ICANN and GDPR Compliance
The Vital Need for Continued Access to Open and Accurate WHOIS Data

- The International Trademark Association (INTA) is a global association of brand owners, domain industry service providers, and legal professionals dedicated to defending trademarks and related intellectual property (IP) rights to foster consumer protection, economic growth and innovation.

- INTA members use ownership information in the global WHOIS database not only to facilitate business but to locate and contact registrants behind web sites that steal personal information, sell counterfeit goods, distribute malicious software and perpetuate fraud through the unauthorized and infringing use of brand names.

- Access to registrant data in the WHOIS database is universally used to detect, prevent and address a wide range of harms, including: (i) sites that offer counterfeit goods that hurt individuals by using poisonous and substandard materials (ii) sites that offer fraudulent services that perpetrate identity-theft, steal credit card information and divert funds to large-scale criminal enterprises; and (iii) domains/sites that cloak themselves with the legitimacy of a familiar brand, and/or offer access illegitimate copies of movies, music and other protected content as a means to distribute malware and perpetrate fraud.

- If access to open and accurate registrant data is unreasonably restricted or denied, efforts to protect consumers and trademark owners will be thwarted, leading to a rise in abusive activity, damage to cybersecurity, diminished trust in online marketplaces, and increased costs and burdens for those entrusted to keeping the domain system secure, reliable and trustworthy.

- Law enforcement agencies would also be further burdened if private citizens (including companies) are unable to independently identify and act on the huge volumes of infringement and frauds that they currently detect.

- ICANN has stated that its goal is to identify a WHOIS model which complies with GDPR while maintaining the existing WHOIS system to the greatest extent possible. The model proposed by ICANN on February 28, 2018 falls far short of these aims for a number of reasons including: (i) vital WHOIS data would become non-public, including the critically important registrant email address; (ii) the lack of a ready mechanism to grant brand owners access to full WHOIS data as part of layered access; (iii) the failure to explicitly confirm that users approved to access non-public data will have unfettered access to all such data, and will not be further restricted by having to access such data on per registrant, domain name or data field bases (iv) failure to address the need to search across data sets using email addresses, or maintain port 43 and bulk access to identify patterns of abuse; and (v) failing to distinguish legal persons from natural persons, and processing with an EU-nexus versus processing with no such nexus, leading to GDPR “over-compliance”.

- ICANN’s approach undermines vital anti-abuse uses of WHOIS. It also fails to prescribe any compliance remedy for contracted parties who decline to follow the model, such as de-accreditation.
• INTA supports an approach which balances the privacy interests of individual domain registrants with the public and legitimate interests of others. Such an approach can accommodate public access to a limited amount of personal WHOIS data where the requestor has a legitimate interest in the data, namely, such as for intellectual property protection, strengthening cybersecurity or law enforcement purposes. This approach is consistent with the position of the ICANN GAC in their November 2017 Communique, as well as views expressed by the European Commission, ICANN, and the Article 29 Working Party. Any approach must improve WHOIS accuracy and filter out false or inaccurate data, which is not protected under GDPR, through additional requirements for verification and validation of the data elements, both at the time of collection, and throughout the registration period.

• INTA urges ICANN stakeholders and constituencies to press for the implementation of a model which balances important privacy objectives and remains true to ICANN’s stated goal of preserving the current WHOIS system while complying with the GDPR.

For more information about INTA and its policies, you may contact Lori Schulman, Senior Director for Internet Policy, lschulman@inta.org.