ICANN Transcription

Privacy and Proxy Services Accreditation Issues PDP WG
Tuesday 24 February 2015 at 1500 UTC

Note: The following is the output of transcribing from an audio recording of Privacy and Proxy Services Accreditation Issues PDP WG call on the Tuesday 24 February 2015 at 15:00 UTC. Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record.

The audio is also available at:

http://audio.icann.org/gnso/gnso-ppsa-24feb15-en.mp3

Attendees:
Frank Michlick – Individual
Val Sherman – IPC
Griffin Barnett – IPC
Kathy Kleiman – NCSG
Todd Williams – IPC
David Heasley - IPC
Steve Metalitz - IPC
Luc Seufer – RrSG
Don Blumenthal – RySG
Jim Bikoff - IPC
Michele Neylon- RrSG
Osvaldo Novoa – ISPCP
James Bladel – RrSG
Vicky Scheckler – IPC
Kiran Malancharuvil – IPC
Volker Greimann – RrSG
Christian Dawson – ISPCP
Sarah Wyld – RrSG
Carlton Samuels – ALAC
Richard Leaning – no soi
Lindsay Hamilton-Reid – RrSG
Roger Carney – RrSG
Tatiana Khramtsova – RrSG
Phil Corwin – BC
Stephanie Perrin - NCSG

Apologies :
Alex Deacon –IPC
Darcy Southwell – RrSG
Chris Pelling – RrSG

Graeme Bunton – RrSG
Holly Raiche – ALAC

ICANN staff:
Marika Konings
Mary Wong
Daniela Andela
Terri Agnew

Coordinator: Good morning, good afternoon. Please go ahead, this call is now being recorded.

Terri Agnew: Thank you. Good morning, good afternoon and good evening. This is the PPSAI Working Group call on the 24th of February, 2015.

On the call today we have Tatiana Khramtsova, Steve Metalitz, Dick Leaning, Lindsay Hamilton-Reid, Roger Carney, Val Sherman, James Bladel. Sarah Wyld, Don Blumenthal, Griffin Barnett, Michele Neylon, Christian Dawson, Osvaldo Novoa, David Heasley, Jim Bikoff, Philip Corwin, Kathy Kleiman.

I show apologies from Darcy Southwell, Graeme Bunton, Chris Pelling, Holly Raiche and Alex Deacon. And joining us, again, Stephanie Perrin and Frank Michlick. From staff we have Mary Wong, Marika Konings, Danielle Andela and myself, Terri Agnew.

I would like to remind all participants to please state your name before speaking for transcription purposes. Thank you very much and back over to you, Steve.

Steve Metalitz: Thank you very much. This is Steve Metalitz and I'll be chairing in the hiatus of Don's chairmanship. I just want to start by thanking Don - we've had several expressions of this on the list already but thanking Don very much for all the work he has put in and all the stress he has endured as the chair of this working group. We're actually quite far along in the process and I think a

great deal of that is due to Don's efforts and persistence so thank you and we look forward to your continued participation as you're able to in the weeks ahead.

Let me - we have an agenda up in the upper right on your screen. I guess we could just start right in with the usual request of whether - if anybody has an update to their Statement of Interest that they wish to share orally please do so now.

Okay seeing none what we have on the agenda here, and I will ask if we have any other agenda items, but what we have here is basically to walk through the document that was circulated yesterday which is an approach to how to address our main remaining - our largest remaining issue which is the Category F, the whole question of disclosure of contact information of customers of privacy proxy services.

So unless there's other business that people want to discuss first I'm happy to kind of walk - or put this document in some context and walk through it and then open the floor to questions, comments, reactions and so forth. I'm assuming this is a fairly extensive document. People just got it yesterday. So I'm not assuming we will reach any conclusions today but hopefully we can get started on a constructive discussion that we hope will bear fruit relatively soon and enable us to wrap up the initial report.

So if - unless there - and let's see, I see Kathy has her hand up so let me call on Kathy. If anybody else wants to get in the queue you can put your hand up in Adobe or just speak out if you're not in the Adobe chat room. Go ahead, Kathy.

Kathy Kleiman: Hi, Steve. Hi, everyone. Good morning, afternoon, evening. Hey first, thank you, for everybody who put this together. The six page document has a lot of work and thought put into it. And I just - Steve, as you go through it I wanted to encourage - one of the things I'm looking at are the variations. It would be

interesting to know, you know, in the weeks that you were working on this - you and others, Graeme, clearly and others, were working on it, you know, what you were thinking what the variations were.

So, you know, you know, the more background you and others who worked on it can provide the more we'll be able to kind of grasp it more quickly and help us more forward together in the next, you know, week or two. So I just wanted to share that. I'd love to know, you know, people's thoughts and - on variations on background, on specific examples that they were thinking of as this was being drafted. Thanks, Steve.

Steve Metalitz: Thank you, Kathy. James.

James Bladel: Thanks, Steve. And to Kathy's point, you know, Graeme probably would normally and naturally take the role of a spokesperson for, you know, for service providers who helped to draft this statement but since he's absent I'll just go ahead and step into that.

So as we go through it I think if you have specific questions in that area, Kathy, then, you know, just kind of knock me on the head or something and get my attention and I will do my best to provide that context that you're looking for.

Kathy Kleiman: Terrific. Thanks, James.

Steve Metalitz: Okay thank you. So, James, also if you have anything you want to add to what I say as we walk through this just let me know. Okay so as - the document - and I think you have control of the document on your screens. But I'll just walk quickly through it.

What we're trying to do in this was to come up with a balanced approach that dealt with all the interests to give a higher degree of certainty to the requestors to retain a sufficient degree of discretion for the service providers

and to include some safeguards and procedures to protect the legitimate interests of the customer.

So that was the goal. And of course this group will be the arbiter of how well we have achieved or approached that goal. That introductory comment is really just kind of to put this in context. And I guess I should also just mention that reference to the title here which is illustrative example of disclosure standards for intellectual property requests.

You may recall that the initial document that we put forward back in October shortly before the face to face meeting in LA, was an attempt at a more global policy statement and there were some pushback against that and seemed to us that it might make more sense to just deal with this case of request from intellectual property owners or requests regarding intellectual property infringements which obviously is a significant part of the universe of requests to disclose the information on customers, but it's not the whole universe by any means.

And what we have here may provide a template for other types of requests, for other types of abusive activities that may be taking place using domain names that are registered in a privacy or proxy program or, you know, maybe it's not that useful a template but since we have the people kind of here at the table that have the concerns about intellectual property and also the service providers who have experience in responding to those requests we thought we would start with that and use this as an illustrative example.

So this is not a global policy proposal but it is an illustrative example proposal. And hopefully we'll move things along on a broader policy statement.

And the document falls into three parts. One is the process for intake of requests; the second is what should be in a request in order to trigger some action on the part of the service provider - and we have three case - use

cases of that; and then finally, what would be the service provider action on the request.

I'm not sure that everything falls exactly under each point in perfect logical order but hopefully these points are pretty well organized and can kind of help walk through this process.

So in terms of intake of requests the idea is that a service provider would have a point of contact for submitting complaints or requests for disclosure based on intellectual property infringement. And of course we already have some provisions in other parts of our initial report about points of contact that service providers have to establish and publish.

So this would be - whether it's through email or through a web submission form or similar means, there would be someplace that intellectual property interests could go and say we would like to request disclosure of contact data on this customer for these reasons. It could be a telephone point of contact but that's optional. Our assumption is normally would be email or web form. That's set out in A.

B is kind of a best practices type provision and you'll see there's two phrases bracketed there. Kathy raised a point on the list about what do the brackets mean. I think in this case the brackets are two alternative formulations. We're not totally consistent in this document on how - what the brackets mean and I'll get to some others.

But you could either say that nothing in the document prevents a service provider from doing certain things or the service provider is encouraged but not required to do certain things. In any case these would not be requirements but they would be things that service providers could do and perhaps would want to encourage them to do it.

The five things are listed there. One is requiring requestors to register themselves; the second is authenticating complaint submissions as originating from a registered requestor, the words - that it comes either a login or a use of a pre-identified email address.

The third, which is bracketed for another reason, is about assessing a standardized nominal cost recovery fee. In this case - and throughout most of the document these brackets signify areas that are still quite a bit in contention. As you might imagine there are many folks in the intellectual property side of this who are quite wary about the idea of paying for these disclosures, the thinking being that this is part of the bargain or part of the overall framework here for proxy and privacy services should be the disclosure is available when certain conditions are met. So that's bracketed. It's still a point of contention but it's in the document as a topic to be discussed.

James, why don't you - I'm sorry, James has his hand up so please go ahead.

James Bladel: Thanks, Steve. James speaking for the transcript. And I just wanted to give kind of a little bit of color commentary on that point if I may. And I think the position of the service providers is that, you know, establishing and maintaining these procedures will be - whether it's automated or actually involve a human employee, will be - will not be, you know, will have some costs associated with them.

And, you know, it's really a recognition that the benefits of these services do not - are beneficial to - not to the providers and not to our customers but to the third parties that use these disclosure mechanisms. And so how do we strike that balance where, you know, where the costs and operational burden lies in one area and the benefits lie in another area and making sure that that doesn't get skewed, for example, to having, you know, not routine uses of these systems but let's say abusive or bulk scripted uses of these systems.

And so one idea was, you know, if there were some nominal cost recovery fee of even just a few cents or a few dollars or a deposit made that could be - would be surrendered, some kind of earnest money that would be surrendered in the case of any abuse or something like that that registrars - sorry, service providers, wouldn't be prevented from developing systems like that so long as they weren't constructed or architected to be a barrier to accessing these systems at all.

And I think that's kind of the balance that we were trying to strike in our discussions or at least that's what I was trying to strike. Thanks.

Steve Metalitz: Okay thank you, James. I think that's helpful clarification on that point. Just quickly going through the other two sub-points on this 1b, it would be a service provider could set up some type of trusted requestor program that would have a more streamlined process if they had validated the requestor in some way. And of course some such systems already exist.

And then finally, as James said, the concern about the abuse is there and there could be - this wouldn't prevent the service provider from blocking access in cases of egregious abuse of the system.

Now we've given some examples there. Those aren't, you know, those could be subject to further discussion obviously just like everything else in this document. But the concept that a requestor could use some kind of barrier against abuse and could kind of kick someone out of the system for repeated instances of abuse I think is really the point here.

And, again, just as - just as James said in his earlier comment, so long as it's not, you know, a pretext for making the system inaccessible to legitimate users. So that's - those are the five points that we have in 1b.

And 1c is a more general savings clause just to make it clear that, you know, a service provider can have its own terms of service and follow and enforce those. As we already have decided those should be published and made accessible to the users obviously, to the customers.

But they can have their terms of service and enforce them and act in accordance with them and that's not - this doesn't prevent them - these disclosure standards wouldn't prevent them from doing that. So that would be, again, up to the service provider. So that's kind of Roman Numeral 1 which is the process for intake of requests and the system for processing requests, if you will.

I'm happy to pause here if people have any questions. Again, you can put up your hand in the Adobe room at any time. But default of any hands up I'll just continue on here.

Section 2 provides some templates. Again, once you have this system, what do you as an intellectual property interest, intellectual property owner, have to submit in order to trigger the disclosure process?

And so there was a lot of discussion in our group about what should be needed in three use cases; one in which the domain name itself infringes a trademark, cybersquatting would be a primary example of that; the second in which the domain name resolves to a Website where copyright is being infringed, that's the second intellectual property concern; and then the third the domain name resolves to a Website where trademark is being infringed such as counterfeit goods being offered. That's the third template.

And there's a lot of similarity between - among these templates. There are a few differences however, a few intentional differences and I suppose there might be some unintentional differences too that we just haven't succeeded in cleaning up.

But let's just look at the first one which is where a domain name - the concern is that a domain name itself is infringing a trademark. So the first thing that the requestor would have to provide - and again, these are - the order is somewhat arbitrary here but there was some discussion about whether you needed to have first tried to relay your concern to the customer before you could employ the - before you could employ the disclosure process.

I'm going to stop here because I see Michele has his hand up so, Michele, please go ahead.

Michele Neylon: Thank you, Steve. Michele for the record. You know, just in terms of any of these templates, the obvious thing from my perspective is I would want the domain name both in the subject line and at the top always. Because trying to work out - depending on how you're taking these things in, be it through an automated process, an inbox, or something like that, you're obviously going to want to group - as the person dealing with them, you're going to want to group them based on, you know, a common trait. And obviously the common trait is going to be the domain name.

So just my input on that initially would be please the domain name - if that's what's in relation to, should be at the top should be prominent always because otherwise - I mean, trying to work out what the hell it is, I mean, imagine a situation where you're sending 20 or 30 different complaints about 20 or 30 different domain names or whatever, I mean, it's going to be quite hard for somebody to process those if the domain name isn't prominent or in the subject line. Thanks.

Steve Metalitz: Thank you, Michele. I think that's a good point. Obviously, if this were - if these templates were adopted you could easily put them into a form. And we didn't get to that level of granularity about how the form should be organized but I think your comment makes a lot of sense.

Okay so, again, going through this first template, the first is you would have to - you would have to show what you had done to try to use relay and what responses had been received. So, again, this is just kind of documenting that you had done.

And we reference here, you know, the standards regarding relay that this group has already, you know, reached tentative conclusions on. And that's the process that we're referring to there so you have some type of cross reference.

So that would have to be part of what you submit, you know, we tried to use relay but got no answer or we tried to use relay and nothing happened or whatever.

Second is the - identifying the requestor by contact information and so forth. Third would be identifying the trademark and linking to a national trademark register where it is - where the mark is registered and showing that it's currently in force.

Fourth is the domain name that infringes the trademark. And Michele's suggestion was that should be first which I think makes a lot of sense. But it obviously needs to be in there.

And then I think the crux of this is the good faith statement that would have to be made to really show that on its face there is an issue here about intellectual property infringement. And that statement would either be done under penalty of perjury or we have a kind of what we think is roughly a German equivalent of that that Volker suggested as part of the - as part of the template.

And - but in either case you would have to really be asserting two things, first that there is a basis for reason that we believe in that the use of the

trademark is infringing and is not defensible which is a term taken from the terms of service of (unintelligible).

And you'd have to state that you would limit that the requestor would only use the customer's contact details that it would obtain through disclosure in order to resolve this issue either to attempt to contact the customer to determine it may be further action is not needed if you find out who is the registrant or an illegal proceeding. So these are kind of limitations on use of the information.

That basic approach is through - with some variations is present in all of the - in all of the templates that we've (unintelligible). Kathy, I think you had a point, go ahead.

Kathy Kleiman: Yes please. Thanks, Steve. And, thanks, you know, for walking us through in such detail. This is very, very helpful.

So here is the question to Steve and to anyone else who wants to respond. What does it mean, "is not defensible"? What are you thinking of? And what I'm thinking of is that for fair use and other things and critique and criticism do vary from jurisdiction to jurisdiction. So I was wondering what you're thinking of. Thanks.

Steve Metalitz: Yeah, this is Steve. I'll take a shot at that. And, you know, I think that's really what the gets at, it's not just that it's a technical violation but that there really, you know, on its face there's not a defense to it, you know, there might be if you have further information. But again, just based on what you the requestor knows, this is not defensible.

I think this really brings then, if you see the footnote there, which applies to all these templates, is there was concern from some of the service providers that there needed to be some way for the provider to have some redress if the statement from the intellectual property owner turned out to be false or a misrepresentation.

And we had some discussion of how that would be done. We really didn't resolve that point, but that would be one safeguard. So I don't know if that answers your question.

Kathy Kleiman: Interesting. This is definitely an area to be fleshed out a little bit more I think that's important. Thank you.

Steve Metalitz: Okay thank you. Again, I'd welcome James or others if you have other things to add on that, just let us know. All right, that's A. B is where the domain name resolves to a Website where copyright is being infringed. There are a few differences in this template and let me just stress those differences, if I could.

In Number 1 besides the evidence of attempt to use the relay function, there's an optional point about previous attempts to contact the Web host or the domain name registrar, now, we're looking again at a future in which there may be more proxy service providers, privacy service providers who are not registrars, in order to try to - try to deal with the issue.

So as it stands here requestors are encouraged but not required to attempt such contact. So I think in many cases there would have been such contacts and I think it's reasonable to ask to disclose those if there have been. But it's not necessarily mandatory so.

Kathy, is that an old hand or is that...

Kathy Kleiman: Sorry, Steve, yeah, old hand.

Steve Metalitz: Okay. Michele, go ahead.

Michele Neylon: Steve, Michele again for the record. Speaking as a web hosting provider, and somebody who deals with abuse complaints that we currently get, again,

reiterating what I already said, URL of the alleged abuse, should go at the top of the report. We see quite a few phishing and other types of abuse being reported to us as copyright which it really isn't.

Now I can't - I suspect that's not going to change. So, again, putting the actual URL of the alleged infringement at the top helps because if you go - if it's something let's say, for argument sake, somebody has ripped off the Bank of America's Website, that's a phishing case. You could also argue there's copyright. But from our perspective as a hosting provider it's phishing. It vanishes, if you follow my rationale there.

Also, as well as the hosting provider - as a hosting provider it makes more sense, you know, you should contact - always contact the hosting provider and not the registrar because the registrar's only possibility is to pull the domain completely whereas the hosting provider may have other recourse open to them. Thanks.

Steve Metalitz: Yes, thank you. Yeah, you have them both in there but you may well be right that the host is more relevant in this case. But other - any other comments or shall I - let me just continue through this template.

Point 2 is basically the same as in the cybersquatting template. Point 3 is information to identify the copyrighted work. Obviously in most countries there is no mandatory copyright registration and so it's not the same as a trademark situation but if that is available that would be required. And of course you still have to identify what is the work that you claim is being infringed.

Fourth is the exact URL where the infringing copyrighted content is located. That's Michele's point, that perhaps should be at the top. This is bracketed because of the issue about the exact URL where the original content is located, if online content. And the concern there is that many cases there is no place online where the content is legitimately available, in the case, for

example of pre-release piracy of music or movies, there isn't any place where it's available, so there may need to be some - this is why this is bracketed still.

And then the good faith statement is - under 5 - is quite similar. It includes a point that some of the service providers wanted to include which is providing a basis for - 5b - providing a basis for reasonably believing that the copyright protection extends to the locale the Website targets. That's not likely to be a major issue in most cases but there are a few countries that are not in any of the international agreements and don't have an obligation to respect copyrights of other treaty parties so there could be a situation where this would arise.

And then the rest of that good faith statement is basically the same as for trademark, that there's a reasonable basis for believing that the content is infringing and that you'll only use the contact details to basically resolve the issue or to attempt to contact the customer.

Let me pause there. I guess we have a queue and, Stephanie, James and Kathy. Stephanie, go ahead. Stephanie, are you...

Stephanie Perrin: Can you hear me?

Steve Metalitz: Hear you now.

Stephanie Perrin: Hello? Oh good. I'm just a little concerned - and I haven't, unfortunately, had time to really study this document. Obviously it's a lot of work here. But following up on Michele's statement, like I'm wondering to what extent are we using this mechanism rather than other regulatory mechanisms to get at allegedly illegal behavior?

So in other words, if there's something fraudulent going on on what appears to be a commercial Website, there are other mechanisms to go after that than

the use of the domain name, you know? There are plenty of avenues, you know, it's fraud. Ditto phishing, you know, there's evidence of impersonation there.

So why - there's no statement in here about exhausting other either administrative or legal remedies prior to coming to the proxy service provider to unveil the person. Have I got that correct? And is there a reason for that?

Steve Metalitz: Well this is Steve. I can respond to that. Stephanie, it may be that you (unintelligible) because I'm getting a lot of echo. Let's try this now. That's better, thank you.

I'll just give my response and then others - there are others on this call who were involved in drafting this and may have something else to add. But this is not about a remedy; this is about identifying who's responsible for the activity. Obviously once you find out who's responsible for the activity there may be administrative means, legal means, there may be a lawsuit, there may be some other steps that would be taken. But until you have that information it may be very difficult to pursue those.

So I don't think - there's not an exhaustion requirement here because this is aimed at another - this is aimed at another problem which is identification rather than the remedy. That would be my response anyway.

James, you're in the queue.

James Bladel: Hi, Steve. Thanks. James speaking for the transcript. I wanted to direct the group's attention to the fourth bullet point where we have some brackets around that entire statement. And I guess I didn't just quite understand the disconnect until you were walking us through it just now, Steve, so thanks for helping me kind of belatedly come around to this understanding.

But I think that the - it's probably not correct to have the brackets around that entire statement when it really sounds like the - what service providers want is the URL where the infringing copyright content is located on the, you know, on the Website associated with the domain in question.

So I think can we move the brackets to begin to include just as - just after the comma where it's as well as the exact URL where the original content is located? Because I think - I take your point that the original content may not be available online anywhere yet or anywhere publicly so, you know, I understand that that may not always be available.

But the exact URL where the infringing content is located should always be available and I think that is something that's essential for filing these reports. So if there are no concerns with that I think we should move the bracket to only half of Bullet Point 4 and not the entirety.

Steve Metalitz: This is Steve. I completely agree with that, that bracket shouldn't be where it is; it should be just the second half of the statement. Thank you. Kathy and then Stephanie, since you hand is up I assume you wanted to speak again but we'll take Kathy first and then back to Stephanie. Kathy, go ahead.

Kathy Kleiman: Great. Thanks. Yeah, to the extent that the copyright owner's material is online so for example we're dealing with counterfeit Gucci bags, I think it's really critical that that URL be provided of where the material is. There may be a few cases where the material is not yet available but my guess is that's going to be a fraction of what we're talking about here. So I think that should be clarified that when the URL is available.

I think it's going to be really important to put in illustrative examples of what people are thinking of because this is one of the cases - and this type of example, this is one of the cases where I think it's so clear to intellectual property owners, and frankly, so clear to customers but I'm not sure we're thinking the same examples.

So for intellectual property owners I'm thinking counterfeits, piracy of songs, music, movies. But for customers, the response to fair use and critique is always copyright infringement, always. The Church of Scientology has used this very effectively; governments claim - some governments, not the US but other governments claim copyright on their government material, on regulations and laws occasionally.

And so when you post it to critique it and to comment on and maybe even to criticize it, the response is copyright. So I think we have to - I think in this case we need to include examples because the examples will be very useful to show us some clear cases that some people are thinking of and some clear abuse cases that some people are thinking of. And I think we're going to have to work through both sets. Thanks, Steve.

Steve Metalitz: Thank you, Kathy, that's a good suggestion. Michele.

Michele Neylon: Thanks, Steve. Michele again for the record. I mean, just following on sideways to what Kathy was saying and also picking up on what Volker is putting in the chat, the problem - one of the problems I see with some of this is going to be - okay, trademark is one thing case you have a trademark registration so if, I mean, we all have some understanding of that. But copyright, as already mentioned, there is no real registration plus there is a massive issue around freedom of speech and fair use.

Now without getting into the weeds on how one resolves that. All I would - trying to understand is with respect to this entire document this is about request templates and how to submit a request. I would assume that the recipient of the request still has the ability to reject a request.

Because, I mean, for example, if we cannot easily see that the complainant has actually got demonstrable copyright for the material or if we look at it and go oh well, you know, this is more a freedom of speech issue or, you know,

fair use, etcetera, etcetera, if it's not clear cut - I'm just a bit concerned about, you know, where this is going. I mean, I think having the parameters for submitting the complaints is fine. I'm just wondering where we're going with this. Sorry if I'm not being 100% clear. Thanks.

Steve Metalitz: Thanks, Michele. And I think let's keep - if we keep walking through this I think you'll see where we're going so - and then we can discuss whether that's the right place.

All right let me - the final template which, for some reason, appears as A again, this actually should be C is where - is where the - on the Website to which the domain name resolves, there's counterfeit activity. And, again, the template is very similar to the others. I won't walk through it all in detail but basically it's essentially the same templates in terms of what - including the good faith statement that has to be included.

So the next section of this is the service provider action on request, in other words, where we're going with this. But before we get there I see Kathy has another question.

Kathy Kleiman: Yeah, thanks, Steve. Could you give kind of your glaring example case for this C section?

Steve Metalitz: You gave it, the Gucci handbags. That would be one...

Kathy Kleiman: So whether or not it's in the domain name or not, you know, it could be bags.com but then when you get there it's Gucci and Channel knockoffs.

Steve Metalitz: Right.

Kathy Kleiman: Okay.

Steve Metalitz: All right so we're onto 3 here. And this says, okay, you've gotten a - you're the service provider, you've gotten a request that meets these templates. And so what are you - what do you have to do? And it's a - it really steps through what the service provider would need to do.

The first is to notify the customer about the complaint and the disclosure request. And request that the customer respond to the service provider within a set number of days. We had some discussion about what that number would be. We didn't reach any conclusion.

And the provider would also have to tell the customer that if it has a compelling reason to object then it should put that in a form in which that can be shared with the requestor. There was some concern about whether there would be some inadvertent disclosure here but I think that was the reason for this language to say when you tell the customer, you know, we've got this request, if you object you need to say why in a form that can be shared with the requestor. That's the first step that the provider has to take.

Second, again, after a set time limit you either - either the customer hasn't responded or the customer has responded so the service provider then has to make the decision whether to disclose to the requestor the contact information, basically just what would be ordinarily in the publicly accessible Whois or to tell the requestor, in writing or by electronic communication, its reasons for refusing to disclose.

Now those could be the reasons that the customers gave and it could be other reasons. B3 there is just a safety valve if there is some extraordinary circumstance where more time is needed then the provider has to tell the requestor and say when - by when it will respond. Again, we haven't filled in any time limits there and that would be an issue to be discussed.

So C gives some examples of reasons that can be given for refusing to disclose. One is that you've already terminated the customer from the privacy

or proxy service because in violation of your terms of service. Second, that the customer has objected to the disclosure and has provided compelling reasons, and here's what their reasons are.

Or that - and Kathy has brought up several times whether there should be an option for a customer to basically surrender its domain name rather than have its contact information disclosed and this does not mandate that policy but if there such a policy that the service provider has that would obviously be another reason that it could refuse.

This is not an exhaustive list of reasons but these are examples of reasons that the service provider could rely upon to refuse to disclose. Again, our goal here is to have something that's reasonably predictable from the standpoint of the requestor but retain some discretion from the standpoint of the service provider. That's C.

D, which is bracketed, is - but you may remember this from the original October proposal are - here's some reasons that you can't rely on in order to refuse disclosure. You can't say well everything is in order here but you haven't' shown me a court order or a subpoena or there was a lawsuit pending or some other proceeding pending. That by itself can't be an acceptable reason to refuse to disclose.

And similarly because we have templates for the situation where the domain name resolves to a Website where infringement is occurring, you can't take - say everything is in order here and you've met the criteria but because the infringement is in the content on the Website we won't disclose.

I'll defer to James or others on the reason for bracketing there but that's the justification here is that there's a range of discretion that the service provider should have but there are some things that are beyond that range and that's what the attempt was to do in D.

Let me ask James to start the queue.

James Bladel: Thanks, Steve. James speaking for the transcript. And I think you nailed it here, it's where to draw that line, where the provider has discretion and where the providers' hands are tied and their actions are basically following a, you know, a scripted recipe under pain of ICANN compliance.

And I think the concern here from our perspective is that this, you know, paints us into too small of a corner. It essentially creates a situation where we, on behalf of our customer, are surrendering or conceding perhaps an unacceptably high level of due process that's being thrown overboard. And it's just - it's not something that I think as a, you know, as a representative of a provider that I can say that we can onboard this right now because it's just too - it's written too broadly I think for starters.

If we're going to go down this path then we need to start looking at how we can tailor this language more narrowly so that it addresses the concern, you know, from the complainants but still provides some discretion. And I think, you know, given the - just the wild and weird and wooly nature of jurisdictional content issues on the Internet I just - I'm not comfortable, you know, putting service provider into such a small box. Thanks.

Steve Metalitz: Okay, thank you. Kathy.

Kathy Kleiman: I was going to comment on something different than what James says but I'm uncomfortable too and it will take me some time to kind of elaborate on that. But let me ask a question which has to do, Steve, with the disclosure that you just read.

I'm really surprised that - I, you know, I guess I could have anticipated disclosure cannot be refused solely for lack of a court order or subpoena. I'm not saying I agree with it but I could anticipate it. But my goodness, if there's a pending action - let's say we've already got a whistleblower action going on

or we've already got a John Doe case which is where someone's asking for a chat room identity and it's going through the process. You're saying someone can end run with the reveal request?

I'd like you to comment on that and others too that if there's already a pending legal process between these parties, wow, why would we interfere with that? Why wouldn't we let that take place? Thanks.

Steve Metalitz: Okay, let me just respond to that before we turn to Michele because I think that's a drafting problem here. I think lack of modifies pending civil action too so we could say for lack of a court order, subpoena or lack of a pending civil action UDRP or URS because we've heard in our discussions in this working group people saying well, only if there's a UDRP pending will I - would I disclose it so...

((Crosstalk))

Kathy Kleiman Oh okay so you would put lack of a pending civil action...

((Crosstalk))

Steve Metalitz: Yeah.

((Crosstalk))

Steve Metalitz: That's what was intended there. And, again, I'd welcome drafting changes of course. This is bracketed and needs further discussion and similarly to what James said, I'd welcome his thoughts on how this could - ought to be narrowed. But that...

Kathy Kleiman: Thank you.

Steve Metalitz: ...I think I could put your mind at ease on that point anyway. Michele.

Michele Neylon: Thanks, Steve. Michele for the record. I'm not going to put - not going to be too happy about this one. I have huge issues with D. I mean, the - if my client is a private individual who is using a Whois privacy/proxy service in order to protect their identity and there is - and the entire allegation is completely unproven and is just a pure allegation then we're going to refuse, we're going to refuse the disclosure without a court order, a subpoena or something else.

And we need to have that ability, we really do. I can't - I can't see how that - how that disclosure cannot be solely - cannot be refused solely for lack of blah, blah, blah, blah, can stand as a reason.

It's just - it's just not acceptable unless you narrow the time to complaint sufficiently so that you're only dealing with things where there is - what's the word I'm looking for - where there are no gray areas, where there is no potential abuse, where there is no potential abuse of copyright and trademark in order to get at private individuals. Thanks.

Victoria Sheckler: Hi, this is Vicky. And I'm sorry, I'm not on Adobe Connect.

Steve Metalitz: Okay.

Victoria Sheckler: If I may?

Steve Metalitz: Vicky, let's do - Stephanie was in the queue and then Vicky so, Stephanie, please go ahead. Stephanie, you need to come...

((Crosstalk))

Stephanie Perrin: Yes, sorry. I just wanted to raise the issue of cost neutrality here again. It came up earlier in our conversation this morning. But - and Michele's most recent remarks speaks to it. I don't see - (unintelligible) how a machine is going to do this no matter what you put in the subject heading. And you're

basically asking the service providers to break a contract with their customer. In my mind the evidence for breaking that contract and revealing has to be substantial.

And I don't see how a machine can make that decision. So if you're asking a human to do it that inserts quite a bit of cost particularly if that human is a lawyer which it will be if you get too many lawsuits from people like me who sue their service providers back again.

So where's that cost going to be allocated? I mean, we can't even get intellectual property folks to accept the cost of serving these things, which seems to me reasonable enough, but the registrars - if they have to make really complex determination of what's going on here, particularly if it's on a Website and they're being asked to look at the Website and decide whether it's a copyright infringement sufficient that they should reveal. And this thing doesn't add up to me so perhaps if you could provide background on the reasoning here that would be great. Thank you.

Steve Metalitz: Okay, Vicky and then Todd.

Victoria Sheckler: It's Vicky. Thank you, to James and Steve for walking all of us through the draft. And I encourage those that have concerns about it to read it in more detail. It does have thresholds in terms of what is required to submit a copyright complaint. And the Section D where it says you can't refuse because of court order, action, that type of thing, or just because it's an IP complaint, that doesn't say that you must accept it and process it because it's an IP complaint.

So I think that once you read it in detail you'll get a better sense of the types of checks and balances that we tried to put into this draft. I'm not saying that it can't be improved, of course, but we did try to address several of the issues that have been raised on the call. And I encourage you to read it in more detail. Thank you.

Steve Metalitz: Thanks, Vicky. Todd.

Todd Williams: I was just going to comment on Stephanie's question about the cost allocation. And I think James brought this up earlier. And it's a good question to think about. And, you know, essentially there's three possibilities, the complainant, the beneficial user/registrant and the provider. And, you know, in the scenario that we're talking about the complainant obviously had no kind of - gets no benefit from the existence of the proxy service in the beginning, at the outset.

And so I think, Stephanie, to answer your question, when we're talking about who's getting the benefit and who's getting the cost those should be aligned. But it just depends on how you define the benefit, is it a benefit of disclosure or is the benefit of the proxy service in the first place. That's all.

Steve Metalitz: Okay, thank you Todd. Okay let's - if we can, get through the document here since we're almost out of time. And then we can - we may be able to circle back if there's still time on some of these questions.

So E, again, deals with refusal to disclose based on the objection by the customer. Basically just the requestor has to know what that objection is, it's not enough to say the customer objects. So that's a disclosure, you know, that's a transparency issue.

And then F, all right since this system obviously retains a good deal of discretion for service providers to refuse a request, even if it meets the - everything in the template is in order, so then the question comes in is that a final decision or - you have to state a reason.

Again, that goes back to B2 stating the reason for refusing to disclose. But an issue that our group discussed at great length is that that redress or what

review would be available there. So F has two sentences, one which I think is not bracketed and one which is bracketed.

So the first sentence says that you have to have some type of reconsideration process, you the service provider, have to have some type of reconsideration process so that if the reason that you are giving is something that the requestor can correct or can dispel, there would be an opportunity to do that.

And then the sentence that's not in - that is in brackets is to have some type of review process if there's a final refusal would there be some type of review process and it's kind of outlined in the Footnote 4 there with an impartial panelist who would make this decision. Again, our expectation - if we're going to have a system that's practical it's going to be one that doesn't require this type of panelist approach except in a small minority of cases, otherwise we have a very complex and unwieldy system.

But recognizing that there may be some cases where even after reconsidering it there's - the parties are at an impasse if you will, there needs to be some way to resolve that other than simply making it an ICANN compliance matter and this is the proposal that was - has been put forward to do that.

It's phrased in quite general terms but that's, you know, that's why it's bracketed. I mean, it's bracketed because some service providers aren't comfortable with the concept at all but even given that there are still some - perhaps some issues to be resolved as far as how that process would work.

So that takes us through the document. The annex deals with the issue that I know Phil Corwin flagged also in the chat about resolving disputes that - about if there's false statements that lead to improper disclosures, there are a couple of options for dealing with that through arbitration. There could be a jurisdictional provision.

In other words this also needs further discussion but that's in the case where disclosure is made and then it's later learned that the statement underlying it was false so it's, again, a safe - it attempts to be a safeguard against abuse.

I'll - we're almost out of time but let me ask Stephanie if she has an additional question or comment. Or is that an old hand? Okay that's an old hand. All right well we have succeeded in walking through the entire document. People have raised a number of questions and issues which I hope we'll have some discussion of on the list.

Again remembering that our goal here is to have a system that is predictable and has some reliability to it while at the same time preserving a certain level of discretion and safeguarding the interests of customers so that was the goal.

And we'll think about how best to move this discussion along next week but I hope people won't necessarily wait until next week but can offer their contributions online during the week so that we can make some progress on discussing this approach.

So since we're now about out of time we'll conclude the meeting here. Thanks, everybody, for their participation. You can end the recording.

Woman: Thanks, Steve.

Jim Bikoff: Thank you.

Terri Agnew: Once again the meeting has been adjourned. Thank you very much for joining. Please remember to disconnect all remaining lines. And have a wonderful rest of your day. (Francesca), you can please stop the recordings.

END