

Protective Letter

regarding a possible application for a preliminary injunction of the possible petitioner

Internet Corporation For Assigned Names and Numbers, 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA

and/or

other applicants

against the potential Defendant

EPAG Domainservices GmbH, Niebuhrstr. 16b, 53113 Bonn, represented by its Managing Director Alexander Schwertner

Attorneys of record: Rickert Rechtsanwaltsgesellschaft mbH, Kaiserplatz 7-9, 53113 Bonn, Germany

because of: breach of agreement

We represent the possible Defendant. Proper authorization is legally assured. On their behalf, in the event that an applicant files an application for a preliminary injunction based on the facts set out below, we request

- I. to reject a possible future or already received application for the issuance of a preliminary injunction at the Applicant's expenses,
- II. **alternatively:** not to decide on an application for an injunction without a prior oral hearing,
- III. in the event that a preliminary injunction is requested and is withdrawn prior to an oral, to impose the costs of the proceedings on the Applicant pursuant to § 269 para. 3 sentence 3 ZPO analogously.

We declare that we are authorized to accept service of documents.

REASONING

It is to be expected that the presumed Applicant will apply for a preliminary injunction ordering the Defendant to cease and desist from implementing the announced practice of no longer collecting certain data in the course of registering domain names or to continue collecting this data.

I. The facts of the case

The Defendant is a so-called registrar, i.e. a company that, among other things, enables the registration of domain names.

The Applicant coordinates the allocation of unique names and addresses on the internet, including the coordination of the Domain Name System (DNS).

The Defendant is an ICANN-accredited registrar, i.e. the parties have concluded a so-called Registrar Accreditation Agreement in the version of 2013 (RAA), see <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>. The RAA requires registrars to collect the following data, among others, as specified in the Registration Data Directory Service (WHOIS) Specification, which is an annex to the RAA.

Registrant Name: EXAMPLE REGISTRANT
Organization: EXAMPLE ORGANIZATION
Registered Street: 123 EXAMPLE STREET
Registrant City: ANYTOWN
Registrant State/Province, AP.
Registrant Postal Code: A1A1A1
Registrant Country: AA
Registrant Phone: +1.5555551212
Registrant Phone Ext.: 1234
Registrant Fax: +1.5555551213
Registrant Fax Ext: 4321
Registrant Email: EMAIL@EXAMPLE.TLD
Registry Admin ID: 5372809-ERL
Admin Name: EXAMPLE REGISTRANT ADMINISTRATIVE
Admin Organization: EXAMPLE REGISTRANT ORGANIZATION
Admin Street: 123 EXAMPLE STREET
Admin City: ANYTOWN
Admin State/Province: AP
Admin Postal Code: A1A1A1
Admin Country: AA
Admin Phone: +1.5555551212

*Admin Phone Ext: 1234
Admin Fax: +1.5555551213
Admin Fax Ext: 1234
Admin Email: EMAIL@EXAMPLE.TLD
Tech Name: EXAMPLE REGISTRANT TECHNICAL
Tech Organization: EXAMPLE REGISTRANT LLC
Tech Street: 123 EXAMPLE STREET
Tech City: ANYTOWN
Tech State/Province: AP
Tech Postal Code: A1A1A1
Tech Country: AA
Tech Phone: +1.1235551234
Tech Phone Ext: 1234
Tech Fax: +1.5555551213
Tech Fax Ext: 93
Tech Email: EMAIL@EXAMPLE. TLD*

According to this extensive data for the domain holder (registrant), the administrative contact (Admin-C) and the technical contact (Tech-C) have to be collected.

In the course of preparations for the General Data Protection Regulation, which will enter into force on May 25, 2018, the ICANN Board of Directors adopted a so-called Temporary Specification on May 17, 2018, see <https://www.icann.org/news/announcement-2018-05-17->, which contains various changes to the contractual specifications and policies applicable to domain registrations and their administration.

The registrars shall comply with the Temporary Specifications pursuant to clause 4 of the Registrar Accreditation Agreement. The stipulation of the contract, which is only available in English, is as follows:

4. PROCEDURES FOR ESTABLISHMENT OR REVISION OF SPECIFICATIONS AND POLICIES.

4.1 Compliance with Consensus Policies and Temporary Policies. During the Term of this Agreement, Registrar shall comply with and implement all Consensus Policies and Temporary Policies in existence as of the Effective Date found at <http://www.icann.org/general/consensus-policies.htm>, and as may in the future be developed and adopted in accordance with the ICANN Bylaws, provided such future Consensus Policies and Temporary Policies are adopted in accordance with the procedures and relate to those topics and subject to those limitations set forth in the Consensus Policies and Temporary Policies Specification to this Agreement.

The Temporary Specification requires registrars to continue to collect all of the above data elements from their customers and to store them for a period of 2 years after domain registration is completed. In addition, the data must be forwarded to the relevant registry, i.e. the central administration of a so-called top-level domain such as .info or .nrw, and additionally transmitted to an escrow agent so that the data can be restored in the event of a crisis.

However, the publication of data via the so-called "Whois service" is to be restricted unless the domain holder has consented to the publication of the data.

The Defendant has stated that it will no longer collect the data for the Admin-C and the Tech-C, so that it can now be expected that the Defendant will seek have the Defendant ordered by way of a preliminary injunction to comply with the requirements and thus to collect the data. The Applicant has already published an application on her website.

We assume that these facts are undisputed.

II Legal issues

1. The Applicant did not demonstrate a reason for a preliminary injunction. There is already a lack of the necessity required under § 940 ZPO to prevent major disadvantages.

The Defendant has announced that she will no longer collect the data for the Admin-C and the Tech-C. For the registration of domain names and the maintenance of domain registration, the data of Admin-C and Tech-C are not required. The data on the domain holder allows both a clear assignment of a domain name to the holder and, if necessary, contact the domain holder. The security and stability of the domain name system is not endangered by the collection of fewer data elements. The Applicant can thus easily fulfil its statutory task.

If the Applicant should state that more data elements are helpful for the enforcement of claims under trademark law or criminal prosecution, this is disputed and must be proven. This applies in particular because for the majority of the domain registrations the customers provide identical data for the domain holder, Admin-C and Tech-C and therefore only limited additional knowledge is gained.

When comparing the available data of domain holder, Admin-C and Tech-C for approximately 10 million registered domain names of the registrar Tucows Domains Inc, an ICANN-accredited registrar belonging to the Tucows group like the Defendant, it turns out that in significantly more than half of all registered domains the e-mail address of the domain holder is identical to that of Admin-C and Tech-C. In more than three-quarters of all cases, all information for first name, last name, organization, address and email is completely identical between owner and Admin-C.

Evidence: Affidavit of Mr. Alexander Schwertner, **Appendix AG 1.**

In any case, these data elements are not required for the fulfilment of domain registration contracts. For technical and administrative questions, the Defendant contacts the domain holder or the holder of the customer account through which one or more domain names are administered, but not the Admin-C or Tech-C.

Evidence: Affidavit of Mr. Alexander Schwertner, **Appendix AG 1.**

It is not clear what disadvantage in general or even what disadvantage for the Applicant should arise if fewer data elements are collected. This applies all the more as the Defendant could also later still collect data for the Admin-C and Tech-C from the customer if an obligation to do so were to be established.

2. The Applicant can also not rely on a right to claim for a preliminary injunction. The Applicant cannot force the Defendant to act illegally. This is also expressly stipulated in the RAA. Section 3. 7.2 stipulates that the registrar shall comply with applicable laws and state regulations:

"Registrar shall abide by applicable laws and governmental regulations."

The GDPR applies to the Defendant, who is domiciled in Germany since personal data is processed in accordance with Art. 2 (1) GDPR and processing takes place in the European Union in accordance with Art. 3 (1) GDPR.

Art. 5 (1) lit. c GDPR provides that personal data must be adequate and relevant as well as limited to what is necessary for the purpose of processing ("data minimization"). Furthermore, Art. 25 of the GDPR requires that services and products be designed according to the principles "privacy by default" and "privacy by design", i.e. data protection through technology design and data protection-friendly presettings. These principles are violated by the Applicant's requirements.

Personal data are generally processed so that this provision is relevant. Domain holders may be natural and legal persons, whereby the names of legal persons may also have personal references.

Furthermore, address, telephone number, fax number and e-mail address are to be qualified as personal data, so that personal data are usually processed for domain registrations and this is only not the case if none of the data elements can actually be assigned to a natural person.

For the registration of domain names, the maintenance of the registration, the transfer of domain names from one provider to another as well as the clarification of possible domain disputes, the establishment of contact in case of compromised systems or other technical problems or the determination of responsible persons only the allocation of a responsible domain owner to a domain name as well as its contact data are necessary.

Evidence: Affidavit of Mr. Alexander Schwertner, **Appendix AG 1.**

In accordance with the requirement of data minimization, all necessary data would be collected with the registrant data to achieve the purpose of the Contract, especially as the domain holder can be reached via different channels such as address, telephone or e-mail. For the sake of completeness, it should be noted that there are domain extensions (Top Level Domains) for whose registrations, according to the guidelines of the registry, the collection of further data elements is required due to special requirements, for example with ".law", where the admission to the bar must be proven. However, the Applicant's contractual requirement does not make such a distinction.

Rather, the Applicant requires the collection of all data elements without any further justification. The Defendant takes the legal view that the collection and other processing of further data elements is not permissible on the basis of the legal basis of Art. 6 (1) lit. b GDPR for the execution of the contract for lack of necessity.

A collection based on Art. 6 (1) lit. f GDPR would have to be presented by the Applicant including a comprehensible weighing with the rights of the person concerned. Neither the RAA nor the Temporary Specification contain explanations in connection with the collection of this data.

In this context, we would like to point out that the Art. 29 Group has already complained for many years about the practice prescribed by the Applicant in connection with the Whois service. This is stated in a letter from the then chairman of Art. 29 Group Peter Schaar to the Defendant:

The original purposes of the WHOIS directories can however equally be served by using a layered approach, as details of the person are known to the ISP that can, in case of problems related to the site, contact the individual or transmit the information to an enforcement authority entitled by law to access this information.

Schaar explains there that the original purpose of the Whois directory can be equally fulfilled if a layered access is used and the data of the person is known to the ISP, i.e. the Internet Service Provider - here the domain provider / registrar - so that the ISP can be contacted in cases of problems with a website or its data can be handed over to law enforcement authorities who are legally entitled to receive the information. Although this letter refers to the publication of data on the public Whois directory the Art. 29 Group obviously assumes that a sufficient possibility of contact is provided even in the case contacting the domain holder is possible. The other contacts of Admin-C and Tech-C known and already used at that time are not mentioned as alternatively required communication channels.

Evidence: Letter of Art. 29 Group as an annex, available on the Internet at <https://www.icann.org/en/system/files/files/schaar-to-cerf-22jun06-en.pdf>, Annex AG 2.

The International Working Group on Data Protection in Telecommunications, which is composed of data protection commissioners from various countries and whose secretariat is headed by the Berlin Commissioner for Data Protection and Freedom of Information, has also condemned data collection at ICANN and its diverse use on page 3 in its working paper on privacy and data protection issues in connection with registrant data and the WHOIS directory at ICANN, available at <https://www.datenschutz-berlin.de/working-paper.html>:

"While the privacy issues have been discussed and disputed over the many years WHOIS has been analysed and discussed at ICANN, no reassessment of the original purpose of the directory has been considered. Many new "use cases" have arisen because the data in the directory are useful for the interests of players in advertising, market research, legal protection, consumer protection, law enforcement and other areas. As a result, the various stakeholders, some of whom are members of the ICANN community, are increasingly requesting data, which is to some extent reflected in RAA 2013. In the opinion of the Art. 29- Group, this is in part contrary to European data protection law. The Art. 29 Group has commented extensively on this in the past."

Further it says on p. 4 ff:

"There are a number of concerns about the registration data for domains or names:

- The requirements defined in RAA 2013 for the collection of data from domain name registrants appear excessive and disproportionate and appear to occur without the voluntary consent of the persons concerned. The Art. 29 Group has commented on this repeatedly in the past.*

...

Various data processing activities required by the RAA 2013 do not correspond to the original purpose of the gTLD guideline adopted by ICANN in 2006. This 2006 policy was approved by the Council of the Generic

Names Supporting Organization (GNSO) and defines the following purpose for the publication of registration data in the WHOIS directory:

The purpose of the gTLD Whois service is to provide information sufficient to contact a person responsible for a particular gTLD domain name who can either resolve issues related to the configuration of the records associated with the domain name within a domain name server [Domain Name System], or reliably pass data to another person who can resolve these issues. "

This purpose is satisfied solely with the collection of the domain holder's data.

"Data collections must be economical, specific and proportionate. Just because different third parties currently benefit from being able to retrieve data from WHOIS without restriction and use it for a wide variety of selfish purposes does not necessarily mean that this is legitimate data collection purposes for ICANN or that this practice can simply continue.

• The retention of data may be unlawful or disproportionate, in particular if certain data elements appear to be processed solely for the purpose of their future use by law enforcement authorities."

The Group makes the following recommendation on page 8:

"Data minimization

2. personal data collected from and about registrants must be limited to those data necessary for the purposes described in recommendation No. 1 of this Working Paper".

To this end, it has already been stated that the necessary purposes can also be achieved by means of the Defendant's practice.

With regard to the extensive statements which the Applicant has presumably made, it should only be noted at this point that the reference to public trademark registers misses the point. The GDPR is a prohibition with permission reservation and while there is a legal basis for trademark registers, this is not the case for Whois data. A legal basis is necessary in this respect and must be established in the relationship between the registrar and the domain holder. Although this may also be third-party interests under Art. 6 (1) lit. f GDPR, there is already no verifiable explanation in RAA 2013 or the Temporary Specification as to why ICANN either has its own interests or third party interests that are so important that they always outweigh the interests of the party concerned and ICANN should therefore be entitled to demand and enforce the collection of this data by contract without further ado.

While the Applicant relies on the alleged use of different contact data for combating abuse, the Whois data is targeted in bulk and systematically with spam and phishing mails, read and used for purposes that do not correspond to the purpose of the Whois database. The Defendant will make further submissions on this. In any case, the collection of less data effectively puts a stop to this form of illegal behavior.

Finally, it should be noted that DENIC e.G, which is responsible for the allocation of domain names ending with ".de", has stopped collecting data for the Admin-C and the Tech-C in the course of implementing the requirements of the GDPR. DENIC explains this in its press release:

"The contact information previously used here for the technical and zone manager (Tech-C, Zone-C) as well as the administrative contact person (Admin-C) will no longer be collected in the future and will therefore no longer be displayed".

Evidence: Press release of DENIC e.G. of 24 May 2018, available on the Internet at <https://www.denic.de/aktuelles/pressemitteilungen/artikel/denic-setztzum-25-mai-2018-umfangreiche-aenderungen-an-whois-abfrage-fuer-de-domains-inkraft/>, **Annex AG 3**.

There is no other view, either from a legal point of view or from the Applicant's submissions to date.

A decision on the admissibility of the data collection for the Admin-C and the Tech-C would furthermore anticipate the main action.

Any application for preliminary injunction must therefore be rejected in its entirety as unfounded. There is no claim or reason for interim relief.

We reserve the right to make further submissions.

Rickert Rechtsanwaltsgesellschaft mbH by:

[signature]

Thomas Rickert
(Attorney at law)

Appendices