

Spam, Privacy and WHOIS

Introduction

AuDA, the .au domain name space industry self-regulatory body, recently revised its June 2006 policy on the WHOIS database and published its new policy in December 2010. The new policy was published after public consultations and submissions were received in late 2010.¹

What is the WHOIS database?

The WHOIS database is a publicly accessible database designed to provide information concerning the registrants of registered domain names, this can include personal information. The maintenance of a searchable database which enables interested persons to find out the details of the registrants of domain names has been a standard feature of the Internet since the invention of the domain name space. The function of the WHOIS database has evolved over time and has numerous functions including:

- supporting the security and stability of the Internet by providing contact points for network operators and administrators;
- assisting law enforcement authorities in investigations;
- facilitating inquiries and subsequent steps to conduct trademark clearances and to help counter intellectual property infringement; and
- identifying persons or entities responsible for content and services online.

The WHOIS policy prescribes what information about the registrant of a .au domain name will be collected, used and made available through the WHOIS database.

AuDA Review

As AuDA's WHOIS database is publicly accessible, there are a number of issues arising out of the WHOIS policy which impacts individual and business Internet users, including the scope of registrant identity disclosed and the accuracy of registrant identity disclosed. The latter is subject to a Names Policy Panel review, the outcome of which will be made available in mid 2011. The recent review of the WHOIS policy affected domain name registrants in particular, as the prohibition on the use of WHOIS data for unsolicited communications was lifted.

Arguments for removal of the prohibition (thus enabling unsolicited communications)

AuDA, in its response to the public comments received, summarised the arguments for removal of the prohibition. Effectively, the following three arguments resulted in AuDA lifting the prohibition on unsolicited communications.

1. There is a perceived conflict between the prohibition against using WHOIS data for unsolicited communications in clause 5.1(a) and the requirement for registrants in clause 4.3 to provide contact email addresses for the purposes of enabling contact with the registrant in relation to their domain name.

2. The prohibition hinders legitimate use of the registrant contact email, for example by way of contacting the registrant to sell the domain name, advising of infringing use of the domain name etc.

3. Procedures are already in place to minimise misuse of registrants' email addresses by spammers, including the implementation of Image Verification Checks and limits on the number of queries to the WHOIS database coming from the same IP address.

Arguments against removal of the prohibition (retain status quo and maintain prohibition on unsolicited communications)

Of the nine submissions which argued for or against the prohibition, a slim majority (5) argued that the prohibition should be maintained. These arguments were based primarily on privacy and spam concerns. For example, one owner of multiple domains argued that "the constant offers to have me renew my domain through expensive registrars, register „similar“ domains in China and other place[s are] an unwanted intrusion".²

The *Spam Act 2003* (Cth) in Australia provides protection to some extent, however, notably it does not apply to overseas organisations (non-Australian businesses).³

Impact on Australian individual and business Internet users

Of the potential stakeholders most affected, the removal of the prohibition on unsolicited communications will likely impact Australian individual and business Internet users the most. Generally such users desire the ability to easily register a domain name at low-cost and to be able to transfer that registration to another registrar/re-seller/ISP with ease (if they so desire). Internet users do not want to be the recipients of spam, false/misleading marketing schemes or false/misleading domain renewal scams.

From a privacy point of view, the *Privacy Act 1988* (Cth) applies to organisations collecting personal information to include in a generally available publication, such as the WHOIS database. The Office of the Australian Information Commissioner's *Information Sheet (Private Sector) 17 – 2003: Privacy and Personal Information that is Publicly Available* explains this best in Questions 2 and 3:

The Privacy Act applies when an organisation is collecting information for inclusion in either a record or a generally available publication (see section 16B(1)). This means it must comply with the collection principles (NPPs 1, 10 and 3) when it collects the information it intends to publish and holds the information in a record before the time of publication. All the NPPs apply to the personal information an organisation holds before it is published. Once the personal information is published, the NPPs will apply to any personal information that the publishing organisation continues to hold in a record even though the organisation no longer has any obligations in relation to that information in its published form.

Once the personal information is published in a generally available publication the organisation publishing the information has no obligations under the Privacy Act in relation to the personal information in its published form (see section 16B(2)). However, the NPPs continue to apply to any personal information that the publishing organisation holds in a record.

As a consequence, although the Privacy Commissioner could not resolve concerns in relation to use of personal information in the WHOIS database for the purpose of sending unsolicited communications, the Australian Communications and Media Authority, through its regulation of the Spam Act, is likely to receive more complaints.

¹ This note provides an overview of the arguments AuDA received relating to clause 5.1(a) in the 2006 policy which prohibited the use of WHOIS data for unsolicited communications: “In the interests of protecting the privacy of registrants, the following activities are strictly prohibited: a) use of WHOIS data to allow, enable or otherwise support the transmission of unsolicited communications to any person, by any means”. As a consequence of the review, AuDA has removed this prohibition from the updated policy.

² See Stephen Davis’ submission available at: www.auda.org.au/pdf/StephenDavis.txt.

³ See section 7 of the *Spam Act 2003* (Cth).

Resources

AuDA’s 2006 WHOIS policy can be found at: www.auda.org.au/policies/auda-2006-06/
Submissions to WHOIS policy review can be found at: www.auda.org.au/reviews/whois-2010/

AuDA’s updated 2010 WHOIS policy can be found at: www.auda.org.au/policies/auda-2010-06/

Annelies Moens

Vice-President, iappANZ

John Selby

Lecturer, Macquarie University