

**Transcription ICANN London
WHOIS Conflicts
Sunday 22 June 2014**

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(Karen): The topic that was - has been discussed or raised quite extensively. So there is an existing Whois procedure for the details how ICANN would handle conflict between the contract - sorry, contractual obligation and particular loss. That is a process - a procedure that is based on policy development work that was done within the GNSO.

It's been in place since I think early 2008. The objective of it is obviously to have a procedure is consistently used to address when those conflicts arise. The procedure also contains a recommendation for an annual review to be done it says in consultation with all constituencies, but particularly with input from registries and registrars.

That review has never actually taken place. And to date, the issue still continues to arise and be a concern. So we're looking to use that review to start the discussion on - continue the discussion in that area. So there is a paper that's published that's been posted for comment in May that does look at the current procedure.

It describes related processes. I should point out that the procedures never actually formerly been invoked in terms of a registry or registrar coming to ICANN and saying - formerly invoking the set of steps by presenting evidence

there's an enforcement action or judgment against me because of my compliance with this contract. And so, there have been other processes that address similar cases. For example, some registries have used the Registry Services Evaluation process to submit requests for contractual amendments that help address this.

We've also recently established the procedure for registrars to request data retention waivers which are being published and granted now. So it does look at some of those processes and how they can potentially relate to inform what we're doing in terms of (Who Is). So the - as I said, the paper is open for comment. I encourage people's feedback on it.

The comment period was extended based on requests from people who I wanted I think to particularly discuss the issue at this meeting. So it is - the comment period is open through July 3. And the reply period closes on August 1. In terms of the process, what we'll - what we foresee to occur after the comment period, we didn't want to constrain the process too tightly.

We wanted to see what feedback we got. But I first want to you know make clear that the procedure is based on GNSO policy advice. And so the GNSO does always have the option to review or modify the existing policy recommendations. The - you know one possible outcome that we see - you know depending on the feedback if there are you know one or two solutions that are proposed often is to develop a paper around some of those for additional discussion.

Potentially also, again depending on the feedback, one approach could be a form a - something like an implementation recommendations team that looks at actual implementation of the policy advice and whether that could be done differently. I think that covers the key points of the issues. So I'll turn it back to you for any questions or discussions. Thanks.

Man: Thank you. I see no one in the queue at this time. But I'll start with Steve and then go to (James).

Steve DelBianco: Hey, (Karen), Steve DelBianco for the BC. Appreciate the extension. BC's comments are in draft and review right now. But I wanted to ask a question and offer an observation. The question would be do we have enough data on actual time of the exemption or non-enforcement was granted to really be able to move ahead?

I mean it's my sense we've never used this process. Is it - is it you know unusual than for us to be looking at revising a process we've not yet used? Or are we assuming that its' nonuse is indicative that it may not be useful in its' current form. That what you're thinking?

(Karen): Thanks, Steve. So yes, there's a - it says in the paper that there hasn't been a case where this procedure, this actual set of steps has been followed. And you know which may be indicative of there's no problem which may be indicative of you know maybe there's a reason it's not being used and people are going around and trying to look at other ways to do this.

So, we're kind of looking for people to comment on that. It is - I mean one of the reasons that I think we haven't reviewed it to date is you know that there's not much in terms of statistics or experience that you can - that you can point too.

Steve DelBianco: Then if I can do a follow up on that. Then so the BC's current principles to guide that would be that - to maximize the number of times we retain all the language and the contracts since we worked so hard to do policies that generated the contracts. To minimize the reach of an exemption or a non-enforcement and that reach could be geographical reach, you know tightly constrained to the jurisdiction that it affects. Better still, tightly constrained to the contract party that requested it. Tightly constrained to the situation and circumstances of the registrar that it might affect.

And then finally, constrain the time so that it only applies - the exemption would only apply for the time period for which all of these conditions were present. Thank you.

(Karen): Thank you.

Man: Thank you, Steve. Next in queue is (James).

(James): Hello. Thanks for the update, (Karen). And you know I'm just kind of getting spun up into this. And I noticed that some of our more outspoken members of our group are not currently in the room. But I had a couple of questions. And some of them may just come for unfamiliarity with what we're talking about.

But I thought that there was one case where this process was invoked with a sponsored GOB and that may be anecdotal or that may have not completed the entire process. So I was just a little surprised to hear that it's never been used. I thought it had been used at least one. At least that was my understanding with the (Who Is) review team that we found one case, no?

(Karen): I don't believe so. We looked - you know before we - as we were writing the papers delve into all of the history and all of the cases that you know we knew about and could recollect as to where this issue had occurred. And went back pretty extensively and looked at all the paths that people had taken. So I think that we didn't find one where this procedure had actually been beneficially invoked. But if there you know if there's something that we missed that- then we'd be happy to...

(James): I'll talk to you offline. Maybe I've got it wrong...

(Karen): Okay.

(James): But I remember us taking a look at that exact issue of...

(Karen): Okay.

(James): How many times has this been used? And is it - is it serving a purpose. You know I feel like this problem is just going to continue to proliferate and escalate. And as global service providers, we find - unfortunately, Steve I wish we could get the government to also limit the scope of you know - but they keep saying, "well, you know this is our citizen" or "this you know service is provided in our country or whatever. So we - you know you have to now apply our laws you know generally."

And I think that we - I think what we're looking for in - you know is just some backstop support from ICANN organization that says we're not going to add insult to injury and beat you over the head with a contract while you're having all these disjointed conversations with governments of the world and trying to reconcile all those laws.

So I think we're just looking for some organizational help and not any sort of additional policy or contractual you know hoops we have to jump through. We've got enough on our plate with them. Thanks.

(Karen): Okay. Thank you, (James).

Man: An additional point that ICANN might want to consider is to reach out to those parties that have contacted them in the past, pointing out problems with data protection such as the working - the Article 29 Working Party and communicate with them. Enter into a dialogue. The way it's currently set up, if a company, if a contracted party has a problem with any provision, they have to obtain the legal opinion.

They have to do all the work. It would be helpful if ICANN in parallel, also commissioned work and investigates the issues that have been pointed out to them and enter into dialogue with parties obviously willing to engage.

(Karen): Great. Thank you.

Thomas Rickert: This is Thomas Rickert for the transcript. (Karen), you were mentioning the related policy for data retention waivers, and we discussed this quite extensively in Singapore. And since we're made some progress, that I have to say that it was an extremely painful process for our parties, extremely result intensive and money and time consuming.

I would encourage ICANN to look at ways to deal with national law conflicts on the country by country basis and not on a company by company basis. I'm not aware of any law that is specific to a particular company. But still the registrars have to file individual applications and enter into communications with ICANN.

And I think that's unfortunate and unnecessary because the laws are applicable for all traders in their respective countries.

(Karen): Thanks, Thomas. So I think what you're describing is - would be a scenario where you know there's a procedure and there's a known approach kind of for a given country so that you know if there's a new contracted party or somebody's changing their jurisdiction or something, there's a set of resources already there?

Thomas Rickert: I guess that when - to stay with the example of registrars and the data retention waiver where one registrar in a specific country has gone through the process successfully, then there should not be the need for an extra application by other players which is currently the state of it.

(Karen): Right. Thank you.

Man: Okay. I was going to enter myself. But I'm leaving Steve the first.

Steve Metalitz: Thank you. Steve Metalitz, a member of the intellectual property constituency. We also appreciate the extension of time and will be - we have our comments in draft as well. I guess I'd just like to make two points. First one, that this - just to remind you, as you mentioned I think (Karen), that this policy is the result of I think unanimous or almost unanimous GNSO policy development process.

I mean it was done in the old way. But it was one of those rare occasions where everyone pretty much agreed on the policy. And then the procedure took a long time to put into effect. And there may be some deviations between the policy and the procedure. But it's worth noting that this was an area of unanimity on an issue that doesn't always command unanimity.

The second point I'd just like to make is on the data retention waivers which obviously are - its' part of this discussion as well. And I think our concern about that process has been - I mean it's a very serious transparency deficits in how those have been handled. You know, Brett mentioned earlier the idea of signing tickets.

These are the only public comment notices I've seen in recent years that are not - have no ownership. There's nobody in - at ICANN who claims ownership of this public notice. It was never posted on the public comment page. And then there's never really been any explanations or responses to the comments that our constituency has filed on all four of the pending waivers.

One is still pending. So maybe we'll see a response on that. So I think there's some problems that have occurred there that hopefully could be avoided in whatever changes if any are made to the (Who Is) conflicts procedure. Thank you.

(Karen): Thank you, Steve. We'll take those comments back.

Man: Thanks, Steve. Seeing that the queue is emptied, I would like to make one final comment from - in my own personal capacity which regretfully contradicts the one that was made by Steve. I would like ICANN to be - to take a very broad approach for waivers and exemptions that's made simply for the fact that the law may apply to more than one company that has asked for it.

So for example, if a company asks for an exemption in another company in the same country, ICANN might want to reach out to that company and ask if they want the same exemption if it applies to them. Another case may be for a registrar that may be physically located in one country but operates all its' service operations, technical specifications. For example in the EU which means that it becomes under EU law, European data handler and therefore European data protection law would apply to that entity.

And therefore its' based physically in another location, it would have to have the same waiver to be legally compliant. That's just a consideration that ICANN should take. And therefore, a more broad approach would be appreciated by many contracted parties. That was my personal comment. I don't see any further requests to be put in the queue.

Do you - would you like to add the final comment?

(Karen): Yes. Thank you. I was just thinking of one point that I didn't make that I probably should have is that you know as I said at the beginning, this process is a result of GNSO policy advice. And so while we didn't you know define an exact set of steps for you know if there would be a new or revised procedure, how that would work.

But I did want to note that we - and we said this in the paper. That we would expect to bring the result back to the GNSO for their review of it.

Man: Thank you, (Karen). We're looking forward to that. And thank you for all your work so far.

(Karen): Thank you.

Man: Conscious of the time, we would now like to enter immediately into the NTIA Accountability discussions. (Jonathan) will lead that topic. So I would like to ask that the recordings be stopped and immediately restarted. Could you give me a signal when you have done so?

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