

## **Domain Name WHOIS Information Set to Disappear with the Implementation of the GDPR**

On May 25, 2018, the WHOIS domain name database, consisting of registrant identity data that brand owners, trademark practitioners, law enforcement, and brand protection companies rely on to assist with transactions, investigations, and enforcement activities, will disappear into the shadows. May 25, 2018 is the day that the European Union (EU) personal information privacy regulation - the General Data Protection Regulation (GDPR) - goes into effect.

### **The WHOIS System**

Under current policy of the Internet Corporation for Assigned Names and Numbers (ICANN), anyone who registers a domain name must provide accurate identifying contact information. ICANN's contracts with its nearly 2,500 domain registries and registrars require this information to be publicly available through the WHOIS service. Having free and immediate access to WHOIS records is critically important to identify registrants, conduct domain name purchase and sale transactions, and deter counterfeiters, cyber criminals, cybersquatters, trademark infringers, and fake news purveyors.

### **The GDPR**

Once the GDPR goes into effect, the public availability of WHOIS data as we currently know it will vanish. The GDPR is an EU regulation on data protection and privacy that applies to individuals who reside in the EU and any of their personal identification data exported outside of the EU. The GDPR governs how such data must be handled and protected by companies who transact business with such individuals. Under the GDPR, a company must protect personal identification data on EU consumers and provide ways for these consumers to control, monitor, check, and remove such data. If a company is not in compliance with the GDPR, the penalty could be up to 4% of a company's annual global revenue or €20 million. The GDPR will therefore have a substantial impact on any company in the world that transacts business with individuals residing in the EU.

### **Reaction by Registries and Registrars**

In response to the impending implementation of the GDPR and its steep penalties, and in the absence of an exemption from liability under the GDPR, domain registries and registrars are simply planning to hide personal contact details of registrants in WHOIS records. This means some registries and registrars plan to obscure all contact information, others may hide contact information under identity-shields, and still others may reveal only limited information, such as a registrant's company, state, country, the website name servers, and the creation and expiration dates of the domain name registration. For example, the .UK ccTLD domain registry Nominet announced that it will charge users for access to WHOIS information, though names and addresses will remain

redacted unless the registrant has provided explicit consent. The unilateral and inconsistent steps taken by each registry and registrar will result in a highly-fragmented system, where access to information in WHOIS records could vary substantially from one registry or registrar to another.

### **ICANN's Efforts to Maintain the WHOIS Database after the GDPR Becomes Effective**

In February 2018, ICANN submitted a proposed interim model for WHOIS GDPR compliance to the EU's Article 29 Working Party (WP29). The WP29 is the EU's independent data protection authority. ICANN's proposal would continue to require registries and registrars to collect all registrant, administrative, technical, and billing contact information, but would permit these entities to mask the data fields that contain personal information. In addition, ICANN's proposal would allow access to personal information for "accredited users", such as law enforcement personnel, and the ability to contact registrants through an online form or a proxy e-mail address. On April 11, 2018, the WP29 responded by expressing concerns that ICANN's model did not include enough specificity about the purpose for collecting and processing personal data, as required under the GDPR. Moreover, the WP29 noted that the interim model would potentially provide "accredited users" unfettered access to personal information. Most importantly for the near-term, the WP29 rejected ICANN's request for a moratorium on enforcement of the GDPR while ICANN refined its interim model in response to the WP29's concerns.

On April 12, 2018, ICANN wrote a letter to the WP29 in which it stressed the importance of balancing the right to privacy with the need for publicly accessible information in order to prevent the proliferation of criminal activities after the GDPR's effective date. In addition, ICANN repeated its request for a moratorium on enforcement of the GDPR as it relates to WHOIS records.

ICANN representatives met with the WP29 on April 23, 2018. Following this meeting, Göran Marby, President and CEO of ICANN, reported that the WP29 made clear "that registrant, administrative, and technical contact email addresses must be anonymized", and that many questions remain unanswered to reconcile the WHOIS system and the GDPR.

On or about May 17, 2018, ICANN is expected to adopt a "Temporary Specification" amendment to its registry and registrar agreements, implementing much of the interim model for up to one year. Under this Temporary Specification, registries and registrars will be required to redact all personal information unless the registrant provides explicit consent, and provide an anonymized e-mail address or online form to contact the registrant. Moreover, registries and registrars will be required to provide contact information to administrative dispute providers when a complaint is filed under the Uniform Domain-Name Dispute Resolution Policy (UDRP) or the Uniform Rapid Suspension System (URS). Finally, the Temporary Specification provides that registries and registrars must grant "reasonable access" to domain registration data for purposes

that could include consumer protection, investigations of cybercrime, and intellectual property protection. It is expected that “reasonable access” will be further defined once there is an acceptable model for access and accreditation in place. In the meantime, registries and registrars will have to make their own judgments as to whether requests for WHOIS information from law enforcement, brand owners, practitioners, investigators, and others are reasonable under the Temporary Specification and permissible under the GDPR.

### **Preparing for the Implementation of the GDPR**

Brand owners and trademark practitioners should be prepared to contend with a future where access to WHOIS information is scarce or difficult to obtain. In order to continue enforcement activities in the face of this uncertain future, we propose the following alternative strategies:

- Before May 25, 2018, save copies of WHOIS records for domain names you may be monitoring or have an interest in.
- Obtain contact information for domain name registrants on any websites to which these domain names resolve or redirect.
- Engage the services of private investigators or law enforcement personnel who may have access to WHOIS information under an accreditation system or otherwise.
- Initiate a UDRP or URS in order to learn the contact information of a registrant.

### **For Further Information and Assistance**

The Trademark & Copyright Department at Cantor Colburn LLP will continue to monitor the WHOIS situation. We also stand ready to answer questions you may have about the anticipated WHOIS database restrictions and strategies for undertaking trademark enforcement after May 25, 2018.

Please do not hesitate to contact us if we can be of further assistance.

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