

[WORKING DRAFT]

Human Rights Implications of ICANN's WHOIS Policy¹

I. Introduction

The WHOIS database contains personal information collected under the Registrar Accreditation Agreements (RAA), when individuals register a domain name. The WHOIS database is used for a variety of purposes, but the broad aim is to make contact details available should there be any issues relating to the domain, be it technical issues or law enforcement concerns.² In service of this aim, the Affirmation of Commitments (AoC) between the US Department of Commerce and ICANN requires ICANN to 'implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information'.³

This paper will explore the human rights implications of the current WHOIS policy. Naturally, violations of privacy are the primary human rights concern. However, this paper will also consider how this violation has a chilling effect on other human rights, including right to security of person, rights to freedom of expression, and freedom of assembly and association. This paper recognises a lack of academic material available regarding this subject, and would encourage further research and discussion into this field. Importantly, this paper contends that consideration for human rights should be an integral part of the foundations of WHOIS, rather than an afterthought.⁴

II. The WHOIS Policy

In order to register a domain, the registrant is required to provide accurate personal information, which is entered into the WHOIS database.⁵ This personal information includes

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² 'WHOIS Primer | ICANN WHOIS' (*whois.icann.org*, 2016) <<https://whois.icann.org/en/primer>> accessed 9 September 2016.

³ 'ICANN Affirmation of Commitments' (*ICANN*, September 30 2009) <<https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>> accessed 9 September 2016.

⁴ Dia Kayyali, 'EFF to ICANN: Privacy Must be Purposeful—Not an Afterthought' (*EFF*, September 2015) <<https://www.eff.org/deeplinks/2015/09/eff-icann-privacy-must-be-purposeful-not-afterthought>> accessed 9 September 2016.

⁵ Registrar Accreditation Agreement 2013 (RAA 2013), Section 3.2.1 <<http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm>> accessed 9 September 2016.

the name and postal address of the registrant,⁶ as well as the name, postal address, email address, voice telephone number and facsimile number of the technical, and administrative contact.⁷

Location of the WHOIS Policy

The WHOIS policy is reflected in the Affirmation of Commitments (AoC), as well as a series of commitments under ICANN's agreements with its registries and registrars.

1) Affirmation of Commitments

The AoC⁸ is a document signed by the United States Department of Commerce (US DOC) and ICANN in 2009. It requires ICANN to 'implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information...' To do that, registrars and registries provide public access to data on registered names. Anyone can use WHOIS to search the databases and identify the registered name holder or 'registrant' of a generic domain name.⁹

2) Contractual obligations

Registry¹⁰ and Registrar Agreements¹¹ establish the contractual obligations related to WHOIS. The WHOIS obligations for ICANN's current Registries are set out in their contracts with ICANN. Generally, the 'WHOIS Specification' can be found in the appendices of the Registry Agreements, all posted individually on the ICANN website. ICANN's registrars have signed onto one of the three contracts: the 2001 Registrar Accreditation Agreement¹² (RAA), the 2009 RAA¹³ or the 2013 RAA¹⁴. Each of these contracts contains numerous provisions regarding WHOIS service and data, and sets out requirements for the access and accuracy of WHOIS data.

⁶ *ibid* at Section 3.3.1.6.

⁷ *ibid* at Sections 3.3.1.7-3.3.1.8.

⁸ ICANN AoC (n 3).

⁹ 'WHOIS Online Accuracy Reporting System: Request for Proposal' (ICANN, 19 May 2014) <<https://www.icann.org/news/announcement-2014-05-19-en>> accessed 9 September 2016.

¹⁰ 'Registry Agreements | ICANN WHOIS Policies' (WHOIS.ICANN, 2013)

< <https://whois.icann.org/en/registry-agreements>> accessed 9 September 2016.

¹¹ *ibid*.

¹² Registrar Accreditation Agreement 2001 <<https://www.icann.org/resources/unthemed-pages/raa-2001-05-17-en>> accessed 9 September 2016.

¹³ Registrar Accreditation Agreement 2009 <<https://www.icann.org/resources/pages/ra-agreement-2009-05-21-en>> accessed 9 September 2016.

¹⁴ RAA 2013 (n 5).

The WHOIS provisions of the 2001 RAA and 2009 RAA are very close in their language, intent and goals. The 2013 RAA, which is now followed for registrars wishing to renew their RAA or sell domain names in new gTLDs, represents an expansion of obligations related to WHOIS, in an effort to improve the accuracy and overall effectiveness of ICANN's WHOIS system. The 2013 RAA introduces obligations related to the validation and verification of certain WHOIS data elements, as well as obligations applicable to privacy and proxy services offered by the registrars and their affiliates.¹⁵

Privacy and Proxy Services

Privacy and proxy services are for individuals and entities who wish to keep certain information from being made public via WHOIS.

There are two general types of these commercial services:¹⁶

- A *Privacy Service* keeps the domain name registered in the name of the registrant, but lists alternative, reliable contact information, such as a mail-forwarding service address, instead of giving the registrant's contact information.
- A *Proxy Service* registers the domain name itself and licenses the use of the domain name to its customer. The contact information of the service provider is displayed rather than the customer's contact information. The proxy service is responsible for providing accurate contact information, adequate to facilitate timely resolution of any problems that arise in connection with the domain name.¹⁷

Further, the 2013 RAA stipulates that all publicly available personal data is to be retained,¹⁸ including personal data held by a proxy service,¹⁹ for the term of the agreement and two years after the agreement is terminated.²⁰ ICANN is required to make this retained data available for inspection and copy upon reasonable notice.²¹

¹⁵ RAA 2013 (n 5) Section 3.

¹⁶ 'Privacy and Proxy Services | ICANN WHOIS Policies' (*WHOIS. ICANN*, 2013) <<http://whois.icann.org/en/privacy-and-proxy-services>> accessed 9 September 2016;

'Specification on Privacy and Proxy Registrations' (*ICANN*, 17 September 2013)

<<https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#privacy-proxy>> accessed 9 September 2016.

¹⁷ *ibid.*

¹⁸ RAA 2013 (n 5) at Section 3.4.1.2.

¹⁹ *ibid* at Section 3.4.1.5.

²⁰ *ibid* at Section 3.4.2

²¹ *ibid* at Section 3.4.3

III. Privacy concerns

The right to privacy is protected under Article 12 of the Universal Declaration of Human Rights (UDHR),²² and Article 17 of the International Covenant on Civil and Political Rights (ICCPR).²³ In recent years, the UN has recognised that the same rights people have offline should be protected online.²⁴ A report by the UN Special Rapporteur also highlights that states should refrain from forcing the private sector to implement measures compromising the privacy, security and anonymity of communications services.²⁵

It cannot, and should not be said that once personal data is made publicly available online, it ceases to be under the protection of privacy laws, merely because of its availability.²⁶ The UN Special Rapporteur recognises that the right to privacy also includes the ability of individuals to determine who holds information about them and how that information is used.²⁷ The WHOIS policy prevents registrants from exercising this right to privacy, by forcing their consent over allowing their personal data to be publicly accessible by anyone.²⁸ The effect of this public access is covered under the next section, ‘Chilling effects on other human rights’.

The Council of Europe came out with a report²⁹ analyzing ICANN policies from a human rights perspective, and reached the same conclusion. The report states clearly that open access to the WHOIS database is extremely problematic because of the lack of safeguards over how third parties access and use personal data.³⁰ It argues that the rules have embedded

²² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) <<http://www.un.org/en/universal-declaration-human-rights/>> accessed 9 September 2016.

²³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 9 September 2016.

²⁴ United Nations General Assembly Resolution 68/167 (adopted 19th December 2013)

<http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/167> accessed 9 September 2016.

²⁵ Frank La Rue, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (2013)

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf> accessed 9 September 2016.

²⁶ ‘Opinion 2/2003 on the application of the data protection principles to the Whois directories’ (2003) Report of the European Council Art 29 <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2003/wp76_en.pdf> accessed 9 September 2016.

²⁷ Frank La Rue (n 25).

²⁸ RAA 2013 (n 5) Section 3.3.

²⁹ Dr. Monika Zalnieriute and Thomas Schneider, ‘ICANN’s procedures and policies in the light of human rights, fundamental freedoms and democratic values’ (8 Oct 2014) Report of Council of Europe Report <<https://tinyurl.com/zawwhy>> accessed 9 September 2016.

³⁰ *ibid* at p 42.

disproportionate principles.³¹ In order to serve the global public interest, it is important to review the rules, to find a balance that serves a ‘more holistic public interest’ regarding privacy.³²

IV. Chilling effects on other human rights

Privacy and anonymity on the Internet are crucial to ensure the protection of other human rights.³³ Once anonymity is lost because of the WHOIS database, this paper identifies a chilling effect on other human rights.³⁴

i. Right to Security of Person

The right to security of person is articulated in Article 3 of the UDHR³⁵, and Article 9 of the ICCPR.³⁶ This right is defined in broad terms as being a right to ‘liberty and security of person’.

Public information on the WHOIS database, such as phone numbers and addresses, can make domain registrants accessible in the physical world. This can, and has, led to threats to their physical well-being and security.³⁷ Even the disclosure of the name of the registrant can be dangerous since it is easy enough to use the Internet and other means to locate the owner's address, release it and even incite violence in some cases.

³¹ *ibid* at p 43.

³² *ibid*.

³³ David Kaye, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (2015) p 5, 10
<<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>> accessed 19 September 2016.;

Human Rights Watch and American Civil Liberties Union, ‘With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law and American Democracy’ (July 2014)
<https://www.hrw.org/sites/default/files/reports/usnsa0714_ForUpload_0.pdf> accessed 9 September 2016.

³⁴ The freedom of expression and freedom of association have been recognised as potential rights at risk in relation to WHOIS in previous reports of this working party. See Cross-Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights, ‘ICANN’s Corporate Responsibility to Respect Human Rights: Recommendations for Developing Human Rights Review Process and Reporting’ (2015) p 28
<https://www.article19.org/data/files/medialibrary/38148/ICANN_CS_to_respect_HR_report_ALL_FINAL-PDF.pdf> accessed 9 September 2016.

³⁵ UDHR (n 22).

³⁶ ICCPR (n 23).

³⁷ ‘Letter to ICANN’ (*EFF*, July 2015) <<https://www.eff.org/document/july-2015-letter-icann>> accessed 9 September 2016.

For e.g., women entrepreneurs, small business owners working from home, and activists in totalitarian regimes, etc. have found themselves targeted by these means.³⁸

Limited safeguards are already built into the WHOIS process. For example, Registrars are required to notify each new or renewed Registered Name Holder of the purpose³⁹ of the personal data collected. Similarly, it is necessary that the registrant's consent⁴⁰ to the data processing be obtained. However, since it is mandatory for registrants to disclose WHOIS data, anyone who needs to register a domain name within the current regulatory framework is left with little choice but to do so. The very collection and storage of this information makes registrants vulnerable in the event that the data storage is not secure enough or if there is misuse of the data by any party who has access to it. Depending on who is able to access the data for what purpose, the vulnerability of registrants whose information is stored in the WHOIS database might increase.

Another critical collateral impact of the WHOIS system is its potential impact on political dissidents. For instance, law enforcement agencies of oppressive countries with records of human rights violations may use legitimate channels to acquire WHOIS data that helps them identify dissidents or owners of blogs and subject them to violent treatment.

ii. Right to Freedom of Expression

The right to freedom of expression is widely protected under international law. Article 19 of UDHR⁴¹ and Article 19(2) of ICCPR⁴² define this right as the 'freedom to hold opinions without interference and to seek, receive and impart information and ideas through *any media and regardless of frontiers*'. In recent years the UN has explicitly extended this right to online platforms.⁴³

³⁸ Nadia Kayyali and Mitch Stoltz, 'Powerful Coalition Letter Highlights Danger of ICANN's New Domain Registration Proposal' (7 July 2015) <<https://www.eff.org/deeplinks/2015/07/powerful-coalition-letter-highlights-danger-icanns-new-domain-registration>> accessed 9 September 2016.

³⁹ RAA 2013 (n 5) Section 3.7.7.4.1.

⁴⁰ *ibid* at Section 3.7.7.5.

⁴¹ UDHR (n 22).

⁴² ICCPR (n 23).

⁴³ 'The Right to Privacy in the Digital Age' (2014) Report of the Office of the UN High Commissioner for Human Rights p 5 <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf> accessed 9 September 2016.

The right to privacy is often understood as being essential for the right to freedom of expression to be realised.⁴⁴ Without anonymity on the Internet, freedom of expression is directly and indirectly limited by the fear of being personally attacked or punished for controversial writing. Most importantly, anonymity ‘protects the most valuable speech in a free society: speech that challenges the status quo, majority or government.’⁴⁵ With over 3 billion users worldwide,⁴⁶ the Internet is now one of the primary forums for political discussion, and must facilitate the freedom of expression.

iii. Freedom of assembly and association

The right to freedom of assembly and association is recognised in international law under Article 20 of UDHR⁴⁷ and Articles 21 and 22 respectively of the ICCPR.⁴⁸ They can be extended to apply to the WHOIS policy.⁴⁹

Freedom of assembly and association, in addition to freedom of expression, are the cornerstones of a democratic society.⁵⁰ The Internet has been recognised as an instrument for facilitating active citizen participation in building democratic societies.⁵¹ Similar to the way WHOIS policy limits freedom of expression, freedom of assembly and association are also compromised by publicly available personal data.⁵² If registrars can be identified by their personal information, it stifles the ability to use domains as platforms for assembly and

⁴⁴ Frank La Rue (n 25).

⁴⁵ Robin Gross, ‘IP Justice Commentary on ICANN Whois Preliminary Reports’ (*IP Justice*, July 5 2005) <http://www.ipjustice.org/wp-content/uploads/2015/07/IPJ_2004_whois_ICANN.pdf> accessed 9 September 2016.

⁴⁶ ‘Internet users in the world’ (*Internetlivestats*, 2016) <<http://www.internetlivestats.com/internet-users/>> accessed 9 September 2016.

⁴⁷ UDHR (n 22).

⁴⁸ ICCPR (n 23).

⁴⁹ ‘Freedom of assembly and association on the Internet’ (10 December 2015) Report by the Committee of experts on cross-border flow of Internet traffic and Internet freedom <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064ac99>> accessed 9 September 2016.

⁵⁰ ‘Freedoms of association and assembly cornerstones of democracy and security, say participants at OSCE meeting’ (*Organisation for Security and Cooperation in Europe*, 16 April 2015) <<http://www.osce.org/odihr/151421>> accessed 9 September 2016.

⁵¹ Maina Kiai, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’ (2012) p 13 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf> accessed 9 September 2016.

⁵² ‘Submission to the Special Rapporteur on the rights to freedom of peaceful assembly and of association’ (*Association for Progressive Communication*, 2012) p 4 <<https://www.apc.org/en/system/files/APC%20-%20Freedom%20of%20peaceful%20assembly%20and%20association.pdf>> accessed 9 September 2016.

association for fear that it may attract abuse from governments or other members of the public.

V. Conclusion

Multiple aspects of WHOIS policy have significant implications for the right to privacy on the Internet. Further, this report contends that the violation of the right to privacy has a chilling effect on other human rights; the right to security of person, freedom of expression, and freedom of assembly and association. This chilling effect demonstrates how WHOIS policy goes beyond what is acceptable in a democratic society. There is limited research into the impact WHOIS has on privacy, and even less on the chilling effect of WHOIS policy on other human rights, which this report contends should be rectified.

Again, this report reiterates that ICANN should hold these human rights considerations as being fundamental to WHOIS policy, rather than an afterthought.