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To ICANN, Nominet and other registries

GDPR and personal data in WHOIS directories

1. We refer to ICANN's temporary specification for registration data, and other proposed compliance models being discussed as a result of the implementation of the GDPR.
2. We believe that WHOIS registry data should be widely, easily, and freely accessible to all. The consequence of this temporary specification (and of other proposals) is that those data are only accessible with restrictions, delays and charges – to the detriment of brand owners and consumers alike.
3. The fashion retail industry is reported to account for £1.2 trillion in sales globally, of which £233 billion are in the EU. Counterfeiting is a major issue and is said to account for annual losses of some €26.3 billion in the EU fashion industry. Infringers are increasingly setting up websites using logos and images stolen from genuine retailers in order to sell counterfeit goods to cheated consumers. The PIPCU, the UK's Intellectual Property Crime Unit, has shut down over 19,000 fraudulent websites. Counterfeiting funds other organised crime. Consumers are affected by receiving lower quality goods, or failing to receive goods at all. And, of course, online fraud is not limited to the fashion retail industry.
4. It is in this context that we believe WHOIS searches play a vital part in protecting members of the public. Those searches enable brand owners to make enquiries about, and pursue, fraudsters in circumstances where time is invariably of the essence, and where there is a *real* not a *theoretical* impact on consumers. Those searches also empower concerned consumers to take steps to protect themselves.
5. The purpose of this letter is to set out some concerns about the temporary specification and other models being discussed. We also aim to offer a counter-narrative which – unlike much of the discussion to date – does not focus solely on protecting the interests of a relatively limited number of individuals who have chosen to register and use domain names. In so doing, we hope to highlight not just the interests, but also the fundamental rights, of the hundreds of millions of other consumers and businesses affected (or likely to be affected) by these measures, in the hope that their interests and rights will also be taken into account as part of any assessment.

Legitimate interests – balancing competing rights

6. Although WP29 has recognised that, in theory, legitimate interests might be an available legal ground for publishing WHOIS data by ICANN, WP29 asserted this in its letter of 11 December 2017 (our emphasis): “on first examination, and **without prejudice to a more detailed assessment**: ... ICANN and the registries would also not be able to rely on a legitimate interest for making available all personal data in WHOIS directories to the general public.”
7. But it seems to us that the “more detailed assessment” (which, on its own admission, appears not to have been conducted by WP29) is in fact a crucial determinant as to whether/what extent ICANN and the registries might be able to rely on a legitimate interest as a legal ground for making available all personal data in WHOIS directories to the general public.
8. Had a “more detailed assessment” been undertaken by WP29, we anticipate that it would have involved balancing the legitimate interests of the data controller and third parties against the interests or fundamental rights and freedoms of data subjects.
9. In our opinion, to date the effect of (so far as we are aware) not conducting that test is that the interests of relatively few individuals are favoured to the detriment of the legitimate interests of third parties – which include hundreds of millions of consumers.
10. It seems to us that any balancing test should have considered the following:
 - (i) There is a marked absence in recent WP29 correspondence (e.g. WP29 letters to ICANN of 11 December 2017 or 12 April 2018) of reference to any prejudice caused to data subjects (whether theoretical or actual) from having their name and contact details listed in WHOIS directories. So far as we are aware, during the public consultation process held by both ICANN and Nominet, no information on the issue of such prejudice was provided.
 - (ii) Domain names are invariably registered by data subjects with a view to offering information society services. Those data subjects must be transparent about, and accountable for, the online services they provide. Transparency and accountability includes empowering consumers to identify who is offering them online services, and how to contact them with concerns. That is no different to what is currently required under the e-Commerce Directive (more below), but often ignored.
 - (iii) In addition to investigating consumer deception and consumer protection purposes (including identifying online service providers), there are numerous other third party legitimate interests which are engaged, many of which are common to both brand owners and consumers. These include use of WHOIS data to investigate fraud, intellectual property violations, or other violations of law.
 - (iv) Many of those third party legitimate interests are not just ‘interests’ – they are fundamental and/or human rights protected by the Convention and/or the Charter. It seems to us that those rights have not been taken into consideration; nor additional weight accorded to them as a result of their elevated status as ‘rights’ as opposed to mere ‘interests’ (more below).
 - (v) The WHOIS data is anodyne in nature, it comprising simply of a name and contact details. That information is the minimum required to identify the individual behind a website and to contact them.
 - (vi) In any event, registrants concerned about public disclosures of their identities and contact details have been, and continue to be, able to use the services of proxies to mask their identities.

11. We note that WP29's 2014 Opinion on legitimate interests expresses a preference for disclosures for the purposes of transparency and accountability being on the basis of a legal obligation rather than legitimate interests. But ICANN was not set up by EU or Member State law. That said, ICANN and its registries clearly perform a public function in the public interest, in much the same way as trade mark or company registries (even if those registries operate pursuant to a legal obligation).
12. It is counterintuitive then that contact information for trade mark owners or directors/shareholders of companies has been, and will remain, publicly accessible, but that the same information for owners of domain names will no longer be – less still given that registrants should arguably be all the more transparent and accountable because their websites are directly accessible to billions of consumers around the world (including in the EU) with varying degrees of knowledge of the English language, education and indeed awareness. We are concerned that the proposed layering system will deny those consumers access to critical information, and unfairly discriminate against them.
13. When it comes to mentioning prejudice to consumers, the Berlin Group's working paper of November 2017 – which appears to be championed by WP29 in its correspondence – highlights that: *"The rise of cybercrime, phishing attacks, and the use of the Internet as a communications medium for a wide variety of crime is of concern to everybody."* But these are precisely the sort of issues which, to our minds, call for greater accountability and transparency, including through greater ease of access to information about who is behind a website – not for making it more opaque and complicated.

Imparting information to protect consumers

14. European legislation repeatedly emphasizes that the free flow of information across borders is critical to the smooth functioning of the internal market, and key to ensuring competition. Citizens transmitting and receiving information, and consumers having new forms of access to goods and services, are the bedrock of our so-called information society – and of the Digital Single Market.
15. In fact, we observe that of the Commission's three policy pillars to its Digital Single Market Strategy, the first pillar listed is:

***"Improving access to digital goods and services"**
The Digital Single Market strategy seeks to ensure better access for consumers and business to online goods and services across Europe, for example by removing barriers to cross-border e-commerce and access to online content while increasing consumer protection."¹*
16. But as set out above, we believe that removing or hindering access to WHOIS data is going to undermine consumer protection and create a barrier to cross-border e-commerce and access to online content.
17. The reality is that registrants register domain names in order to provide information society services of one form or other. The recitals to Directive 2000/31/EC (i.e. the 'e-Commerce Directive') stress the importance of ensuring *"legal certainty and consumer confidence"* and a *"high level of ... consumer protection..."*; not to mention freedom of expression – a fundamental right which involves receiving and imparting information and ideas without interference.
18. In that context, it is unsurprising that all EU website operators, irrespective of whether a website is directed at businesses or consumers, or owned by an individual or company, are

¹ <http://ec.europa.eu/eurostat/cache/infographs/ict/bloc-4.html>

required (by Article 5 of the e-Commerce Directive) to provide (amongst other things) information about:

- (i) The name of the service provider.
- (ii) The geographical address at which the service provider is established.
- (iii) The details of the service provider, including his/her e-mail address, to allow him/her to be contacted rapidly and communicated with in a direct and effective manner.

19. Further, this information must be made easily, directly and permanently accessible.

20. It is clear then that providing contact details, and making those details publicly available to all who access an online service, is a legal requirement then it comes to offering an information society service. Information society services rely on domain names. It stands to reason then that WHOIS data relating to the owner of a domain name, and their contact details, should also be made publicly available in the same way. The e-Commerce Directive does not require members of the public to apply for disclosure of details and perhaps get them a few days later, for a fee.

21. The accessibility of WHOIS data complements the e-Commerce Directive given that, in reality, many websites do not comply with their legal requirements, so ICANN performs an important role in ensuring that information about who is behind a website remains available to the public.

Competing Rights – not ‘interests’

22. Recital 4 of the GDPR states that: *“The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.”*

23. So the data subjects’ Article 8 right under the Charter to the protection of personal data is not an absolute right which trump all others. It must be balanced against a number of other equally fundamental and competing rights.

24. Those rights include the:

- (i) Freedom to conduct a business, as enshrined in Article 16 of the Charter.
- (ii) Right to the protection of intellectual property, as enshrined in Article 17(2) of the Charter. That intellectual property consists not just of the domain name itself used as an instrument of fraud, but also the images featured on the website associated with that domain name, as well as in any products sold via that website.
- (iii) Freedom of expression and information, as enshrined in Article 11. This right includes the freedom to receive and impart information and ideas without interference, and regardless of frontiers. It is worth recalling that Article 85 of the GDPR provides that: *“Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes.”* As the CJEU has confirmed, ‘journalistic purposes’ is to be interpreted broadly, and encompasses all activities if their object is the disclosure to the public of information, opinions or ideas, irrespective of who is carrying on such activities (i.e. not necessarily a media undertaking).

25. Further, Article 38 of the Charter provides that policies of the EU shall ensure a high level of consumer protection. It seems to us that (a) restricting access to WHOIS data (b) delaying access and/or (c) imposing fees to access those data (which in many cases will likely act as a bar), undermines consumer protection. It is likely to result in damage to consumers and/or aggravate damage to them.
26. Whilst many registries are making WHOIS data available to law enforcement agencies, that measure is not sufficient to address the points we have made above. This is not least because, to our minds, by the time law enforcement agencies engage it is usually too late – consumers are already victims of crime. Law enforcement also has limited resource at its disposal to be able to deal with complaints, either properly or indeed at all. It is generally accepted that when it comes to fraud – especially in an online environment – prevention is better than cure. The temporary specification will deprive individuals of the ability to take an important preventative step in protecting themselves from harm.

What we would like to see next

27. We believe that all personal data in WHOIS directories relating to registrants should remain accessible to the general public in much the same way as it has in the past. In our opinion, domain name registrants should be transparent and accountable; and publishing their names and contact details is a proportionate way of ensuring not just transparency and accountability, but that the rights and freedoms of millions of other EU citizens and brand owners are not undermined.
28. We are concerned that the temporary specification is wholly disproportionate (we observe, for example, that it applies to all registrations, without requiring registrars to differentiate between registrations of legal and natural persons, or indeed persons in the EU and persons outside of the EU). Our concern is that it will result in more fraud, more consumers duped, more brand owners with infringed assets, more difficulties for law enforcement, and less trust and confidence in e-commerce and cross-border trade generally.
29. We hope that you will take these concerns into consideration as you re-evaluate the WHOIS system.
30. Should you wish to discuss the concerns raised in this letter in more detail, please contact the Brand and IP Legal team at ASOS.com Limited.

This letter was prepared by ASOS.com Limited on its own behalf and on behalf of the brands and companies listed in Annex A to this letter who give their support to the contents of this letter and its call to action.

Yours sincerely



For and on behalf of

ASOS.com Limited

ANNEX A

Signatories to this letter

Brand/Company	Name of individual and their role	Date
1. Yoox Net-A-Porter Group	Sarah Gauld, Head of Intellectual Property.	6 June 2018
2. N Brown Group Plc	Sannia Aqeel, In House Legal Counsel	7 June 2018
3. Superdry Plc	James Sweeting, Senior IP Counsel	12 June 2018
4. New Balance Athletics Inc.	Rory O'Hare, Senior Counsel	14 June 2018
5. River Island	Sally Lloyd, Senior Legal Counsel	19 June 2018
6. Bauer Hockey Corporation	Chrissie Florczyk, IP Enforcement Executive	19 June 2018
7. Cerberus IP	Michael Wakefield, Anti-Counterfeiting Manager	19 June 2018
8. Deckers Europe Ltd	Alistair Campbell, Brand Protection Manager Europe	19 June 2018
9. DHAntiCounterfeit	Joakim Gustafsson, CEO	19 June 2018
10. ghd Hair	Harriet Shaw, Brand Protection Manager	19 June 2018
11. JML	Stacie McKendrick, Product Trials Manager	19 June 2018
12. Stephens & Associates Ltd	Tony Stephens, p.p. Radley	19 June 2018
13. Tottenham Hotspur Ltd	Ciarán O'Sullivan, Brand Protection Manager	19 June 2018