



The Com Laude guide to WHOIS and GDPR

- are you prepared?

Welcome to the special GDPR edition of our newsletter: a practical guide to the General Data Protection Regulation (GDPR), and what the changes will mean for the domain name space, including WHOIS records and online brand protection efforts, as of 25 May 2018.

While the GDPR has been years in the making, its enforcement deadline has crept up rapidly, seemingly catching many (including ICANN) unprepared. There remains considerable uncertainty as to how domain name policymakers, registrars and brand protection specialists will adapt in order to comply with the new regulations, as well as what the changes will mean for brand owners seeking to protect and enforce their rights online. This guide assesses the present state of the industry and the plans for compliance as they are currently known. We do expect to see further clarity in the coming weeks, and will be in touch with further updates as and when answers to the outstanding questions emerge.

As ever, if there are matters relating to your domains or questions about these incoming policy changes, please don't hesitate to get in touch at experts@comlaude.com or contact us on +44 (0) 20 7421 8250.

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GDPR: WHAT DOES IT MEAN FOR DOMAIN NAMES?

The GDPR is introducing wide-ranging reform in the way that organisations are able to capture and process personal data within the EU. The regulations cover far more than a business's domain name presence or activities, and steps to achieve compliance will likely have already been put in place within your business or organisation. This guide looks specifically at the implications of GDPR for domain names, including the potential impact on corporate strategies against cybersquatting and other forms of brand theft online.

5 KEY REASONS WHY THE GDPR MATTERS

1 It applies to your business whether you are based in EU or not

Any organisation that is based in the EU, or offers products or services to companies or consumers in the EU will be impacted by the new legislation. The EFTA countries, Iceland, Lichtenstein and Norway, will also be impacted, although they must enact legislation to that effect. It will also continue to apply in the UK after Brexit, as the Data Protection Bill currently going through parliament will enshrine the GDPR in law in England and Wales.

2 The maximum penalties for breach are considerable

Non-compliance with the GDPR could potentially result in very large fines: up to €20 million or 4% of a company's worldwide turnover, as well as the threat of reputational damage.

3 'Personal data' includes more than you might think

Personal data includes any data captured about a living individual, from the obvious (e.g. name, address, email and phone number) to the less obvious, such as IP addresses, company records and even, e.g. if the company is named after them, the domain names themselves (e.g. Cathkidston.com).

4 You probably 'process' more personal data than you realise

If you collect, record, store, use, retain, retrieve, delete or send data about your customers (and/or employees) to another party, then you 'process' personal data for the purposes of the GDPR. Note that a role email, domains@client.com is not personal data under the regulations.

5 The changes will impact your ability to enforce your brand rights online

It is currently unclear how brand owners and/or their advisers will be able to access the WHOIS data of potentially infringing domain names. What is clear is that the new processes will slow down and potentially increase the costs of acting against cybersquatting.



HOW COM LAUDE MANAGES YOUR PERSONAL DATA

While we must wait to see how GDPR will apply in practice, as a EU registrar, we must ensure that we are compliant in the way that we process personal data that belongs to our clients and their employees, irrespective of where our customers are based. That means minimising the amount of personal data that we hold or gaining specific consent for any personal data that you require us to hold on your behalf.

We have been in touch with all our customers to update any personal data held in our registration records. This service is being provided free of charge by Com Laude, and any third-party registry charge is being passed to customers at cost. We will also continue to monitor for new developments to ensure we and our customers remain compliant, both with GDPR and future ICANN/WHOIS models (see back cover).

Even if the GDPR doesn't apply to your business, there are good reasons for having non-personal data (e.g. role rather than individual contacts) as domain name registration data; for example, to provide business continuity should an employee leave. ■

Sample WHOIS record pre- and post-GDPR highlighting potential variation

Domain Name: jscoexample.com
Registrar WHOIS Server: whois.comlaude.com
Registrar URL: http://www.comlaude.com
Updated Date: 2018-03-24T13:02:53Z
Creation Date: 2010-03-25T18:52:54Z
Registrar Registration Expiration Date: 2019-03-25T00:00:00Z
Registrar: NOM-IQ Ltd dba Com Laude
Registrar IANA ID: 470
Registry Registrant ID:
Registrant Name: John Smith
Registrant Organization: John Smith Company
Registrant Street: The Street
Registrant City: London
Registrant State/Province: London
Registrant Postal Code: N1 1AA
Registrant Country: GB
Registrant Phone: +44.07777777777
Registrant Email: john@johnsmithexample.com
Admin Name: Domain Administrator
Admin Organization: Com Laude
Admin Street: 2nd floor, 28-30 Little Russell Street
Admin City: London
Admin State/Province: London
Admin Postal Code: WC1A 2HN
Admin Country: GB
Admin Phone: +44.2074218250
Admin Phone Ext:
Admin Fax: +44.8700118187
Admin Fax Ext:
Admin Email: admin@comlaude.com
>>> Last update of WHOIS database: 2018-05-14T10:10:06Z <<<

Domain Name: jscoexample.com
Registrar WHOIS Server: whois.comlaude.com
Registrar URL: http://www.comlaude.com
Updated Date: 2018-03-24T13:02:53Z
Creation Date: 2010-03-25T18:52:54Z
Registrar Registration Expiration Date: 2019-03-25T00:00:00Z
Registrar: NOM-IQ Ltd dba Com Laude
Registrar IANA ID: 470
Registry Registrant ID: XXXXXXXXXXXXXXX
Registrant Name: XXXXXXXXXXXXXXX
Registrant Organization: John Smith Company
Registrant Street: XXXXXXXXXXXXXXX
Registrant City: XXXXXXXXXXXXXXX
Registrant State/Province: London
Registrant Postal Code: XXXXXXXXX
Registrant Country: GB
Registrant Phone: +XXXXXXXXXXXXX
Registrant Email: jscoexample.com-reg@anonymised.email
Admin Name: XXXXXXXXXXXXXXX
Admin Organization: XXXXXXXXXXXXXXX
Admin Street: XXXXXXXXXXXXXXX
Admin City: XXXXXXXXXXXXXXX
Admin State/Province: XXXXXXXXXXXXXXX
Admin Postal Code: XXXXXXXXXXXXXXX
Admin Country:XXXXXXXXXXXXX
Admin Phone: XXXXXXXXXXXXXXX
Admin Phone Ext: XXXXXXXXXXXXXXX
Admin Fax: XXXXXXXXXXXXXXX
Admin Fax Ext: XXXXXXXXXXXXXXX
Admin Email: jscoexample.com-admin@anonymised.email
>>> Last update of WHOIS database: 2018-05-14T10:10:06Z <<<



NEED TO KNOW

Find answers to some frequently asked questions, or contact us if you require further information or support.

Does Com Laude consider itself to be a data controller or data processor?

For gTLDs, it is generally agreed that ICANN, gTLD registries and gTLD registrars are all joint data controllers. For ccTLDs, those ccTLD registries looking at the GDPR generally regard

themselves as controllers. A number think that registrars are also controllers, but some see registrars as processors.

How will Com Laude handle transfers of personal data outside of the EU?

We may be required to transfer registration data you provide to us outside of the EU, if, for example, you are registering a domain name in a non-EU ccTLD, or we are required to use a third party supplier (e.g., local presence provider) outside of the EU. Under the GDPR, we are restricted from transferring any personal data outside of the EU except in certain, limited circumstances defined in the GDPR. Wherever you provide us with personal data as part of the registration data in such cases, we will work with you to ensure the transfer is GDPR compliant.

What if we have no other alternative contacts available to use other than personal data, or you want personal data to be public?

We will work with you to decide on the best course of action. This may include the use of proxy/privacy services if permitted by the registry concerned, setting up any temporary non-personal contacts (e.g. a forwarding email address) and/or getting the individual's signed consent to the processing and transfer of their data in this way. ■

ENFORCING YOUR RIGHTS POST-GDPR

There is a secondary and arguably more disruptive impact of this new regulation for brand owners; namely, that if you use WHOIS to understand who is behind a potentially infringing website, you will no longer have access to that same level of information as of 25 May 2018.

Aligning WHOIS with GDPR

The EU's data protection authorities (DPAs) have consistently said that the publication of personal data as part of domain registration data on a publicly available WHOIS is not permissible under the GDPR (as it is not strictly 'necessary' for the registration of a domain name). As we reported in our Spring Newsletter, ICANN has been attempting to agree a WHOIS model, which is acceptable to the various different interests within its community and to the European DPAs.

ICANN published its proposed Interim WHOIS model for gTLDs at the end of February. In it, it requires Contracted Parties (registries and registrars) to continue to collect all registrant, administrative, technical and billing contact information, but enables them to 'mask' those associated data fields, which contained personal information, in the public WHOIS. The model further proposes tiered/layered access to the rest of the WHOIS information, whereby accredited users, such as law enforcement officers, would be permitted access to the full (non-masked) set of WHOIS details. Other users could contact the registrant, e.g. through a web form or message relay link. ICANN also requested a moratorium on enforcement of the GDPR upon Contracted Parties until the end of the year.

The EU's Article 29 Working Party (Article 29) responded to the proposal on 11 April, dashing ICANN's hopes that its interim model would be accepted. While Article 29 did suggest agreement with the approach of seeking to limit WHOIS data publication through layered access and accreditation of users, and to allow for contacting registrants without publishing their

email address, the group set out a number of outstanding issues, and requested that ICANN:

- Provide specific detail on legitimate purposes for accessing WHOIS data;
- Ensure that those purposes relate to its mission and not the interests of third parties (appears to be a negative reference to the use of WHOIS data by IP owners for enforcement purposes);
- Block accredited users from having unfettered access to WHOIS data, i.e. each request for full WHOIS data needs to be tied to a specific purpose, and be necessary to achieve that purpose (i.e. users would not be given free access to the private data once accredited, just to the data related to the specific accredited purpose);
- Implement strict security around accredited access to WHOIS data so that those given access can be identified. Whitelisting of user IP addresses is not sufficient (i.e. multiple unidentified users could access data from a single IP address); and
- Justify its suggestion that Contracted Parties should retain WHOIS data for two years

These recommendations make grim reading for anyone still hoping to retain universal access to gTLD WHOIS information. In particular, it will have a major impact on companies' ability to access accurate, up-to-date information on the registrants of abusive registrations supporting counterfeiting, fraud and other crimes. It will also impact the operation of brand and security-threat monitoring companies who rely on access to records in bulk in order to identify patterns of infringing activity across multiple domains. ■



THE US JOINS ICANN'S CALL FOR MORE TIME

In a 9 April letter, the US Department of Commerce also requested a delay on enforcement actions, writing: "ICANN and the companies that provide domain name services are working hard to find a solution that respects the General Data Protection Directive (GDPR) and maintains access to WHOIS. Despite best efforts, it is clear that the implementation of a compliance plan will extend beyond the GDPR effective date of May 25, 2018. Given the criticality of lawful access to WHOIS information, we are asking for your help in securing temporary forbearance from GDPR enforcement on the processing of WHOIS information. This forbearance would prevent the interruption of the critical work of cybersecurity specialists and law enforcement that rely on this information." There has been no reply to this request, and indeed, given how long this enforcement deadline has been known, a moratorium seems extremely unlikely.

WHAT WILL BE THE IMPACT ON THE UDRP/URS?

The uncertainty about access to registrant WHOIS data leads to both substantive uncertainties about how to make out a case under the Uniform Domain Name Dispute Resolution Procedure (UDRP) and Uniform Rapid Suspension (URS), as well as some practical difficulties arising from the procedural rules which are in place.

In brief

- The UDRP applies to all gTLDs (as well as a number of ccTLDs which have voluntarily adopted it, or a variation of it). It's been in existence for nearly 20 years and has given brand owners a quick and relatively cost-effective avenue to address bad faith registration of domain names rather than having to resort to the courts.
- The URS was introduced as an additional rights protection mechanism for the new gTLD programme (although a few legacy gTLDs like .JOBS and .TRAVEL have now also adopted it). It does not presently apply to .COM, .NET or .ORG.
- The test for both procedures is basically the same:
 - i) The domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights (in the case of the URS you must also show the trademark is in use);
 - ii) The registrant has no rights or legitimate interest in the domain name; and
 - iii) The domain name has been registered and used in bad faith

Substantive challenges

Although the burden of proof is higher for the URS than for the UDRP, in both proceedings it is for the complainant to prove each of these elements. However, if you do not know who the registrant of a domain name is, then you will have difficulties with establishing elements ii) and iii).

You will also potentially be going into any complaint blind as to defences that the registrant might be able to raise and which, if you were aware of them, might either cause you to conclude:

- that the domain registration is not of concern after all; or

- that this is not a case for which the URS or UDRP is going to be appropriate.

Although the procedures and associated rules are not exhaustive on how you establish the lack of rights and legitimate interest, and bad faith, there are some specific examples which are set out - for which the loss of access to the WHOIS data will have an impact. One of the most important here relates to the ability of a complainant to show a pattern of bad faith/abusive registrations. If you can demonstrate such a pattern, it is strong evidence of bad faith, but if you do not have registrant details you may not be able to make those connections across multiple registered domains to build that evidence.

Procedural difficulties

In addition, the procedures and rules for both the URS and UDRP have various places where the WHOIS records are either expressly or implicitly relied upon for the conduct of the case. These include, for example, the requirement for service of the complaint to the address as set out in the WHOIS record. The complainant is given the responsibility under the rules for providing the full WHOIS contact details to the Dispute Provider, something which they may no longer be able to do. It is generally expected that responsible registrars will provide the URS and UDRP providers with the necessary contact details from the WHOIS on request (and certainly Com Laude would expect to do so), and the draft Temporary Specification referred to below does impose an obligation on registries and registrars to do so. Nevertheless, at a minimum this imposes extra procedural hurdles for the dispute providers, potentially impacting the timing and cost, and there are concerns that some registrars may not be as responsive as others. Under the UDRP rules, the complainant is also required to send a copy of the complaint to the registrant, and to certify that they have done so - a step which will not be possible if the full WHOIS data is not made available to the complainant.

There are also additional rules relating to translations and jurisdiction that will be impacted if the registrant's country is also hidden in the WHOIS data moving forward.

In addition, the rules permit complaints to be brought against multiple domain names, where registered by the same domain name holder (UDRP Rules 3(c); URS Rules 3(c)). However, the complainant will not necessarily have the information to determine this, resulting in increased cost of separate actions and the likelihood that some of them may not be prioritised for action (in absence of the knowledge that they are connected). ■



A DISJOINTED APPROACH LIKELY FOR gTLDs

ICANN's suggested interim model proposed a single model applicable to all gTLD registries and registrars; however, its request for a moratorium on enforcement of the GDPR on Contracted Parties, in order to buy more time to implement any changes to WHOIS systems, was not addressed by Article 29 in its letter. Without this moratorium, it is likely that Contracted Parties will each implement their own short-term solution for WHOIS, in order to ensure their own compliance. This could result in inconsistent WHOIS outputs, at least until the Temporary Specification referred to below is adopted and implemented, and is likely to lead to an inconsistent approach to the granting of access to the non-public data, and a fragmented WHOIS in at least the short term. ■

ENFORCING YOUR RIGHTS POST-GDPR

Referring to the risks of a fragmented approach to WHOIS and the need for more time, ICANN CEO Göran Marby wrote to the Chair of the Article 29 Working Party on 12 April 2018 "a fragmented WHOIS will hinder the ability of law enforcement around the world to get important information and for the anti-spam community to help ensure the Internet protects end users. It will also:

- Protect the identity of criminals who may register hundreds of domain names specifically for use in cyberattacks;
- Hamper the ability of consumer protection agencies who track the traffic patterns of illicit businesses;
- Stymie trademark holders from protecting intellectual property; and
- Make it significantly harder to identify fake news and impact the ability to take action against bad actors

We strongly believe that if WHOIS is fragmented, it will have a detrimental impact on the entire Internet. A key function of WHOIS allows those participating in the domain name system and in other aspects of work on the Internet to know who else is working within that system. Those working on the Internet require the information contained within WHOIS to be able to communicate with others working within that system.

It is for these reasons and countless others that we believe it is essential for the Article 29 Working Party to spend more time considering the balance between the important right to privacy and the need for information."

Given the lack of clarity in this space, and the time and resources required to build the technical

There is a secondary and arguably more disruptive impact of this new regulation for brand owners; namely, that if you use WHOIS to understand who is behind a potentially infringing website, you will no longer have access to that same level of information as of 25 May 2018.

solutions needed to mask data, it is expected that most registries will severely curtail their WHOIS output from 25 May. Neustar, the registry behind .co, .biz and .us, has indicated that it plans to implement ICANN's Interim model in the short term, and Google registry has already implemented it for the new gTLDs it runs. Afilias announced plans in early April that it intended to stop showing all contact information and ownership data on the TLDs it manages, including .info and .mobi. Verisign, which currently only displays a thin WHOIS, is yet to confirm its plans; although it is thought to be in the process of putting steps in place to prepare for the GDPR deadline. ■

Verisign WHOIS output for valideus.com

```
Domain Name: VALIDEUS.COM
Registry Domain ID: 122473614_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.comlaude.com
Registrar URL: http://www.comlaude.com
Updated Date: 2016-03-11T16:24:41Z
Creation Date: 2004-06-14T09:53:15Z
Registry Expiry Date: 2020-06-14T09:53:15Z
Registrar: Nom IQ Ltd (DBA Com Laude)
Registrar IANA ID: 470
Registrar Abuse Contact Email: abuse@comlaude.com
Registrar Abuse Contact Phone: +44.2074218250
Domain Status: clientDeleteProhibited https://icann.org/epp#clientDeleteProhibited
Domain Status: clientTransferProhibited https://icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited https://icann.org/epp#clientUpdateProhibited
Domain Status: serverDeleteProhibited https://icann.org/epp#serverDeleteProhibited
Domain Status: serverTransferProhibited https://icann.org/epp#serverTransferProhibited
Domain Status: serverUpdateProhibited https://icann.org/epp#serverUpdateProhibited
Name Server: NSGBR.COMLAUDE.CO.UK
Name Server: NSSUI.COMLAUDE.CH
Name Server: NSUSA.COMLAUDE.NET
DNSSEC: unsigned
URL of the ICANN Whois Inaccuracy Complaint Form: https://www.icann.org/wicf/
```

>>> Last update of whois database: 2018-05-11T15:24:41Z <<<

THE ccTLD SPACE

A number of ccTLDs also require publication of registration data on WHOIS, and some ccTLD registries have already announced how they are changing what they input into WHOIS to try to make it compliant.

Nominet, which manages the .UK, has announced that it plans to hide data as of 22 May, unless explicit consent to keep personal data in the public WHOIS has been given. It is also planning to charge the IP profession for access to its thick WHOIS as of 25 May. The same applies to the Council of Country Code Administrators (CoCCA), which supports 59 Top Level Domain registries, and has also announced plans to charge for access to its WHOIS, but is only planning to redact data if the registrant or registrar is in the EU (it will also enable registrants to opt out). Other ccTLD registries, such as .FR and .NL, have announced they are already compliant with GDPR and hence no changes are required.

Although it plans to no longer publish almost all other personal information as of 25 May, Iceland's ccTLD registry, ISNIC, stated at the end of April that it will continue to publish email addresses in the public WHOIS post-GDPR, quoting the need for 'transparency in domain registrations'. This approach is at odds with many other European ccTLDs (note that Iceland, while not an EU member, is part of the European Economic Area, so is subject to the GDPR), and ICANN. Individuals/companies who do not want their personal/company email appearing in the records, can change the email associated with their account to a role-based email address (likewise, registrants will be able to opt in to having their full details published if they agree with ISNIC's approach).

EURID, which operates the .EU registry, also intends to continue to publish the email addresses of natural persons. EURID is supported in this by the fact that the legislation which governs its operation specifically provides for the publication of WHOIS data, which allows it to argue that there is a public interest basis for doing so. ■

WHAT IF A ccTLD REGISTRY REQUIRES US TO PROVIDE PERSONAL DATA?

This is less of a difficulty if the registry does not provide a publicly available WHOIS. In any event, we will work with you to decide on the best course of action. This may involve the use of proxy/privacy services if permitted by the registry concerned and/or getting the individual's signed consent to the processing and transfer of their data in this way. ■

WHAT THE UK'S INFORMATION COMMISSIONER SAYS...

On 23 March 2018, Elizabeth Denham, UK Information commissioner gave a speech to the Alan Turing Institute in Manchester on GDPR. Here is an extract:



“The GDPR increases and intensifies my regulatory armoury - from issuing warnings or reprimands to fining those that deliberately, consistently or negligently flout the law up to £17 million or four per cent of annual global turnover, whichever is greater. I can even stop an organisation from processing personal data. So yes, this regulator will have teeth. But I prefer the bark to the bite and my office is committed to prevention over punishment. Yes there is enforcement - but encouragement, engagement and education must all come first. Because at the heart of this law is the public. People. In the end, it comes down to building trust and confidence that organisations will handle their personal data fairly and in line with the law. When you understand and commit to that, compliance will follow”

”



WHAT HAPPENS NEXT?

It is anticipated that, on or about 17 May, the ICANN Board will adopt a Temporary Specification to the ICANN Registry Agreement and the ICANN Registrar Accreditation Agreement implementing much of the proposed ICANN interim model. By adopting a Temporary Specification, ICANN is able to require a unified policy that all gTLD registries and registrars must implement for up to one year. It will be up to the GNSO Council to ensure a more permanent policy solution is in place within that timeframe, possibly by initiating an Expedited Policy Development Procedure - a new process which has not yet been used.

Although some details have yet to be finalised, it is expected that ICANN will require that all personal information be "Redacted for Privacy" from all of the WHOIS contacts unless GDPR-compliant consent is received by the registry or registrar. In the place of the e-mail addresses for each of the contacts, registrars will probably provide a substitute email address or offer a web form to enable contact. However, they will not identify the contact email address or the contact itself. Registries will likely be required to provide a message substantially similar to the following: "Please query the RDDS service of the Registrar of Record identified in this output for information on how to contact the Registrant, Admin, or Tech contact of the queried domain name."

Registries and registrars will be required to provide the contact information of the registrant to all domain name dispute providers where a dispute is filed under the Uniform Dispute Resolution Process and/or the Uniform Rapid Suspension Policy. In addition, ICANN is requesting that all contact information be provided to its compliance department so that ICANN is able to respond to any complaints filed and to ensure that registries and registrars are compliant with their agreements with ICANN.

Under the Temporary Specification, in its current draft form, ICANN will require that registries and registrars provide reasonable access to non-public registration data to third parties for one of the ten purposes specified in the Temporary Specification and on the basis of legitimate interests set forth under GDPR. These purposes do include addressing issues related to consumer protection, investigation of cybercrime, DNS abuse, and IP protection. However what constitutes "reasonable access" remains undefined for the time being, until a model for accreditation and access has been agreed or further guidance is received from the European Data Protection Authorities.

Given all the confusion and uncertainty, the one thing which seems clear is that from the 25 May 2018, WHOIS will cease to exist in its current form and access to full WHOIS data will be much more restricted, if available at all.

We will keep monitoring this space on advocating on behalf of our clients for a sensible solution. At a minimum we would like to see the name of the registrants who are legal entities and the email address continue to be published and, if that is not the case, then a means to unmask that information in bulk in order to allow it to be used to track associated registrations and patterns of infringing behaviour.

For further advice or guidance, please don't hesitate to contact us.



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Disclaimer: Information in this bulletin has been compiled from research at the domain name registries, directly from sources and over the Internet. We advise you to contact Com Laude at info@comlaude.com before taking any action in case there are errors due to matters beyond our control.