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INTERNATIONAL TRADEMARK ASSOCIATION

Powerful Network Powerful Brands

655 Third Avenue, New York, NY 10017-5646

Telephone: +1 (212) 642-1733

email: wknox@inta.org

Facsimile: +1 (212) 768-7796

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COMMENTARY

AVAILABILITY OF WHOIS INFORMATION AFTER THE GDPR—IS IT TIME TO PANIC?

*By Tara M. Aaron**

I. INTRODUCTION

From the perspective of most U.S. practitioners, the General Data Protection Regulation (the “GDPR” or the “Regulation”),¹ the most significant personal data protection law enacted in at least twenty years, burst onto the scene out of nowhere in about April of 2018. Although it was approved in December of 2015, the GDPR did not become effective until May 28, 2018, and it wasn’t until the spring of 2018 that the widespread conversation about the GDPR started in the United States. Since then, we have been madly re-working privacy notices and helping our clients run data audits. We have deleted hundreds of e-mails from every vendor we had, and many we did not know we had, each proclaiming that they have “reconsidered and improved their Privacy Practices.” We have struggled with the frustrating ambiguities in the GDPR’s language. The Regulation has raised endless questions about how it will interplay with U.S. law in the context of discovery, litigation holds, subpoenas and investigations, and, in particular to trademark owners, domain name ownership investigations.

Internet Corporation for Assigned Names and Numbers (“ICANN”), the entity in charge of overseeing domain name registration, is currently negotiating with European authorities over how it can carry out its mission of governing a reliable domain name registration system that, among other things, allows brand owners to track down fraudulent or malicious registrations while also allowing domain name registrants to have control over disclosure of their personal data. The crux of this conflict for trademark professionals is the public-facing WHOIS database,

* A founding partner of the intellectual property, technology, media and privacy law firm of Aaron | Sanders PLLC in Nashville, Tennessee, Associate Member, International Trademark Association. Ms. Aaron received her Certified Information Privacy Professional accreditation for U.S. privacy law (CIPP/US) in July 2018. Ms. Aaron would like to thank Francine Tan of the Francine Tan Law Corporation in Singapore for her generous contributions to the accuracy of this commentary. All errors are of those of the author.

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the “General Data Protection Regulation” or the “GDPR”), OJ 2016 L 119/1.

which as of the time of publication of this article is largely no longer public facing, at least with respect to domain name registrations originating in the European Union (“EU”). Brand owners and their representatives are caught in the middle, trying to use a WHOIS system that has been crippled by the redaction of all contact information of registrants in the EU and in many cases in territories beyond that. Worse, the system seems to further change with each bureaucratic decision.

The sands are shifting. But the sands have been shifting underneath our feet for a long time. So-called “privacy shields”—proxy service providers who mask the identity of domain name registrations—have been a reality in domain name investigations for years. Is anything really different now?

This commentary provides an overview of the portions of the GDPR that are relevant to the new issues with the WHOIS database. It explains who ICANN is and what the WHOIS database is. It looks at how exactly the GDPR has affected the WHOIS database so far and what that means for domain name investigations, both theoretically and in terms of how those effects have played out since the GDPR was enacted. It will explore whether alternative paths exist for resolving the conflict between public access to the WHOIS database and the GDPR. And it will answer the question “Is it time to panic?”

II. WHAT IS THE GDPR?

The GDPR became binding on European Union Member States on May 25, 2018. The Regulation is meant to harmonize data protection laws across the EU, which already has instated some of the world’s strongest protection laws. It replaces the 1995 European Data Protection Directive,² the EU’s initial push to consolidate its widespread data protection regulations and address concerns over consumer privacy when digital commerce was in its infancy. A proposal was crafted and negotiated over the five years and became the GDPR on April 27, 2016.

The GDPR greatly expands the reach of European data protection principles, imposing new requirements on any business that controls or processes the personal data of natural and legal persons who are in the European Union,³ whether or not that business is located in the European Union, if the control or

² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

³ GDPR, art. 3.2 (“This Regulation applies to the processing of personal data of subjects who are in the Union...”) The use of the phrase “in the Union” is one example of the ambiguity of the text, e.g., does this mean that the Regulation will apply to the processing of the personal data of U.S. citizens when they are on vacation in France? This question has yet to be answered.

processing of the personal data relates to offering goods or services, whether or not in exchange for payment. It further applies to the monitoring of the natural person's behavior "as far as their behavior takes place within the Union."⁴ "Personal data" means all identifiable data relating to a natural person, whether in their personal life or professional life, and includes IP addresses as well as all other contact information.⁵ The GDPR further requires that all of the expansive rights that Europeans have with respect to their data, such as the right to correct their data, the right to control the processing in certain instances, and the "right of erasure," be clearly explained to them in a "concise" privacy notice that is "easy to understand."⁶

The Regulation requires that the processing of personal data always be limited to purposes that are considered "lawful" under the GDPR. Article 6 sets forth these lawful grounds, which include getting consent from the data subject, processing data as necessary for the performance of a contract or to comply with a legal obligation, or because the processing is to advance or protect a "legitimate interest" of the processor.

"Processing" in the GDPR is defined as "any operation performed on personal data."⁷ In the context of WHOIS, then, any storing, transferring, or publicizing of the names, addresses, e-mail addresses, and phone and fax numbers of registrant and administrative and technical contacts would constitute "processing."

The obligations of the GDPR fall on both "controllers" and "processors" of data. Controllers "determine the purposes and the means of the processing of personal data;"⁸ processors process the personal data on behalf of controllers.⁹ A registrar who collects personal data in exchange for opening an account for a domain name registration is a "controller" at the point of collection of the information; that same registrar "processes" that same information when it receives notice of a Uniform Domain Name Dispute Proceeding and transmits the registrant's identity to the arbitration organization in response. Controllers are responsible for the actions of their processors and, for every level of processing of every piece of personal data, they must be able to articulate a purpose that falls under one of the lawful grounds set forth in Article 6.¹⁰

⁴ *Id.*

⁵ GDPR, art. 4.1.

⁶ GDPR, Recital 58.

⁷ GDPR, art. 4(2).

⁸ GDPR, art. 1(7).

⁹ GDPR, art. 1(8).

¹⁰ GDPR, art. 24, Recital 74.

III. WHAT IS WHOIS?

ICANN is a central quasi-regulatory body for some elements of the Internet's Domain Name System ("DNS"). It is not subject to any specific country's laws. ICANN, in conjunction with its subsidiary, IANA, the Internet Assigned Numbers Authority, oversees and allocates certain Internet resources, primarily domain names, but also IP addresses and Internet protocols.

ICANN contracts with "registry operators" (those who control the "top-level domains" such as .com, .org, and .net, as well as the recently introduced gTLDs—generic top-level domains such as .hotels and .music) and "registrars" (Network Solutions, Inc., GoDaddy, TuCows, etc.) who dole out domain name registrations. ICANN's agreements with the registry operators ("Registry Agreements") set forth the format under which the data of "registrants" (individuals and companies seeking registration of a domain name) should be displayed in a publicly accessible database.¹¹ Registrars gain their accreditation through compliance with the Registration Accreditation Agreement ("RAA"). Under the RAA, registrars are required to collect from registrants complete and accurate contact information, including name, e-mail address, physical address, phone and fax numbers for the registrant, as well as for administrative, technical, and billing contacts.¹² The "Data Retention Specification" in the RAA further requires that a registrar maintain this information in its own electronic database. The collection of these databases from the various registrars compiles what is referred to as the WHOIS Database. Prior to the implementation of the GDPR, both the Registry Agreements and the RAA stated that WHOIS Data must be publicly accessible, and could be used for any purpose except to enable marketing, spam, or high-volume search queries.¹³

WHOIS was defined in 1982. In the early 2010s, ICANN was in the process of making significant changes to the database to "better meet the needs of tomorrow's internet"¹⁴ until the GDPR came along and threw everything in to flux.¹⁵

¹¹ ICANN, Base Registry Agreement, Specification 4 (updated July 31, 2017), <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf> [hereinafter "Registry Agreement"].

¹² ICANN, 2013 Registration Accreditation Agreement, § 3.3.1 (2013) <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#whois>.

¹³ *Id.*

¹⁴ ICANN WHOIS, *What's on the Horizon?* (July 2017), <https://whois.icann.org/en/whats-horizon>.

¹⁵ *Id.* ("This page is under review and will be updated" to address GDPR requirements).

IV. WHY WOULD THE GDPR AFFECT WHOIS?

In light of the GDPR, ICANN has turned its attention away from developing the WHOIS for tomorrow's Internet and is focusing instead on today's privacy pitfalls. The conflict with the public WHOIS database was apparent from the outset; on one hand, the GDPR requirements are sweeping and registries are adamant that complying with their ICANN Registry Agreement obligations not invite inquiry from the data protection authorities of the EU Member States charged with enforcing the Regulation. On the other hand, one of ICANN's stated missions in its Bylaws is the "resolution of disputes regarding the registration of domain names,"¹⁶ the Bylaws further specifically articulate that ICANN, in carrying out its mandates, should "adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection."¹⁷

The GDPR raises a number of questions about how registrars and registry operators can comply with both the GDPR and the RAA, specifically:

- (i) whether or not registrars must continue to collect the contact details for administrative and technical contacts and transmit them to the registry and escrow provider;
- (ii) whether or not anonymized email addresses should be substituted for the email addresses for registrant, administrative, and technical contacts in public WHOIS;
- (iii) whether or not registrars and registry operators should be permitted to optionally apply the model on a global basis;
- (iv) whether or not the model should apply to contact details supplied by registrants who are legal persons; and
- (v) which elements of WHOIS data should be published in public WHOIS while an accreditation program for layered/tiered access is being developed.¹⁸

ICANN has answered each of these questions, to varying degrees of approval from the European authorities, in Temporary Specifications, which update the Registry Agreement and the RAA

¹⁶ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers, § 1.1(a)(i) (June 18, 2018), <https://www.icann.org/resources/pages/governance/bylaws-en>.

¹⁷ *Id.* at § 4.6(d).

¹⁸ ICANN, Proposed Interim Model for GDPR Compliance—Summary Description (Feb. 28, 2018), <https://www.icann.org/en/system/files/files/proposed-interim-model-gdpr-compliance-summary-description-28feb18-en.pdf> (For the final question above regarding public access to the WHOIS Databases, trademark professionals submitted copious comments).

and which were finalized on May 17, 2018.¹⁹ The Temporary Specification is the outcome of two years of negotiation among ICANN, entities with a Registry Agreement, European data protection authorities, legal experts, and “other stakeholders.” ICANN must reaffirm the Temporary Specification every 90 days and may continue to so for only one year.²⁰ It was reaffirmed on November 8, 2018.²¹ On July 19, 2018, the Generic Names Supporting Organization within ICANN²² initiated an Expedited Policy Development Process (“EPDP”), composed of various stakeholder representatives, to review the Temporary Specification and request public input as to the GDPR Article 6 purposes ICANN has identified as grounds for processing registrant data.²³ The EPDP Initial Report was opened for public comment on November 21, 2018, and was scheduled to stay open through December 21, 2018,²⁴ after final submission of this article. But at least until February 2019, and likely until May 2019, the Temporary Specification is the ruling document.

Registry Operators and Registrars, no later than October 7, 2018 (135 days from the Effective Date of May 25, 2018), MUST have redacted all information of data subjects in the EU relating to name, physical address, phone number, and fax number, not only for the registrant but for the administrative and technical contacts as well, ICANN having determined that a vast majority of the time this information is duplicative of the registrant’s information. You have likely experienced a WHOIS search that returned the phrase “REDACTED FOR PRIVACY” where the registrant’s name and contact information used to appear. Some good news remains—in the list of Registrant fields that the Temporary Specification requires registrars to redact, the “Registrant Organization” is not listed among them.²⁵ Although the Temporary Specification does apply to domain name registrations owned either by individuals (“natural persons”) or companies (“legal persons”),²⁶ company

¹⁹ ICANN, Temporary Specification for gTLD Registration Data (May 25, 2018), <https://www.icann.org/resources/pages/gtld-registration-data-specs-en> [hereinafter “Temporary Specification”].

²⁰ Registry Agreement, *supra* note 11, at § 2.2.

²¹ ICANN, Initial Report of the Expedited Policy Development Process (“EPDP”) on the Temporary Specification of the gTLD Registration Data Team (Nov. 21, 2018), <https://www.icann.org/news/announcement-2-2018-11-21-en>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Temporary Specification, *supra* note 19, Appendix A, Section 2.3.

²⁶ Temporary Specification, *supra* note 19, at § 2 (“Registration data means data collected from a natural and legal person. . .”).

names are not considered “personal data” under the GDPR²⁷ and can therefore still be made public.

Further, to balance the data subject privacy and ICANN’s mission to address “consumer protection” and “rights protection,” another small light still shines through the privacy curtain, namely, an anonymized e-mail address. Article 2(5) of Appendix A of the Temporary Specification states “Registrar MUST provide an email address or a web form to facilitate email communication with the relevant contact, but MUST NOT identify the contact email address or the contact itself.”²⁸ The email address or web form “MUST provide functionality to forward communications received to the email address of the applicable contact.” Registrars must follow the obligations of the Temporary Specifications with respect to EU data subjects. They *may* follow the same obligations for the rest of their customers as well.²⁹

The Temporary Specification provides a further avenue for “reasonable access” to third parties who have a “legitimate basis” for seeking access, “except where [the third party’s] interests are outweighed by the interests or fundamental rights and freedoms of the Registered Name Holder or data subject pursuant to Article 6(1)(f) GDPR.”³⁰ However, the “legitimate basis” grounds for processing personal data under Article 6 of the GDPR is not the catch-all that many data processors would like it to be. ICANN itself concluded that none of the lawful grounds for processing set forth in Article 6 of the GDPR permit registrars to share the personal data of registrants with the public.³¹ Heightening the uncertainty, on July 5, 2018, the European Data Protection Board (“EDPB”) sent a letter to ICANN calling into question ICANN’s claim that it could use stakeholders’ rights as an Article 6(f) “legitimate basis” ground for processing personal information.³² Specifically, the EDPB cautioned against conflating “the different processing activities that take place in the context of WHOIS and the respective purposes pursued by the various stakeholders involved.”³³ The EDBP appears

²⁷ GDPR, art. 4(1).

²⁸ Temporary Specification, *supra* note 19.

²⁹ Temporary Specification, *supra* note 19, at app. A.5.

³⁰ *Id.* at § 4.

³¹ ICANN, Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union’s General Data Protection Regulation—Working Draft for Continued Discussion (Mar. 8, 2018), <http://www.icann.org/en/system/files/files/gdpr-compliance-interim-model-08mar18-en.pdf> (“ICANN org understands that current requirements for unrestricted public access to WHOIS cannot continue in light of the GDPR, and the ICANN Proposals [(for compliance with GDPR)] included layered/tiered access to WHOIS data.”)

³² European Data Protection Board, Letter to ICANN (July 5, 2018), https://edpb.europa.eu/news/news/2018/letter-icann_en.

³³ *Id.*

somewhat unsympathetic to ICANN's Bylaws, to the extent they conflict in any way with the GDPR. The EDBP has made clear that it is ultimately up to the third party seeking access to the personal data to demonstrate lawful grounds for processing it.

Ultimately, it will be in the discretion of the registrars whether to allow access to personal data under Article 6(f). Given that the registrars are the data controllers who will be the ones to face the data protection authorities in the EU and its considerable arsenal of remedies for breach (the penalties for violation can reach twenty million Euros, or four percent of global revenue),³⁴ one should not expect the registries to be especially liberal in their responses to Article 6(f) requests.

V. HOW WILL THE REDACTION OF WHOIS AFFECT DOMAIN NAME INVESTIGATIONS?

The trademark law community has certainly been concerned over the last year about the loss of WHOIS,³⁵ the primary tool in tracking down cybersquatters. It's helpful to look at the numbers to see just how alarmed we should be.

To consider how the redaction of the WHOIS database will affect domain name investigations, we should talk a little bit about how those investigations are conducted. For example, your client owns the ACME trademark registration and sells travel packages. She alerts you to a web page at www.theacme.com, with pictures of sailboats in the back and links to information about travel, casinos, beaches, luxury cars, cruises, and so on, with a sign-up page for a "newsletter." You, the intrepid trademark lawyer, look over the website, check to see if they've listed a company name and address in a "Contact Us" page somewhere, and then go straight to the WHOIS search page at your register of choice and type in "theacme.com." If you were conducting this search in 2017, there is a decent chance your results came back looking like this:

³⁴ GDPR, art. 83.

³⁵ See, e.g., International Trademark Association, Internet Committee, WHOIS/RDS Subcommittee, *WHOIS Challenges: A Toolkit for Intellectual Property Professionals* (June 15, 2018), <https://www.inta.org/Advocacy/Documents/2018/WHOIS%20Challenge%20A%20Toolkit%20for%20Intellectual%20Property%20Professionals.pdf>.

DOMAIN INFORMATION

Domain:
 Registrar: GoDaddy.com, LLC
 Registration Date: 2018-07-30
 Expiration Date: 2020-07-30
 Updated Date: 2018-07-30
 Status: clientDeleteProhibited
 clientRenewalProhibited
 clientTransferProhibited
 clientUpdateProhibited
 Name Servers: ns31.domaincontrol.com
 ns32.domaincontrol.com

REGISTRANT CONTACT

Name: Registration Private
 Organization: Domains By Proxy, LLC
 Street: DomainsByProxy.com
 14455 N. Hayden Road
 City: Scottsdale
 State: Arizona
 Postal Code: 85260
 Country: US
 Phone: +1.4806242599
 Fax: +1.4806242598
 Email: @domainsbyproxy.com

ADMINISTRATIVE CONTACT

Name: Registration Private
 Organization: Domains By Proxy, LLC
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 Country: US
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 Phone: +1.4806242599
 Fax: +1.4806242598
 Email: @domainsbyproxy.com

Domains by Proxy was the named Respondent in 4.6% of World Intellectual Property Organization (“WIPO”) Uniform Domain

Name Dispute Resolution Policy (“UDRP”) proceedings in 2017.³⁶ Domains by Proxy is one of the most popular, but certainly not the only, proxy service for registering domain names. A proxy service allows a customer to use a domain name without displaying any of the customer’s information in WHOIS. The proxy service provider becomes the registrant of record (the registered domain name holder).³⁷ Legally distinct from a proxy service, a privacy service allows a customer to register a domain name as the registered domain name holder (meaning that the customer’s name appears in the “registrant name” field in WHOIS) but alternative, reliable contact information (such as a mail-forwarding email address) is published by the service provider in place of the customer’s personal contact information.³⁸ All in all, proxy and privacy service providers accounted for approximately sixteen percent of the respondents in the 3,074 UDRP cases filed at WIPO last year.³⁹

Our operator of www.theacme.com web page has engaged a proxy service provider to hide his contact information. But the proxy shield you have encountered is certainly not the end of the road. You discuss the next steps with your client. Fortunately, under the RAA, registrars who offer proxy or privacy services must “publish a point of contact for third parties wishing to report abuse or infringement of trademarks (or other rights).”⁴⁰ Since Domains by Proxy, LLC offers its proxy services through its partner registrars,⁴¹ those services must be offered in accordance with the RAA. It’s fortunate that our registrant in the theacme.com case has chosen to use this particular proxy service, since proxy service companies that offer services directly (as opposed to through a registrar) are currently not obligated under the RAA. ICANN is in the process of implementing a new accreditation program for all proxy and privacy service providers, but as of this writing the program is not yet in place. Furthermore, having the contact information of the owner of an infringing domain name is considerably more useful if it can be obtained prior to filing a claim. It is especially useful in conducting “Reverse WHOIS” searches, which allow investigators to search some WHOIS databases by owner, amass a list of other infringing

³⁶ From the author’s review of the named respondent in 2017 WIPO domain name decisions, www.wipo.int/amc/en/domains/search.

³⁷ ICANN, Information for Privacy and Proxy Service Providers, Customers and Third-Party Requesters, <https://www.icann.org/resources/pages/pp-services-2017-08-31-en> (last visited Nov. 11, 2018).

³⁸ *Id.*

³⁹ *See supra* note 37.

⁴⁰ ICANN, 2013 Registrar Accreditation Agreement, Specification on Privacy and Proxy Registrations, § 5 2(2) (2013), <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#privacy-proxy>.

⁴¹ Domains by Proxy, Domain Name Proxy Agreement, § 1 (Oct. 25, 2017), https://www.domainsbyproxy.com/policy/ShowDoc.aspx?pageid=domain_nameproxy.

domain names held by a registrant, and bolster a bad faith case. If this list includes additional domain names that infringe on the trademark of the investigator's client, they can be added to the complaint, making the process more economical for clients.

You have uncovered some evidence to address the bad faith element in a UDRP proceeding—the link to “casinos” on the acme.com site led to some shady-looking online gambling sites that have resulted in ten or fifteen pop-up windows showing up on your screen, and the address listed in the site's terms of use doesn't actually exist. Further, the fact that the registrant used a proxy shield may be used as evidence of bad faith.⁴² You and your client decide that the next best step in this case is to forego further investigation and issue a cease and desist letter through Domains by Proxy, demanding that the registrant turn over registration of the domain name to your client. As is often the case, you receive no response to your letter, so your client requests that you try to have the name transferred using a UDRP proceeding. You file the complaint with the WIPO Arbitration and Media Center against Domains by Proxy, since it is listed as the registrant in the WHOIS record. The WIPO Arbitration and Media Center transmits a request to the registrar, GoDaddy, to verify control of the domain name, and within days, GoDaddy confirms that Mr. John Smith of Ohio is the registrant of the domain name. You amend the complaint accordingly.

So how is this process playing out differently since the implementation of the Temporary Specification?

As with proxy services and privacy shields, the WHOIS database still tells you when the domain was registered, so you can confirm whether your client is the senior user. One small benefit of the GDPR redaction over proxy services is that under the Temporary Specification, the Registrant Organization does not have to be redacted.⁴³ If the owner of the site lists an organization, you may be able to use that name to discover additional contact information elsewhere. If this fails (and bad faith infringers are unlikely to use legitimate corporate names in their filings), you make use of an INTA-published guide of other options to find out about registrants when the information is not available through WHOIS. Other options include seeking out historical WHOIS databases and using subpoenas, although INTA's report seems to suggest that these options may not be completely satisfying.⁴⁴ You might also consider hiring a domain investigation service, if your client is willing to pay

⁴² Nat'l Geographic Soc'y v. Domain Admin. (Nat'l Arb. Forum Feb. 6, 2015), www.adrforum.com/domaindecisions/1596598.htm. (See also WIPO Overview 3.0, Section 3.6, <http://www.wipo.int/amc/en/domains/search/overview3.0/#item36>).

⁴³ See *supra* Part IV.

⁴⁴ See *supra* note 36 (“Protecting IP Rights online will become a more resource-intensive process without WHOIS Data.”)

for it. One distinct disadvantage when information is redacted because of the GDPR is that because the registrar and not the domain name owner is preventing the display of the contact information of the registrant, the redaction is not likely to be taken as evidence of bad faith the way the use of a proxy service may be. Reverse WHOIS searches are also equally crippled.

Happily, it does not appear that any of ICANN's actions have as of yet made the actual complaint process more difficult than it was before when filing complaints against proxy servicers or against domain names registered under a privacy shield. A search conducted on December 2, 2018, of the UDRP complaints filed since the GDPR went into effect revealed two cases at WIPO and twenty cases at the National Arbitration Forum in which the respondent's name was "Redacted for Privacy," as called for under the Temporary Specification.⁴⁵ The relevant language appears in the *Rodes* decision: "The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on July 3, 2018, naming the Respondent as "REDACTED FOR PRIVACY."⁴⁶ The Center sent its request for registrar verification to the registrar on July 3, 2018. The registrar replied on July 4, 2018, confirming that the domain name is registered with it and providing the full contact details held for the domain name on its WHOIS database, including the registrant's name."⁴⁷ Indeed, Annex E of the Temporary Specification expressly acknowledges that registrars must provide full contact information to UDRP providers upon being notified of a UDRP complaint.

The complainant in this case was fully able to file a complaint naming REDACTED FOR PRIVACY as the respondent. The registrar, pursuant to the Interim Compliance Model and the RAA, forwarded the identity of the complainant to the WIPO Arbitration and Media Center within one day. Article 6(2) of the GDPR permits the processing of information to the extent necessary "to fulfill a legal obligation to which the controller is subject." The registrar is bound to the obligations of the RAA and is required to share the information with the arbitrator. Furthermore, WIPO has evidently determined that once the information has been shared with it from the registrar, it is fair game—the publicly available version of the *Rodes* decision lists the UK respondent's name. (One may anticipate that EDPB will eventually get around to complaining about that.)

⁴⁵ See, e.g., *PB Web Media B.V. v. Redacted for Privacy, Domains by Proxy, LLC/ George Larson*, D2018-2141 (WIPO Nov. 13, 2018); *Arnold Clark Autos. Ltd. v. Rodes*, D2018-1473 (WIPO Aug. 27, 2018).

⁴⁶ *Arnold Clark Autos. Ltd. v. Rodes*, D2018-1473 (WIPO Aug. 27, 2018).

⁴⁷ *Id.*

VI. HAS ICANN GONE TOO FAR?

ICANN's decision to restrict the public availability of WHOIS data relating to persons in the EU zeroed in on the "legitimate basis" grounds for processing information. But there are five other lawful grounds. Could registrars require "consent" under Article 6(1) for data to be allowed to be public in exchange for domain name registration services? This would be problematic—consent is revocable,⁴⁸ and must be "freely given;"⁴⁹ consent is freely given only if the subject is able to withdraw or refuse to provide consent "without detriment."⁵⁰ Outside of the obligations the registrars had under the RAA before the GDPR, it may be difficult to argue that a public WHOIS database is a necessary element of registering domain names, particularly since it is so easy to mask through either proxy service providers or redaction. But could ICANN have determined that it was necessary for the registrars as controllers to make the database public because of their legal obligations under the pre-GDPR RAA in accordance with Article 6(3)? The legal obligation to publicly disclose registrants' information only went away because ICANN revised the agreements in light of the GDPR. The GDPR does not require companies to negotiate away their legal obligations; if that were the case, Article 6(2) would be superfluous. "Legal obligations" is not a defined term in the GDPR, but one can assume it covers contractual as well as statutory obligations. Admittedly, this argument was not among any highlighted by ICANN from the community responses to the Interim Compliance Model. Further, one can imagine, given the posture of the EDBP in its July 5 letter, that the EU authorities would not look kindly on such a broad definition, and perhaps not relying on Article 6(3) is a better course of action than tying up the WHOIS database in even more uncertainty while that issue is litigated. Still, one may wonder what Article 6(3) is for, if not for this. Nothing in the EPDP Initial Report addresses this question either, so we may simply continue to wonder.

VII. SHOULD WE PANIC?

So should we panic? On one hand, the system is still in flux. The European Data Protection Board has already cast some doubt on the Temporary Specification.⁵¹ We await what comes of the EPDP Initial Report.

On the other hand, even if every WHOIS Database is redacted in its entirety, the required anonymized e-mail still leaves open an

⁴⁸ GDPR, art. 7(3).

⁴⁹ GDPR, Recital 32.

⁵⁰ GDPR, Recital 42.

⁵¹ *Supra* note 33.

avenue to send demand letters, and the proceedings for UDRP and URS with respect to redacted records are no different from what they have been since proxy service providers came into existence. And this loss of WHOIS data may be a temporary situation for trademark professionals; in the course of developing the Temporary Specifications, ICANN floated a proposal to create a tiered accreditation system for certain professionals to obtain access to the “thick” WHOIS data, potentially solving some of the issues related to “Reverse WHOIS searches” and consolidating UDRP actions. On June 18, 2018, it published a Draft Accreditation & Access Model for Non-Public WHOIS Data, which called for accreditation for intellectual property attorneys and their staff and agents.⁵² The potential for access of non-public data for intellectual property enforcement is also included in the EPDP Initial Report.

VIII. CONCLUSION

The question of how badly the redaction of WHOIS data of EU registrants will affect trademark protection and enforcement is still open. This commentary comes at a certain moment in time—six months from now the landscape likely will have changed dramatically. It is possible that the EU authorities will not approve of ICANN’s accreditation model, or any accreditation model at all that involves any access to personal data of domain name registrants. It is possible that some or all WHOIS databases could redact the information for all of their customers, not just the ones in the EU. The uncertainty in and of itself is a barrier to action for many; outside the context of the WHOIS database, the GDPR has created significant burdens on companies, not only because of the required overhaul of their data protection policies, but because its ambiguity means no one knows how much of an overhaul they really have to undertake. But within the domain name investigation and trademark enforcement context, successful UDRP cases are proceeding against EU registrants whose information has been redacted; demand letters are being sent. Other investigation avenues remain open. Although none of the other investigation options are as efficient or as likely to be successful as a fully open WHOIS, many trademark professionals have been well aware of the limitations of WHOIS since proxy service providers first came on the scene. For now, the sky has not fallen any further. Keep calm, keep watch, and carry on.

⁵² ICANN, Draft WHOIS Accreditation and Access Model for Non-Public WHOIS Data (June 18, 2018), <https://www.icann.org/en/system/files/files/draft-whois-accreditation-access-model-v1.6-18jun18-en.pdf>.