

December 21, 2018

Re: WIPO Arbitration and Mediation Center observations on ICANN's *Initial Report of the Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data Team*

Please find below comments from the WIPO Arbitration and Mediation Center on the EPDP Initial Report.

Recommendation No. 1

The EPDP team came up with a purpose drawn from the ICANN Bylaws (No. 6), but which somehow omits important language from those same Bylaws.

We suggest adding the underlined additional text to mirror the ICANN Bylaws:

“Coordinate, operationalize, and facilitate policies for resolution of disputes regarding or relating to the registration of domain names (as opposed to the use of such domain names, but including where such policies take into account use of the domain names), namely, the UDRP, URS, PDDRP, RRDRP, and future-developed domain name registration-related dispute procedures for which it is established that the processing of personal data is necessary”

Recommendation No. 2

With six months of GDPR experience behind us, it is obvious that ICANN needs to turn its concerted attention to addressing the need for a unified/standardized system for reasonable access to non-public registrant data.

Failure to provide a solution is harming a range of legitimate causes.

As [stated by the Interpol representative at the ICANN Meeting in Barcelona](#), “investigations are affected by [and] have been slowed down or have been challenged by WHOIS.”

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Decisive action in developing a unified/standardized access model would foster predictability, in all stakeholders' interests, and to this end WIPO remains willing to assist in a potential accreditation body capacity.

Even if this reflects the EPDP Charter, we find Recommendation No. 2 troubling in that it suggests the EPDP will “turn its attention to considering a system for Standardized Access to non-public Registration Data once the gating questions in the charter have been answered” (emphasis added).

Not only does this fail to commit to actually coming up with a solution, it proposes to only begin “considering” one once the “gating questions” have been answered.

We see no compelling reason why work on a unified/standardized system for reasonable access to non-public registrant data cannot commence immediately in parallel with the EPDP effort.

Recommendations No. 4 and 22

To the extent any of the currently-collected data elements (i.e., admin and tech contacts) would no longer be collected, and pending any relevant rule change, ICANN should advise UDRP providers that due process obligations will be deemed to be met for purposes of UDRP case administration as long as a provider uses all available information to notify cases.

Recommendations No. 11 and 18

Further to our observations on ICANN's request for feedback on *Proposed Interim Models for Compliance with ICANN Agreements and Policies in Relation to the GDPR*, a one-year data retention practice would risk harming legitimate investigations.

ICANN may recall that other industries' (e.g., accounting and legal) data retention best practices generally point to seven years as a guide.¹

UDRP decisions

We also note that UDRP paragraph 4(j) mandates that “[a]ll decisions under this Policy will be published in full over the Internet, except when an Administrative Panel determines in an exceptional case to redact portions of its decision.”

By accepting registration terms and conditions, registrants are bound by this provision.

Publication of party names in UDRP decisions is essential to the UDRP's overall functioning in that it helps to explain the panel's findings, supports jurisprudential consistency, facilitates the conduct of other cases as appropriate (e.g., in establishing a pattern of bad faith), and furthermore can provide a deterrent effect.²

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¹ See e.g., www.sec.gov/rules/final/33-8180.htm, and www.vantageinsurance.co.uk/assets/files/atrisk/September%202011.pdf.

² NB, in certain specific circumstances (e.g., identity theft) UDRP panels have ordered the redaction of a party's name from a decision.

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Recommendation No. 16

For the EPDP team's background/information, as stated in [section 4.4.1 of the WIPO Overview](#):

"[a]s a matter of panel-endorsed practice, in cases involving a privacy or proxy registration service initially named as the respondent, on timely receipt from the registrar (or privacy or proxy service) of information relating to an underlying or beneficial registrant, further to its compliance review and case notification responsibilities, the WIPO Center will (a) provide any disclosed underlying registrant information to the complainant, and (b) invite the complainant to amend the complaint to reflect such information."

See also *WIPO Center informal Q&A concerning the GDPR as it relates to the UDRP* – [Will WIPO provide the registrar-confirmed Whois data to UDRP complainants?](#)

"In order to give effect to the UDRP, providers have a reasonable and legitimate purpose to relay registrar-provided Whois data to complainants in pending UDRP proceedings so as to provide an opportunity for complainants to make substantive and/or procedural amendments as appropriate (an accepted practice today concerning privacy/proxy services named as respondents). The provision of such data may also serve to facilitate party settlements (roughly 20% of cases filed with WIPO settle prior to panel appointment, saving the parties time and money; see below information about the WIPO's UDRP fees).

Accordingly, once WIPO receives relevant information from the registrar, the complainant will be invited to amend its complaint to reflect the registrant information received from the registrar."

The above-described privacy best practice has been successfully followed in thousands of UDRP cases, in the interests of all parties.

Recommendation No. 17

We submit that in lieu of or in addition to a representative of the RPM WG, a UDRP provider should be included as a representative in any update to the EPDP team to properly assess the potential impact of the EPDP work on UDRP case administration.

MPA-5 and MPA-6

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)."

We submit that Art. 6(1)(f) is also applicable.

Note also that many global ccTLD policies require similar notification/due process as the UDRP.

As is also described in the *WIPO Center informal Q&A concerning the GDPR as it relates to the UDRP* – [What is the legitimate purpose for which WIPO collects and processes personal data?](#)

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“The above-described information relates to registrar provision of non-public WhoIs data. As to WIPO’s role as a UDRP Provider subject to the UDRP Rules, the legitimate purpose for which personal data is collected and processed by WIPO flows from the administration of cases under the UDRP – this includes notably:

- assuring timely and reliable notice of UDRP complaints to domain name registrants (i.e., forwarding the complaint via email, and the Written Notice to all addresses available for the registrant);
- understanding the “mutual jurisdiction” in a particular case;
- relaying registrant information which a complainant is required to include in its UDRP complaint;
- allowing a UDRP complainant to amend, if it chooses, its complaint upon being apprised of the registrant’s contact details;
- providing the fullest possible record on which appointed panelists decide a UDRP case;
- within appropriate limits, providing case information legitimately retained by WIPO to parties involved in subsequent litigation;
- publishing a range of [statistical information](#) on domain name disputes.

The categories of personal data necessary for the administration of a UDRP cases are: names, postal addresses, email addresses, telephone numbers and fax numbers for complainants and domain name registrants (and any authorized representatives).”

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Thank you for your attention and for the opportunity to provide comments on this important issue.

These observations are posted on the WIPO website at:

www.wipo.int/amc/en/domains/resources/icann.

Yours sincerely,



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