

## A highland battle?

### ICANN / WHOIS update and discussion

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#### Abstract

Today's online environment is characterised by fast paced innovations, an unsaturable source of user generated content and dynamic platform services. In this "web 2.0 environment", where an increasing number of online service providers depend on user data for marketing, analytics and other commercial purposes, the protection of privacy and personal information has taken up the centre of attention. The **Internet's domain name system (DNS)** forms an important part of this environment and personal data in relation to domain names is collected, disclosed, retrieved and transferred on a daily basis. The main share of the processing activity revolves around the **WHOIS directories**, a series of databases managed by registrars and registry operators containing information related to registered domain names. This information includes personal identification and contact information of domain name holders (registrants), such as names, email addresses, phone numbers, physical addresses, and administrative and technical contacts. The WHOIS records serve as a primary resource for a number of entities, such as law enforcement authorities, consumer protection organisations and intellectual property ('IP') rights holders, to investigate and tackle crime and infringements online. IP owners specifically rely on expedient access to accurate WHOIS information in their continual struggle against online infringers. In order to address online copyright or trademark infringements, counterfeiting or cybersquatting, IP owners rely on WHOIS data to investigate and address infringements, reach out to unauthorised parties directly, report the activity to regulatory agencies, or file a claim or a complaint to put a stop to the infringement, to claim damages or to recover/disable an infringing domain name.

However, with the introduction of the European Union's (EU) **General Data Protection Regulation 2016/679 ('GDPR')**, the unlimited publication of personal data of individual domain name holders in the WHOIS system was put into question. The free public disclosure of this personal data was determined to be inconsistent with several principles of the GDPR, such as the principle of necessity, purpose limitation, the rights of data subjects and the arrangement between joint data controllers.

As a result, ICANN put forward the so-called '**Temporary Specification for gTLD registration Data**' ('**Temporary Specification**') on 25 May 2018, which serves as a preliminary measure for compliance with the GDPR until a more final consensus policy is implemented. Under the Temporary Specification, all previous personal data of registrant is still being collected. This means that, in order to register a domain name, registrants will still have to provide their full name, organisation (if applicable), phone number, physical address, email address, and administrative and technical contact information. However, the Temporary Specification restricts

the accessibility of personal registrant data available through public WHOIS queries. At the moment, Internet users seeking information on a specific registrant are only able to view the registrant's organisation (if applicable) and his or her country, state or province in public WHOIS, together with an anonymised email addresses that is meant to relay messages to the registrant's actual email address. All other information is redacted.

The redaction of important identification and contact information in the WHOIS records resulted in **increasingly difficulties for IP owners to investigate infringements online**. The tendency to extensively protect the privacy of Internet users – by shielding their identity and/or providing anonymity – comes at the cost of a decrease in online accountability and transparency. IP owners can no longer depend on readily available identity and contact information of potential infringers available in the WHOIS records associated with infringing websites. Also, bulk access to WHOIS information is no longer possible. This means that reverse WHOIS queries or other general searches to monitor infringements or discover patterns of conduct are no longer possible. As a result, IP rights holders must revert to more traditional measures to investigate and tackle potential infringements. For example, they can investigate a website's IP-address to obtain information on its location or to request the disclosure of additional information based on the IP-address from other intermediaries, such as the ISP. They can also examine historical repositories of WHOIS data, although their relevance diminishes with every passing day. Substantive information on a website, such as languages, currencies, hyperlinks and postal addresses, can provide further insight. One can also attempt to contact a registrant directly through the provided anonymised email address or try to obtain the disclosure of the infringing registrant's identity through a request with the responsible registrar. The Temporary Specification requires the latter to provide 'reasonable access' to the personal data of registrants to a third party with an overriding legitimate interest, such as a law enforcement authority or IP owner. However, the lack of uniform criteria or a standardised process to provide such 'reasonable access' has resulted in uncertainty and a fragmented treatment of access requests. Another controversial aspect of the Temporary Specification is its scope of application. While the GDPR only applies to the data of natural persons, the Temporary Specification applies without making a distinction between natural persons and legal entities. It is also permitted for registrars and registry operators to apply the model globally, without a connection to the EEA or its citizens. Such an over-extension of the Temporary Specification's scope of application is not in accordance with the material and territorial remit of the GDPR.

Since the Temporary Specification only serves as a temporary measure for WHOIS to comply with the GDPR, ICANN launched a so-called **Expedited Policy Development Process (EPDP)** on 25 May 2018. The EPDP aims to review the elements of the Temporary Specification and evaluate whether they are in conformity with the GDPR and the ICANN by-laws and whether additional actions are necessary to put in place a reasoned and balanced policy by 25 May 2019, including a uniform mechanism for access and accreditation. The EPDP working group, which consists of 31 representatives from all ICANN stakeholder groups, has finished the first phase of this process on 20 February 2019. On that date, the working group issued a Final EPDP Phase I Report containing 29 policy recommendations regarding the Temporary Specification and the actions required to further bring WHOIS in compliance with the GDPR and ICANN by-laws. The recommendations concern (i) the validity, legitimacy and legal basis of the

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purposes for the processing of WHOIS data, (ii) the legitimacy, necessity and scope of the registrar collection of registration data, (iii) the legitimacy, necessity and scope of the transfer of data from registrars to registries, and (iv) the publication of registration data by registrars and registries.

The consequences of the **Final Report** for public access to WHOIS data are that only the State/Province and the Country of the registrant will remain visible for gTLD domain name registrations. All other data elements (including the organisation field)<sup>1</sup> will be redacted. Accordingly, the e-mail address of the registrant will not be disclosed and communications can only be brought through an anonymised email address or web form provided by the registrar. Additionally, the “Administration Contact” information will no longer be collected and the collection of “Technical Contact” information is made optional. Lastly, the Final Report does not lay down uniform requirements with regard to ‘reasonable access’ that registrars must provide to third parties with an overriding legitimate interest, instead it only sets out criteria for what constitute ‘reasonable request for disclosure’. Despite opposition from the intellectual property and business stakeholders of ICANN, the Generic Names Supporting Organisation (‘GNSO’) Council adopted the Final Report and sent it to the ICANN Board for approval and implementation. On 15 May 2019, the ICANN board approved the Final EPDP Phase I Report.<sup>2</sup>

Now that the first phase of the EPDP has been completed, work on the important second phase will commence. In this phase, the EPDP undertakes to develop a **System for Accredited Access to Non-Public Registration Data (Unified Access Model)**. Additionally, the EPDP working group will aim to answer some important questions deferred from the first phase, such as regarding the distinction on a geographic basis and between natural and legal entities. With regard to the Unified Access Model, access to non-public WHOIS data will be reserved to specific third parties approved under a formal accreditation programme administered by either ICANN or an independent third party. It is still uncertain who will eventually be eligible for accreditation and under which requirements, but ICANN has already specifically referred to national law enforcement authorities and IP owners and their representatives. Private accredited users will potentially need to comply with predetermined codes of conduct, which would establish standardised criteria, limitations and responsibilities for granting access to non-public WHOIS data. It is unlikely that the Unified Access Model will be completed within the coming year. However, the eventual implementation of the Model will be detrimental to reinstate efficient and expedient access for IP owners to important WHOIS information, which will help to restore the current imbalance between intellectual property protection and the protection of personal data.

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<sup>1</sup> The “organisation” field in WHOIS will be redacted until 29 February 2020, after which the registrars and registries have the option to publish the “organisation” field.

<sup>2</sup> The Board formally accepted 27 of the 29 recommendations and only accepted part of two recommendations (‘processing purpose’ and ‘organisation field’), the determination of which it deferred to Phase II of the EPDP.