

[WHOISChallenges@INTA.org](https://www.inta.org/whois-challenges): GDPR and WHOIS Users Survey Results

Prepared by the Internet Committee 2018/2019

I. Introduction

This report summarizes the results of the Internet Committee's survey conducted during the summer and fall of 2018 regarding ICANN's Temporary Specification for WHOIS and its impact on access to thick WHOIS registrant information. The intention of the survey was to assess how ICANN's Temporary Specification for WHOIS is affecting intellectual property professionals, the businesses and consumers they serve, to what extent and with what impact. The survey investigated whether intellectual property professionals who make use of domain registration data, for business or legal issues, consumer protection, and/or legal action/rights enforcement are encountering current problems as a result of the changes to the availability of registrant data as well as projected problems and potential solutions. These results should also be considered alongside another two other important surveys and information gathering exercises: (i) the joint survey conducted by the Anti-Phishing Working Group (APWG) and the Messaging, Malware and Mobile Anti-Abuse Working Group (M3AAWG) (the "Joint Survey"), (ii) the survey conducted by the WHOIS/RDS2 Review Team of law enforcement agencies worldwide, the results of which were presented by the Public Safety Working Group at ICANN63 on October 23, 2018 (the "WHOIS/RDS2 Survey") and results reported by AppDetex of responses to requests for registrant information on the basis of cybersecurity and consumer protection concerns (the "AppDetex Data"). While the INTA survey sample was small, the responses are consistent with and support the types of impacts that were reported by the Joint Survey (300 respondents) and the WHOIS/RDS2 survey (55 respondents).¹

The responses provided generally fell into one of four categories, namely, administrative matters, litigation and enforcement, business transactions, and policy harmonization. It is noteworthy that the resultant analysis is based on responses received from a total of 31 respondents, as follows:

- 16 respondents from North America (52%)
- 13 respondents from Europe (42%)
- 2 respondents from APAC (6%)

¹ See: <https://www.m3aawg.org/sites/default/files/m3aawg-apwg-whois-user-survey-report-2018-10.pdf>
<https://gac.icann.org/presentations/public/icann63%20pswg.pdf>
https://www.icann.org/en/system/files/correspondence/milam-to-chalaby-marby-12oct18-en.pdf?sm_au=iVVm75p0FMP0QSkN

The survey reflects a small sample size numerically (perhaps due to the closeness in time of the implementation of the ICANN Temporary Specification), Despite the small sample size, nearly all responses reflected concern or frustration at the lack of readily accessible WHOIS data, resulting delays in investigating wrongdoing – all consistent with responses reported by the Joint Survey and WHOIS/RDS2 Survey. The survey responses are summarized according to the noted categories below.

II. Summary

In parallel with the implementation of the European Union’s General Data Protection Regulation (GDPR) to the distributed WHOIS service in May 2018, the International Corporation for Assigned Names and Numbers (ICANN) has employed temporary measures via a Temporary Specification for WHOIS, to restrict the availability of registrant contact data to ensure GDPR compliance. As a result, access and usage of domain name registration information has been affected. Much of the formerly available registrant contact data for generic top-level domains with both European and non-European registrants has been redacted. It is currently possible to obtain limited WHOIS data (such as the creation and expiration dates of the registration as well as its current status), but personal data (such as contact details for the registrant) unless purposefully provided by the registrant. The survey investigated how ICANN’s Temporary Specification for WHOIS is having an effect on intellectual property professionals, the businesses and consumers they serve, to what extent and with what impact. Given that the survey was conducted less than six months after the Temporary Specification was implemented, there was very little time for INTA members to feel the impact of the changes and, in turn, the survey results are comprised of only a small number of respondents. INTA is continuing to collect input from respondents on a rolling basis.

In the aggregate, based on the survey responses received, ICANN’s implementation of the Temporary Specification has adversely affected access and usage of domain name registration information and the ability to address infringing activity and to mitigate abuse.

III. Assessment of Survey Results

In their responses, the intellectual property professionals surveyed reported that the implementation of ICANN’s Temporary Specification introduces the following issues:

a. Administrative Activities

The restriction on registrant contact data considerably increases the time and, as a direct corollary, costs, expended to obtain this information that was traditionally accessed from WHOIS records. The increase in time spent requesting and acquiring the non-public data information is significant and results in obtaining the information is mixed. By way of example, responses highlight that the “current practice of providing the name and address of the alleged domain owner only after substantiating an according request is very burdensome and cots lots of time.” Where registrant information was previously readily available, there are now substantial delays due to the complex pathways and means necessary to obtain access to this information, consequently allowing infringements to continue until the data needed to address the potential infringement is obtained. The current practice of providing the name and address of the alleged

domain owner only after substantiating an according request is regarded as more time consuming and a more involved process than past procedures (regardless of whether applied to ccTLDs or gTLDs).

Further, respondents indicate that brand owners have historically used WHOIS information as a domain management tool. The recent limitation on data available has, in effect, also restricted users from conducting internal audits of their own domain name portfolios and requires more frequent contact with registrars and supporting entities to glean information regarding their own domain name data which has resulted in an increase in costs incurred and time spent.

b. Litigation/Conflict Management

To facilitate proactive monitoring of bad faith registrants and use, respondents claim that it is critical to have access to domain registrant data for virtually every aspect of a domain name proceeding. Legal professionals and brand owners rely on the ability to gain access to registrant data via WHOIS in order to determine whether a given domain is owned by a related or licensed third party or, conversely, to address counterfeiters and online syndicates who register domains in bad faith (particularly in those instances where there are high volumes of registrations) and to take down the domains at issue [where appropriate] before they are linked to active websites. In the experience of INTA's members, identifying the domains registered by bad faith registrants by means of WHOIS information is critical to this process. WHOIS redactions will prevent or impede timely and effective take downs and high volume seizures of this nature.

Without registrant contact information, many brand owners are not apprised of alternative mechanisms to access this data or how to engage rights protection mechanisms. Additionally, it therefore becomes much more difficult for the right's holder to gauge whether they have a credible claim over potential infringers as the redacted data no longer provides insight into whether the claimant has senior rights, whether the registrant is a repeat infringer, whether they have legitimate rights in the domain, whether the registrant is a company or individual, whether the brand owner has an agreement with or relationship to the registrant etc. – all of which are pertinent data points to evaluating whether or where to send a cease and desist letter, initiate a UDRP complaint, foresee the possibilities of success or even to contact the other party in order to reach an amicable agreement. For example, one response stated that “from brand owner’s perspective, it now becomes very hard to enforce our rights or at least try and enter into a commercial (non-legal) discussion with a site owner about its content as we simply can’t get any contact information.”

Redaction of WHOIS information has also made the retrieval of information and analysis of counterfeit products more challenging. For example, the restricted access to registrant data has made it more challenging for pharmaceutical companies. One such respondent indicates that “the anonymizing of WHOIS information has made our job much more difficult battling illicit online pharmacies selling potential counterfeit products and products outside the legitimate supply chain.” These sites are businesses which should have no privacy interest in their contact information and typically purport to be located outside the European Union (in Russia, Canada, Switzerland, India and the United States) yet take advantage of the GDPR to ensure that their contact information is hidden. This makes taking any kind of action against illegitimate sellers (from UDRPs to civil or criminal action) much more difficult.

Another respondent notes that “[t]he main problem and concern for IP holders and practitioners is that there is no a balance between IP rights and data protection rights and the data protection in the detriment of IP rights.”

c. Business Transactions

Responses indicate that the lack of access to WHOIS data has impacted business transactions including, by way of example, due diligence exercises conducted in mergers and acquisitions. During the pendency of such transactions, there is often a vital and urgent need to access the current record of information regarding a registration to ensure accuracy prior to closing. Masked data makes these exigent transactions much more precarious, take a much greater deal of time and, as such, incurring higher costs and requiring the expenditure of greater resources to complete.

In the context of large companies with multiple entities owning many domain names, having ready access to WHOIS information has been shown to be effective for the ongoing management of the overall domain portfolio. This is now not possible and has made the utilization of a company’s own domains more difficult. By way of example, one response states that “[w]e needed to verify the ownership of the domain name within the scope of a due diligence (in the insurance sector), but we’re not able to do so in an efficient way.”

Additionally, in the context of domain acquisition efforts, the lack of accurate and readily available WHOIS information has been a hindrance to contact and negotiations for same.

d. Harmonization of Privacy Requirements

The responses received indicate that there is a strong desire for data protection harmonization, particularly as data restrictions are extending beyond EU based domain registrations. As additional jurisdictions employ similar limitations on access to data, and absent harmonization, it becomes imperative to understand country-specific privacy restrictions.

By way of example, survey input indicates that registrant information is no longer disclosed for Swiss citizens. As a result, it is particularly challenging to determine whether a perceived infringement is the result of a bad faith. The resultant perception is that the opportunities to determine registrant information are restricted to filing a UDRP complaint (with considerable fees). The only known opportunity to find out the registrant seems to be filing a complaint under UDRP against registrar. But in this case, a fee of at least CHF 1500 for procedure is payable.

Further, in Germany, the domain registry "DENIC" elected to change its WHOIS regulations to be GDPR compliant. Previously, DENIC has always been supportive of rights owners with regard to WHOIS regulations. In particular, DENIC provided an open WHOIS tool enabling any third party to access the information on the domain and the registrant online which as highly beneficial to brand owners for the purposes of identifying infringers and addressing adequate remedies. Currently, however, DENIC has changed revised its rules and only allows third parties to access the domain information if a particular interest is claimed. In effect, this means that a rights holder who feels that its rights are infringed now needs to separately contact DENIC and evidence the infringement prior to gaining access to the registrant information. The particular respondent that spoke to the issue regarding DENIC noted that they “would therefore strongly vote for initiatives to harmonize the landscape in a way to enable open WHOIS access again in future.”

Additionally, the alternative mechanisms to garner the registrant data (absent availability via WHOIS) would benefit from harmonized mechanisms and procedures. At present, to obtain the information requires contacting different registrars to request the shielded information and makes it more difficult to make a batch or bulk inquiry regarding a large volume of domains. This results in greater time, resources and fees expended to obtain the information needed when, previously, this information was easily available.

IV. Considerations and Recommendations

Increasing Concerns. The survey results strongly indicate that there are considerable concerns regarding the lack of public access to registrant data at present. Furthermore, the lack of any changes to the existing policy, or the creation of any means to standardize access to registrant data for legitimate purposes means that the angst of brand owners and rights holders will likely only increase in the near future. Currently, inquiring parties are still able to access historical WHOIS that is not terribly out of date to glean further information. However, once that historical data becomes stale and unreliable, the need for clear and ready access to current data will become more urgent. By way of example, once the Temporary Specification period expires (after a year of GDPR being in effect), the risk of historical data being inaccurate escalates considerably as registrations will begin turning over following their renewal periods. While the need to assess and address the pervasive concerns of brand owners is imperative now, it will only become more so as historical data ages. The need for correction of the over-application of the GDPR in the Temporary Specification is overdue, as are practical solutions that could facilitate access to data for legitimate purposes. INTA supports exploring efforts on a number of fronts in order to achieve this.

Public Education. Other responses suggest that it would be beneficial to provide wide access to materials to educate the public on how to gain access to registrant data (in lieu of WHOIS). The survey results indicate that, following the implementation of the GDPR and the Temporary Specifications, the redaction of data has had a chilling effect on rights enforcement as brand owners feel ill equipped to send cease and desist letters or initiate rights protection mechanisms without the proper breadth of data.

UDRP Proceedings and WHOIS data. Currently, when a registrant employs a privacy shield, the registrant's identifying information is not accessible via WHOIS. Once the UDRP is filed, the privacy shield typically is lifted, and thus the WHOIS information changes to reveal the registrant's actual identifying information. The applicable dispute resolution body then returns the Complaint to the Complainant for revision of the Complaint to present the registrant's actual identifying information. It would be imperative to determine what, if any, changes are contemplated to the UDRP Rules in order to conform the required identifying information for the registrant with the amount of information that will become available in the WHOIS page.

Further data gathering. INTA will continue to collect data on experiences with the new WHOIS framework, and supports that gathering of further data to assess the impact of the redaction of WHOIS information brought about by the ICANN Temporary Specification.

