WHOIS and GDPR

STILL A BETTER LOVE-STORY THAN TWILIGHT

STEFAN FILIPOVIC

stefan.filipovic01@gmail.com

What is WHOIS?

- Database of Registration Data (WHOIS data)
- Answers the question: Who is responsible for a domain name

Who is in charge of WHOIS platforms?

- Registry Operators
- Registrars

Why should WHOIS platforms operators care about GDPR?

What was ICANN's response to GDPR?

Temporary Specification for generic top-level domain (gTLD) Registration Data

- Modification of existing RAA and RA
- Temporary fix
- Introduction of new duties for Registry Operators and Registrars

Temporary Specification requirements applicable to WHOIS platforms operators:

- Appendix A to the Temporary Specification
- Access to Personal Data must be restricted
- Personal Data can only be disclosed to third parties if Registrant has provided consent
- Otherwise, allowed to display only non-personal data (Thin Data)

In absence of consent, is there a way for a third party to access Personal Data (Non-Public Registration Data/WHOIS Data)?

Yes, if the third party has legitimate interest to access that overriddes interests or fundamental rights and freedoms of data subjects (Appendix A, Para. 4.1)

Downsides of such approach:

- No definition of legitimate interest/purpose

- Requires balancing between fundamental rights

- WHOIS Operators are not qualified to decide what amounts to legitimate interest and which fundamental rights should prevail

- WHOIS Operators have different approaches on how they meet the duties

- WHOIS Operators will be inclined to err on the side of caution in order to avoid making wrong assesments

- Leads to Chilling Effect

How does Temporary Specification work in practice?

Why do WHOIS Operators make such mistakes?

1. Misunderstanding of GDPR's territorial scope

GDPR – Article 3, para. 2(a)

This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union where the processing activities are related to (...) the offering of goods or services (…)

Temporary Specification, Appendix A – 2.1(ii)

(…)the Registrar or Registry Operator is established outside the EEA and offers registration services to Registered Name Holders located in the EEA as contemplated by Article 3(2) GDPR that involves the Processing of Personal Data from registrants located in the EEA.

Why do WHOIS Operators make such mistakes?

1. Misunderstanding of GDPR's territorial reach OR
2. Decisions based on mailing addresses and country codes for telephone numbers attached to data subjects in their databases
   - Such approach is not reliable

Who gets in trouble?

- ICANN – controller
- Regstry operators and Registrars (WHOIS operators) – processor/controller

Why are they in trouble?

- GDPR – Article 83, Paragraph 5:

Controller and Processor exposed to fines of up to 20 000 000 EUR or 4% of the total worldwide annual turnover, whichever is higher

Some of the Registry operators and Registrars that violate GDPR:

- NameCheap, Inc – Registrar
- Moniker Online Services LLC - Registrar
- Name.com, Inc – Registrar

Some of the Registry operators and Registrars that are compliant with GDPR:

- Verisign, Inc. – Registry operator for .com, .net, .cc and .tv
- GoDaddy Inc. - Registrar

How to ensure compliance with GDPR? – Provisional Remedy

- Apply the „thin data" requirement to all Data Subjects, regardless of where they are from.

How to ensure compliance with GDPR? – Ultimate Remedy?

1. Registration Data Access Protocol (RDAP)
- Created as an eventual replacement for the WHOIS protocol
- It will standardize data access and query response formats
- Expected implementation: April-May 2019

2. Framework for a Possible Unified Access Model for Continued Access to Full WHOIS Data
- Access and Accreditation Model

3. EPDP on the Temporary Specification for gTLD Registration Data

Thank you!

STEFAN FILIPOVIC

stefan.filipovic01@gmail.com