

What's up with WHOIS? The GDPR May Limit or Prevent Access to Domain Name Registration Information

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Domain name registrars and registries might soon be changing their mantra from, "I think ICANN," to, "Maybe ICANN'T," when it comes to providing publicly available WHOIS information for domain name registrants. New potential models for WHOIS will be posted January 15, 2018, and attempts to salvage at least most of the existing WHOIS system are underway.

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ICANN, the Internet Corporation for Assigned Names and Numbers, is an international nonprofit organization responsible for creating and maintaining rules related to domain names. Among other things, ICANN contractually requires accredited domain name registrars (companies selling domain names to the public) and certain domain name registries (companies that manage domain name extensions) to maintain a free, publicly available WHOIS database from which anyone may obtain basic contact and technical information about domain name registrants. This data includes information like the domain name registrants' names, addresses, email addresses, and phone numbers. Registrars that fail to comply with these requirements are in breach of their agreement and risk losing ICANN accreditation.

But registrars and registries now find themselves between a rock and hard place when it comes to providing required WHOIS data in light of changes to EU privacy law under the General Data Protection Regulation ("GDPR"), which become effective on May 25, 2018. We have written previously about the GDPR in other contexts [here](#) and [here](#). In a nutshell, the GDPR imposes duties on companies based in the EU or offering goods and services to EU residents requiring these companies to protect all data that relates to a

living individual, even where that data is publicly available or voluntarily submitted by the individual. EU residents also have various rights, including the right to object (opt-out) and the right to be forgotten (erasure/data cleansing). Consent to use data cannot be folded into online terms and conditions (like those agreed to during the registration of most domain names) and it may be withdrawn. Companies that fail to comply with the GDPR may face enormous fines of up to €20 million or 4% of global annual revenue, whichever is greater. Because much of the information available in WHOIS databases is governed by the GDPR (when it relates to EU registrants), these organizations are concerned about their ability to comply both with ICANN's contractual requirements for public disclosure of personal WHOIS data and the GDPR's data protection requirements. Given the massive fines at stake under the GDPR, it is not surprising that many are opting to shirk ICANN's WHOIS requirements as they prepare for the GDPR's implementation.

For its part, ICANN has acknowledged the conflict and has created a Protection/Privacy Issues [webpage](#) with updates on its consideration of the issue. ICANN received a letter from the EU's Article 29 Working Party in December saying that the current WHOIS system does not comply with the GDPR and the goals of WHOIS may be met by developing a system of layered access in which different users receive access to different sets of data.

For the time being, ICANN is investigating options and has stated and that it will defer taking action for noncompliance with its WHOIS requirements if registries and registrars share their models for complying with the GDPR, their analysis of how each model complies with the GDPR and ICANN obligations, and a description of how the disclosed model does not simply abandon all WHOIS obligations. It has asked for models to be submitted by January 10, 2018, and plans to post the models on January 15, 2018. These submitted models are being evaluated by an outside law firm, which will present a number of options to ICANN, presumably so that it may either adjust its WHOIS policies or provide guidance to registrars and registries on how to comply with both the GDPR and WHOIS obligations.

In its latest memo to ICANN (December 21, 2017), the outside law firm describes how layered access to WHOIS would significantly increase the cost and burden on registrars who are not in a good position to assess legally who should receive which type of access to WHOIS. It recommends that layered access be considered as a temporary solution only. It suggests that ICANN negotiate with EU regulators to allow the current WHOIS system to continue to exist long-term, with the same information publicly available (except for email addresses, which it deems unnecessary for enforcement activities). It notes that similar information is currently publicly available in trademark registers.

In the meantime, this conflict is likely to have a negative impact on the ability of brand owners to enforce their rights against domain name squatters and infringers. If registries and registrars are unwilling to provide WHOIS data, it will be more difficult to ascertain the identities and contact information for infringers, either for purposes of sending demand letters or establishing patterns of abuse. It could also make it difficult to file

complaints under the Uniform Dispute Resolution Policy (“UDRP”), which requires that a complainant list the contact information for a domain registrant as it appears in the WHOIS database. If the WHOIS information is not available, it is unclear what information, if any, a complainant would be required to include in the complaint to ensure it is complete and whether an arbitrator or registrar reviewing the complaint could refuse to act based on a lack of information. Even if WHOIS information is available under a new, layered access system, the increased effort required to obtain ownership information will likely increase enforcement costs for brand owners.

For now, it appears that ICANN is serious about trying to resolve the issue. We will keep our readers updated on changes to this developing situation.