Preliminary Report  
on “a procedure for handling conflicts between a registrar/registry’s legal obligations under  
privacy laws and their contractual obligations to ICANN”

The American Intellectual Property Law Association (AIPLA) presents the following comments with respect to the captioned Preliminary Report of the Combined WHOIS Task Force. AIPLA is a bar association whose more than 16,000 members are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA members comprise a wide and diverse spectrum of individuals involved directly or indirectly in the practice of patent, trademark, copyright, trade secret and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property, including many large and small businesses that make commercial use of Internet websites or otherwise provide services over the Internet.

## I. Introduction

As an active member of the Intellectual Property Constituency (IPC) of ICANN, AIPLA has been involved in WHOIS issues for many years. AIPLA is primarily concerned that WHOIS data be readily available to owners of intellectual property and others as such data is often critical to the effective enforcement of intellectual property rights which are so often violated via the Internet. AIPLA generally agrees with the Statement of the IPC that is included as Section 2.3 of the Preliminary Report.

## II. Comments

AIPLA believes that access to WHOIS contact data submitted by domain name registrants should be widely and immediately available to the general public on an anonymous basis, for free, and with only limited restrictions on how the data can be used. Any exceptions to this general rule should only be applied after careful consideration, and should be targeted to specific circumstances making such an exception necessary.

AIPLA joins the IPC and the WHOIS Subcommittee of the International Trademark Association (“INTA,” which submitted comments on September 27, 2005) in noting that the risk of conflict between obligations under the Registrar Accreditation Agreement (“RAA”) and national law is very low, and urging that ICANN exercise caution to minimize departures from compliance with the RAA by registrars.

AIPLA also joins in the specific revisions proposed by the IPC and INTA in the following areas:

A. The confidentiality provisions in Steps One, Two, and Three could foreclose the ability of interested parties to question or rebut the need for a departure from the RAA on a case-by-case basis. Although there could be circumstances in which confidentiality might be necessary, the policy should not favor such requests, and should specify that they would be granted only in extraordinary circumstances.

B. The statement near the end of Step One that “Meeting the notification requirements permits Registrar/Registries to participate in investigations and respond to court orders, regulations, or enforcement authorities in a manner and course deemed best by their counsel” is ambiguous. If this sentence is intended as an explanatory comment only, it should be clarified as such. If it is intended to provide an incentive for registrars to comply with the notification requirements set out in Step One, the consequence of failing to meet the notification requirements should be specified. In the alternative, the sentence could be removed in its entirety to eliminate the ambiguity.

C. In the first paragraph under "Step Two: Consultation," the last sentence should be amended to specify that, in order to “comply with its contractual obligations to the greatest extent possible” the registrar must obtain consent of the registrants to the publication of their WHOIS data. Thus, the last sentence of the first paragraph should be amended to read as follows: “The goal of the consultation process should be to seek to resolve the problem in a manner that preserves the ability of the registrar/registry to comply with its contractual obligations to the greatest extent possible, including via obtaining consent of registrants to the publication of their Whois data.”

D. "Step Four: Resolution" should re-emphasize the goal of achieving uniform Whois disclosure requirements. The first sentence should be amended to read as follows: “Keeping in the mind the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems, and the value of having uniform Whois requirements apply to all Registrars/Registries to the extent possible, the Board should consider and take appropriate action on the recommendations contained in the General Counsel’s report as soon as practicable.”

E. The Public Notice portion of the Procedure should include information about how information made less accessible can be accessed through other sources. For example, if a departure from the RAA resulted in the registrant’s name but not address being made available, the notice should include information on how such information might be obtained or how to contact the relevant data protection authorities to gain access to the data. Therefore, the final sentence of the recommendation should be amended as follows: “Unless the Board decides otherwise, if the result of its resolution of the issue is that data elements in the registrar’s Whois output will be removed or made less accessible, ICANN should issue an appropriate notice to the public of the resolution and of the reasons for ICANN’s forbearance from enforcement of full compliance with the contractual provision in question, including relevant contact information for how such data might be accessed in appropriate circumstances.”

We appreciate the opportunity to submit our views on the Whois Task Force's Preliminary Reports as well as the preliminary recommendations contained in those reports. We look forward to receiving the Final Reports once they become available.

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