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Submitted to: [comments-epdp-recs-04mar19@icann.org](mailto:comments-epdp-recs-04mar19@icann.org)

April 16, 2019

Ms. Marika Konings  
Vice President, Policy Development Support  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

Re: NSO Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data Policy Recommendations for ICANN Board Consideration

Dear Ms. Konings:

The International Trademark Association (“INTA”) appreciates this opportunity to provide community input prior to Board action on the policy recommendations of the GNSO EPDP on the Temporary Specification for gTLD Registration Data. INTA does not believe it would be efficient to repeat its comments on the Initial Report of the EPDP in this submission, but rather wishes to draw the Board’s attention to what INTA believes are the most significant issues arising from the EPDP team’s recent recommendations. [1]

At the outset, INTA wishes to note that while the GNSO refers to the EPDP recommendations as the “Final Report”, this description is misleading, since the report in question is only the first milestone of the EPDP relating to Phase 1. For clarity, we will refer to it herein as the “Phase 1 Report.” As the Board is well aware, Phase 1 of the EPDP’s work largely consisted of a revision of the Staff-developed Temporary Specification, which was itself intended to be a placeholder while a more comprehensive community-led policy could be implemented.

While the development of the partial policy contained in the Phase 1 Report was community-led, it does little to address unanswered questions and known gaps in the WHOIS framework. Certain of these issues will be addressed in Phase 2 of the EPDP, which is just getting underway, and INTA hopes that the output from Phase 2 will address a number of issues which are crucial to intellectual property, cybersecurity, consumer protection and public safety stakeholders.

INTA’s views on this topic are informed by its mission as a global association “dedicated to supporting trademarks in order to protect consumers and to promote fair and effective commerce.”<sup>[2]</sup> The Internet, as a powerful engine of commerce, touches on various interests of trademark owners, most notably, their interest in protecting the billions of consumers which

engage in e-commerce and other activities online. This belief that trademarks protect consumers is itself based on a more fundamental conviction that attribution fosters accountability.<sup>[3]</sup> This creates incentives for sellers to maintain predictable, consistent quality for their goods and services. And that consistency, in turn, protects consumers, who can rely on trademarks to make quick, confident, and safe purchasing decisions. Brand owner accountability also protects consumers by assigning responsibility; for without trademarks, a seller's low-quality products would be untraceable, leaving consumers without any recourse for faulty, deficient, or unsafe goods.

Trust, legal responsibility, and accountability are also major themes in both Internet governance and data protection laws such as the EU's General Data Protection Regulation (GDPR). INTA supports the proposition that while addressing the various interests implicated by the GDPR in the context of WHOIS, the community should be guided towards an outcome that makes WHOIS a better, more efficient and reliable tool that furthers ICANN's mission and protects the interests of individuals, ICANN stakeholders, and the secure functioning of the domain name system.<sup>[4]</sup>

The recommendations proposed in the Phase 1 Report fall far short of this ideal. In fact, they are a step backwards from the Temporary Specification in a number of fundamental ways, not just for the IP and Business Stakeholders who made their position clear by voting "no" to the GNSO Council's motion to approve the Phase 1 Report, but for the entire ICANN community and for the public more broadly. The recommendations in the Phase 1 Report do not display sufficient regard for the public interest concerns of consumer protection, trust, transparency, legal responsibility, and accountability, and it remains unclear whether such concerns will be considered in Phase 2. <sup>[5]</sup> If ICANN fails, again, in this critical task, it can expect that governments will act unilaterally in order to protect the consumers within their borders just as the European Union acted unilaterally when implement GDPR.

In an effort to maintain ICANN's integrity and leadership position in internet governance, INTA strongly urges the ICANN Board to provide guidance to correct the deficiencies in the Phase 1 Report. We raise the following specific issues with for consideration and ask that guidance be given that allows for correction of the following gaps in the report in Phase 2:

- **Recognize Law Enforcement, Intellectual Property, and Cybersecurity as Legitimate Bases and Purposes for Data Collection, Processing and Access:**  
Phase 1 of the EPDP was a lost opportunity to provide much needed clarity for those who wish to obtain access to data, as well as those who collect and process such data. The Temporary Specification simply cites the GDPR without providing any guidance on what uses may qualify as legitimate purposes for the purposes of satisfying a core requirement. ICANN staff deferred the question in and around access to WHOIS data while than support legitimate purposes that are embodied in ICANN's mission and bylaws. The EPDP team failed to agree on the obvious truth that law enforcement, cybersecurity, intellectual property and consumer protection are legitimate purposes for processing data. This failure represents a missed opportunity to provide much needed guidance and guardrails to the ICANN community and public at large. The result is a deferral, once again, on a critical issue. In enumerating the legitimate purposes for data collection, the Phase 1 Report includes Purpose 2, "Contributing to the maintenance of

the security, stability, and resiliency of the Domain Name System in accordance with ICANN’s mission through enabling responses to lawful data disclosure requests.” INTA notes that in Footnote 2 to Purpose 2, the EPDP recognizes that the such disclosures “should not preclude disclosure in the course of investigating intellectual property infringement”. While INTA appreciates that intellectual property infringement is noted, it is concerning that law enforcement, intellectual property and cybersecurity research are not explicitly included in the recitation of the purpose. This is because GDPR requires a degree of particularity that is generally missing from the Phase 1 Report. In the meantime, cybersquatting is on the rise, consumers are being harmed, and the current environment created by the constant deferral and failure to recognize plain truth increases the dangers to consumers resulting in inevitable loss of trust in the Internet.

- **Require Access for Legitimate Disclosure Requests:** The Temporary Specification laid the groundwork for what registrars should do in response to requests for reasonable access to registrant data. This was useful in that the obligation to provide reasonable access was mandatory, provided doing so was compliant with the GDPR. The Phase 1 Report *eliminates* that obligation and replaces it with a set of requirements for “Reasonable requests for disclosure”, without any accompanying obligation to provide access based on a legitimate interest under the GDPR. The Phase 1 Report requires contracted parties to “reasonably consider and accommodate” such requests. The recommendation grants almost infinite leeway to contracted parties, leaving one to wonder what fulfillment of an obligation to “accommodate” entails. This ambiguity will almost certainly lead to wildly disparate results in how each registrar processes and responds to these requests. How will ICANN.org Compliance monitor and benchmark this activity? Without a requirement that tracks the contours of what the GDPR would permit, it remains possible that the notion of accommodation could be drawn much more broadly than what the law would require. This is a departure from the goals of the EPDP. While Phase 2 will hopefully address access by accredited requestors, this leaves unknown how to handle access for non-accredited requestors who may have legitimate purposes for data access.
- **Assurance of Data Accuracy:** Although it is axiomatic that neither GDPR nor any other law protects fake data, the Phase 1 Report shirks the responsibility of ensuring accuracy as part of an accountable and effective WHOIS framework. It is unfortunate that some saw the EPDP process as a means to evade the responsibility of data processors as much as possible, while losing sight of the very basis for why that data is useful and important within the domain system. [6] A significant proportion of WHOIS data has been and remains inaccurate. This is an acknowledged and uncontroversial fact. It is futile to put this much effort into a framework for data collection and processing without adequate recognition of why data quality matters for end users, data subjects, and data processors alike. As the GAC and ALAC stated in their joint Statement on the EPDP, “In accordance with Article 5 of the GDPR, every reasonable step must be taken to ensure

the accuracy of the data in view of the purposes for which it is processed. The report does not require explicit measures that guarantee the accuracy of the data in order to serve the purposes for which they are processed.”

- **Prevent Overly Broad Application of GDPR:** The Phase 1 Final Report perpetuates a Staff-imposed overly broad application of the GDPR, which is both unwarranted under the GDPR but also inconsistent with ICANN’s obligation to protect the public interest.
  - ICANN Org, through favoring the interest of certain stakeholders, has taken it upon itself to engage in the equivalent of norm-setting, by permitting contracted parties to apply the requirements of the GDPR on a global scale. Prior to the finalization of the Phase 1 Report, the EDPB released guidelines on the territorial scope of the GDPR, but the recommendations in the Phase 1 Report make no reference to these. Notably, the Phase 1 Report indicates a divergence of views on this recommendation. INTA requests the Board to consider whether it would be appropriate for the Board to treat recommendations where there is a noted divergence as consensus policy. And notwithstanding the EDPB’s guidance on this point, the Phase 1 Report does not request further study on this issue to determine an appropriate framework for geographic differentiation. INTA recommends that the ICANN Board request that this work be done as part of Phase 2.
  - Phase 1 Report perpetuates the ability of contracted parties to over apply the GDPR to legal persons, and to natural persons having no contact (either individually or via their registrars or registries) with the EU. INTA is supportive of the recommendation to continue to pursue a solution to this over interpretation of GDPR in Phase 2.
- **Correct Over-Redaction of Information:** The Phase 1 Final Report over-redacts information that should not be subject to the GDPR rules, including redaction of the Registrant’s Organization. Listing the Registrant’s Organization assists in the concerns of trust, legal responsibility, and accountability by providing consumers and other third parties a way to verify if the domain name, or the website linked to it, is associated with the entity advertised on the website itself. In this way, the public can verify that a domain name and the website to which it resolves or the emails which emanate from it, are legitimate by matching the Organization Field to the organization advertised. While it is possible sole proprietors in Europe may operate under business names incorporating their personal name, it would be simple to provide them with instructions to not populate this field and far less burdensome on the public to do so than to redact this information from all WHOIS data.
- **Address Lack of Ability to Perform Reverse WHOIS Searches:** The proposed recommendations do not provide for the ability to perform reverse WHOIS searches once relevant parties know a bad actor’s identity in order to find out what other malevolent uses of the domain name may be employed. This results in the practical

elimination of Section 4. b. (ii)<sup>1</sup> of the UDRP which is dependent on showing a pattern of abusive behavior. Changes to the UDRP were not in scope for the EPDP.

- **Prevent Masking of the Identity of Domain Name Sellers.** The proposed recommendations do not provide for a mechanism that allows the buyer of a domain on the private market to verify that the seller they are dealing with actually owns/controls the domain they purport to own and to ensure that the seller is legitimate.

INTA is not alone in harboring these concerns. The SSAC, ALAC, and GAC have each raised versions of these concerns in the months since the release of the Initial Report for comment and have maintained them following the GNSO Council's vote to approve the report over the objections of the IPC and BC.

Finally, INTA is also alarmed by the diminished importance afforded to the need to complete Phase 2 on an expeditious basis. INTA appreciates the degree of time and sacrifice that was required to complete Phase 1. But the issues to be addressed in Phase 2 (protecting consumers from even more abuse on the Internet) are no less important, or urgent, than those from Phase 1 (protecting contracted parties from potential fines). INTA agrees with the advice in the GAC Communique that Phase 2 should have an "expeditious timeline, similar to Phase 1."

### **Action of the ICANN Board**

INTA requests the ICANN Board to carefully consider the concerns addressed above and, if the Board votes to accept the Phase I Report, that it also issues qualifying language that directs the GNSO to affirmatively resolve the above issues in Phase 2 and not defer critical questions yet again. At the very minimum, the Board should recognize that that nothing that came out of Phase 1 would preclude a finding in Phase 2 that law enforcement, intellectual property, and cybersecurity are legitimate purposes for data collection, processing and access.

Failure to address these issues could have serious consequences for the ICANN community including legislative measures by sovereign nations to remedy the imbalance inherent in the recommendations. The ICANN Board has the opportunity to provide a thoughtful response to these complex issues and to consider the concerns of all stakeholders in its decision to accept the Phase 1 Report and the guidance it provides for Phase 2.

INTA thanks the Board for its consideration of this submission and stands ready to move forward and work towards viable solutions that both comply with the letter and spirit of GDPR while protecting the billions of consumers who engage in e-commerce and other activities online. For more information about INTA and its policies, you may contact Lori Schulman, Senior Director for Internet Policy, [lschulman@inta.org](mailto:lschulman@inta.org).

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<sup>1</sup> "(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct"

Sincerely,



Etienne Sanz de Acedo  
Chief Executive Officer

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

INTA is a 140-year-old global not for profit association with more than 7,200-member organizations from over 191 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 decade, 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 200 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.

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#### Endnotes:

[1] For more detail on the issues INTA raised in its comments on the Initial Report, these comments may be accessed here:

<https://www.inta.org/Advocacy/Documents/2019/INTA%20EPDP%20Dec%202021%20Final%20for%20Posting.pdf>

[2] <http://www.inta.org/About/Pages/Overview.aspx>.

[3] The link between transparency and accountability is a fundamental tenet not just for INTA but also for ICANN, as reiterated in Article III of the ICANN Bylaws and the 2009 Affirmation of Commitments with the United States Department of Commerce. See <https://www.icann.org/resources/pages/governance/bylaws-en/#III> and <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>.

[4] See the SSAC Comment: "The EPDP Working Group's recommendations move away from the model of "purpose-based contacts" that has had wide support in prior work (e.g., WHOIS Expert Working Group8). Such a move will interfere with established, efficient operations that will affect the security, stability and resiliency of the DNS, and will affect the management of domains by potentially millions of registrants. We recommend that the EPDP look at this issue holistically and review how decisions to address one set of concerns may affect others, and more importantly, the workings of the entire ecosystem." At <https://www.icann.org/en/system/files/files/sac-104-en.pdf>

[5] As the GAC and ALAC state in their joint statement of 13 March 2019: "The GAC and the ALAC would like to remind the community of the importance of protecting the public interest. GTLD registration data is used by, among others, law enforcement, cybersecurity professionals, CERTs and those enforcing

intellectual property rights online including brand protection as well as businesses, organizations and users assisting in combating online fraud.”

[6] See the SSAC Comment on the Initial Report: “...the EPDP team has not fully explored the data accuracy requirements of the GDPR, and whether the procedures in the 2013 Registrar Accreditation Agreement (RAA) and the Temp Spec are GDPR-compliant.” And “The accuracy complaint process has been a vital accountability and compliance mechanism. Indeed, registration data inaccuracy complaints have come mainly from the public, who are for example affected by abusive registrations and bad actors who provide bogus data. But the ability of third parties to see the data, and therefore to make complaints, has been greatly curtailed by the GDPR and the Temp Spec. As a result, the number of WHOIS inaccuracy complaints to ICANN has fallen by 40% in a short time. Accuracy requirements and procedures without the opportunity to use them are worthless.”

<https://www.icann.org/en/system/files/files/sac-104-en.pdf>