

**ICANN Transcription
Privacy and Proxy Services Accreditation Issues PDP WG
Tuesday 17 March 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 17 March 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-pps-a-17mar15-en.mp3>

Attendees:

Frank Michlick – Individual
Justin Macy - BC
Val Sherman – IPC
Griffin Barnett – IPC
Kathy Kleiman – NCSG
Darcy Southwell – RrSG
Todd Williams – IPC
Steve Metalitz - IPC
Graeme Bunton – RrSG
Jim Bikoff - IPC
Holly Raiche – ALAC
Kiran Malancharuvil – IPC
Volker Greimann – RrSG
Alex Deacon –IPC
Sarah Wyld – RrSG
Stephanie Perrin – NCSG
James Bladel – RrSG
Tatiana Khramtsova – RrSG
Susan Kawaguchi - BC
Terri Stumme – BC
Phil Corwin – BC
Luc Seufer – RrSG
Osvaldo Novoa – ISPCP
David Hughes – IPC

Chris Pelling – RrSG
Paul McGrady – IPC
Susan Prosser – RrSG
David Cake - NCSG

Apologies :

Don Blumenthal – RySG
Lindsay Hamilton-Reid – RrSG
Richard Leaning – no soi
Michele Neylon- RrSG

ICANN staff:

Mary Wong
Marika Konings
Danielle Andela
Ariel Liang
Terri Agnew

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

Terri Agnew: Thank you, (Francesca). Good morning, good afternoon and good evening. This is the PPSAI Working Group Call on March 17, 2015.

On the call today we have Alex Deacon, Holly Raiche, Steve Metalitz, Val Sherman, Tatiana Khramtsova, James Bladel, Todd Williams, Chris Pelling, Graeme Bunton, Justin Macy, Sarah Wyld, Kiran Malancharuvil, Kathy Kleiman, Paul McGrady, Griffin Barnett, Volker Greimann, Osvaldo Novoa, Terri Stumme, Susan Prosser, Darcy Southwell, and Phil Corwin.

I show apologies from Lindsay Hamilton-Reid, Dick Leaning, Michele Neylon, and Don Blumenthal. From staff we have Mary Wong and 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. It's my - I drew the short straw this week to chair this call, so I assume Graeme will be back in the saddle next week.

So we've got a fairly good turnout. And let me just start the call by asking if anyone has any updates to their Statement of Interest that they wish to share with the group.

Okay, hearing none, we'll continue our discussion on Category F, the disclosure standards. And a fairly extensive revision was circulated by Kathy yesterday afternoon. So unless people have another way that they wish to proceed, I would suggest that we just ask Kathy to walk through the document and point out the main changes that she is proposing. And then we can discuss those and see where we are. So Kathy, are you...

Kathy Kleiman: Can you hear me, Steve?

Steve Metalitz: I can hear you.

Kathy Kleiman: Terrific. Well thank you for the invitation. And hopefully not extensive changes, but ones - I mean we really haven't had the chance to go through kind of line by line and talk about edits.

So the big thing that we'll talk about -- and it doesn't come till Section 3 -- is really kind of a standard for the reveal, and trying to create a

balanced standard for revealing under cases of clear cut infringement. So maybe we can kind of - do you want to start with that? Or go through line by line? Wherever you'd like to start.

Steve Metalitz: I'm happy to do it either way. I'll leave it up to you how you wish to proceed. If you want - I think people have control of the document in the chat, in the Adobe, so if you want to start...

Kathy Kleiman: Actually let me just start by going through it, and then, you know, when we get to some of the big stuff, it will be, as always, you know, Section 3.

Steve Metalitz: Okay.

Kathy Kleiman: Okay, so in Section 1, the service provider intake for requests, recommendation for Roman numeral small vi, that nothing prevents the service providers from sharing information among each other, if a requester has been revoked or blocked. I think that makes sense because then, you know, if there's a bad actor in one place, others will be on notice. And it will save time, I think, because providers work through this process.

Steve Metalitz: Kathy, let me just interrupt you for a second here.

Kathy Kleiman: Sure.

Steve Metalitz: Folks, other folks on the call, if you have questions or comments, feel free to raise your hand. Or if you're not in the Adobe room, speak up. We won't necessarily go through the whole document before questions. So when you have a question, you can raise it.

And I'll just ask Kathy. I see you've made some changes also to take out the reference to illustrative example of disclosure standards. Could you explain - I think it was originally proposed as one example of how a certain kind of request would be processed. So...

Kathy Kleiman: But aren't these the disclosure standards for intellectual property requests? It may be an illustrative example of disclosure standards, but it seems to me this is the standards that we're setting for intellectual property requests. Am I missing something there?

Steve Metalitz: No, I think that's right. It's just that it's an illustrative example in the universe of all requests. But...

Kathy Kleiman: So maybe there's a way to better phrase that. But it seemed to me it left open that this may be an example for intellectual property, where here I think we're really trying to nail down the world of intellectual property requests.

Steve Metalitz: I see James has his hand up. So James, go ahead.

James Bladel: Hello? Hello?

Kathy Kleiman: Hello.

James Bladel: Okay. For some reason I came on and there seemed to be a lot of background noise on my end. Yes, James speaking for the transcript. Thank you.

And sorry to take this on a bit of a tangent here, but I don't see the change you're discussing right now where you say Kathy removed illustrative example, because I remember I think it was my intervention that put that in. So I would like to understand this change, and I don't see it. Can you help me out where that's located?

Kathy Kleiman: I think it's in the top line, top sentence. And...

James Bladel: Oh, okay. The title.

Kathy Kleiman: The title.

James Bladel: Thank you. I was hoping for a section number, but I see it now. Okay, thank you.

Kathy Kleiman: James, let me ask. Are we missing something? Is this an illustrative example of intellectual property request? Or an illustrative example of disclosure standards?

James Bladel: Yeah, so...

Kathy Kleiman: Wordsmithing first thing in the morning.

James Bladel: Yeah, and I'm racking my brain a little bit on why we put that in there. I think that there was a concern that we were perhaps backing either reporters or providers into too small of a corner.

And so we were essentially just emphasizing that this was an example standard, and that the providers would build their policies around the

standard, you know - but somebody bail me out here. I'm talking, but the brain's disconnected. Thanks.

Steve Metalitz: This is Steve. I think Kathy's correct that this is intended as an illustrative example of the kind of standards that would apply for intellectual property requests. But recognizing that there are a lot of other types of requests that could be made, we weren't trying to deal with all of those. So I don't know if we need to resolve this wordsmithing questions right now. I'm not sure there's a substantive disagreement.

So Kathy, why don't you just go ahead. I think you've just talked about Roman vi, which is...

Kathy Kleiman: You know what? Let's jump to Roman numeral III, because that's really where we've been this whole time. I think that's maybe where people's heads are -- service provider action on request.

According to my navigation of the document on the screen, it's Page 6. And right up at the top, Roman numeral III, service provider action on request. Does everybody have that?

Woman: Yep, yep.

Kathy Kleiman: Great. Thanks. So everybody has it. Thanks. So okay. So in A, we hadn't filled in a number of calendar days that the customer has the opportunity to respond to the service provider. We've discussed different time frames.

And so we kind of put out the call. Non-commercial stakeholders group put out the call to some of the public interest groups in the US and in Canada that do work with responses on reveals and other situations like some of the copyright takedowns and reveals that we've been talking about.

And they said 30 calendar days is the standard. And knowing that we always want to work faster than the rest of the world, we put in 15. I don't think that'll be enough in August for people in Paris, but it's more than seven days, which had been discussed.

And so it seems reasonable. That would give people time to kind of get the query, process it, consult an attorney if they need to, respond. And so anyway, that's a proposal that's out there. Going down to B, those edits aren't mine.

Steve Metalitz: If there are any comments on that, people, feel free to raise your hands in chat or just speak up. Go ahead. Go ahead, Kathy, continue.

Kathy Kleiman: Oh, okay. Sorry. I guess we should just - Steve, maybe do you know whose edits are in blue? Are those staff edits? Are those edits that we've talked about?

Steve Metalitz: Yeah, these are - let me just get my...

Kathy Kleiman: Because maybe it's worth us going back and forth and kind of reviewing the full set of edits as we go through.

Steve Metalitz: I mean I think these are ones that were in there before. Let me just...

Mary Wong: Steve and Kathy, this is Mary. Yeah, these blue edits were, I think, in last week's version. And they were the staff attempts to capture discussions from the week previous.

Kathy Kleiman: Makes sense.

Steve Metalitz: I don't see any blue edits in 3A. Are you referring to - I mean maybe my color scheme is different, but I think Mary's correct that the ones that are not from you, Kathy, are Mary's edits trying to reflect the discussion in previous weeks.

Kathy Kleiman: Okay, terrific. In B, no proposed edits. So down to C. Disclosure can be reasonably refused for reasons consistent with the policy stated herein, including - I wasn't sure what for example but not limited to meant. So I crossed out one, but if that means, you know, something different, it's just a proposal.

Really what counts here is C2. There were three different choices. And before we put it up for public comment, I thought that we as a working group should decide what the choices - you know, which choice we wanted. So again, we're talking about disclosure cannot be reasonably refused for reasons consistent with the generally policy stated herein.

Number two, that the customer has objected to the disclosure and has provided, and the choices are substantive, detailed or adequate reasons against disclosure. And so I wasn't sure if the option was available to choose, because it looks like those are choices, so I would like to propose we choose adequate reasons against disclosure. And I know that...

Steve Metalitz: Mary, can you help us out here? Because I know the original language was compelling. And how did we get to these other options?

Mary Wong: Hi, Steve. Hi, Kathy. Hello everybody. This is Mary from staff. That's exactly right, Steve, because as I recall, I think it was two weeks ago, there was some discussion around the use of the word compelling.

So in the edit that we sent, I think it was last week, not just in Section C here but further above, the part that we just covered, we did take out the word compelling. And in the former section we basically said the customer has to give reasons.

And then here, as Kathy noted, we offered a couple of options to see if there was a need to have at least some indication of what the type or the extent of those reasons ought to be. So none of these were anything that was agreed to. It was simply our attempt to try to avoid the word compelling, but to try to provide some sort of possibility for discussion.

Steve Metalitz: Okay, I mean this obviously begs the question of any of these adjectives, you know. At this point in the process it is the provider's decision as to whether the reasons that were given by the customer are compelling, substantive, detailed or adequate.

So I guess I'm not sure necessarily what the significance is until we know what the standard is really supposed to be, which I guess you're probably getting to, Kathy. But Holly has her hand up, so Holly, please go ahead.

Holly Raiche: Yeah, it's just a preference for either compelling or something that says this is not just reasons but actually compelling or substantive reasons. Adequate sort of doesn't get there for me, because it's - when we're talking about situations where we're revealing someone's personal details, we'd want to be really very clear in our minds that in fact we're talking about the reasons that would allow that sort of reveal.

And adequate - I think it's an American term, slam dunk, reasons. I think that would translate more into compelling or substantive reasons, not adequate. That's just my feeling. Thanks.

Steve Metalitz: Holly, just as a point of order here or information, this is about the reasons the customers give not to disclose. We already have in 2 what the requester has to put forward, the prima facie case that they have to put forward. So that's already spelled out there, and this is on the other side of it.

Holly Raiche: Well...

Steve Metalitz: And but it's a provider's decision...

Holly Raiche: Isn't it both?

Steve Metalitz: To put it forward.

Holly Raiche: Aren't we actually sort of saying, well in both cases there ought to be really good reasons?

Steve Metalitz: Yeah, maybe. But all I'm saying is what has to be put forward on the requester side is kind of spelled out in Part 2 of the document.

Holly Raiche: Yes. I see what...

Steve Metalitz: Other comments on this C2? Or other views about how that should read? Well go ahead. Kathy, why don't you move on to C3.

Kathy Kleiman: To C3. Great. Thanks, Steve. So this is adding something that we've talked about, and seem to be in general agreement. So I thought I'd add, the provider has found -- fill in the blank -- adequate reasons against disclosure. And this is the default situation that we've been talking about. The customer doesn't respond, and yet it's Paris and it's August and it's a battered women's shelter.

So the provider can look independently. And this is again something that we've talked about that didn't appear to be any objections. So just elaborating that the provider has the right, not the obligation, to look independently and see if there's something - some situation that would mitigate against reveal, even if the customer hasn't responded.
Thanks.

Steve Metalitz: Okay, and we have a queue of people wishing to comment on this. So Kiran, Val and James. Kiran, go ahead.

Kiran Malancharuvil: Yeah, I'm sorry. I'm a little slow this morning. I actually just wanted to make a very brief comment about the use of compelling versus the use of adequate. I think that I would prefer for us to use language that shies away from the subjective element as much as possible.

I think that compelling seems to have more of a subjective element than the word adequate. I think that adequate means that it fulfills certain criterion which we spelled out here, you know, herein; whereas compelling gives more, in my opinion, discretion for the provider to say this isn't good enough, or that's not good enough.

And that's kind of what we're trying to eliminate in this document, in my opinion, is, you know, the ability of these kind of, you know, fringe and rogue registrars to kind of use any excuse to, you know, deny the request. So that's my two cents on that. I'm sorry for going back. But yeah, it's even earlier here than it is for James. So thanks.

Steve Metalitz: Thanks. Thank you, Kiran. Val? Go ahead.

Val Sherman: Hi, this is Val. Can you hear me?

Steve Metalitz: Yes, I can.

Val Sherman: Okay, great. So my comment is on C3, and I apologize. I may be a little bit confused, but is this the proper place to put, you know - I have to be honest. Maybe it's my cultural ignorance. But I had to Google what happens in August in Paris before this meeting. Is this a proper place for this note as far as disclosure being reasonably refused for this particular reason?

Perhaps, you know, arguably this is when a provider may need some additional time and if, you know, we can discuss that, you know, perhaps under B3. But I understand the intent that the provider may have - may act on its own information and research it because

(unintelligible) doesn't respond. And that's, you know, reasonable to an extent.

But some of these situations - I think the note is what confuses me, and I wanted to know if maybe we can - Kathy can clarify how this fits into reasonable refusal. Thank you.

Kathy Kleiman: Steve, may I? It's a great question. The note is not intended for the final text. I just wasn't sure if, you know, comments in the comment bubble would get reflected in, you know, the Adobe system. So the note is just intended to be kind of an example. But, you know, we can also do, you know, the month of December. So...

Steve Metalitz: Yeah, I'm a little uncomfortable with the suggestion that we've agreed that August and December in Paris, intellectual property rights are suspended.

Kathy Kleiman: Let's delete the note. We can do it right now. Maybe Mary could do that -- just take out that whole thing.

Steve Metalitz: I think the point that Val was making also is that we sort of have something to deal with this, which is B3, if there's some reason for delay. But in any case, James, let's go ahead with you.

James Bladel: Hi, thank you. James speaking. So I think yes, dropping the note's probably a good idea from C3. I just had another suggestion for C3, and it's really - I hope it's not wordsmithing, because I think it does contextually make more sense if we invert that sentence.

So instead of saying that the provider has found adequate reasons against disclosure, we would say something along the lines of the provider has not found adequate reasons for disclosure. I think that's in keeping with understanding - with supporting the sentence that's laid out in C, which is, you know, why a disclosure can be reasonably refused.

If we want to keep it the way that it is, then I would say instead of reasons against disclosure, I would say reasons for refusing to disclose. I just - I don't think it reads very well. That's all. Thanks.

Steve Metalitz: Okay. Thanks, James. Val, is that a new hand or an old hand? I guess my concern with your suggestion, James -- and then we can move on from this -- is that the whole point of Section 2 is to say, here's what you need to put forward to get disclosure.

And if - obviously it's not automatic. But I think it's fair to have some expectation that if you put forward all that information that is requested -- and Kathy's added some additional information there which we'll come back to, or proposed adding it -- then, you know, you're in the game.

So to say that there isn't adequate reason for disclosure, well we've given you what you've asked us for in Number 2. I guess maybe you could say that the request doesn't fulfill the requirements of Section 2. That might be one way to deal with it. But otherwise, I'm a little concerned about that shift that you've suggested.

The other question, of course, is again - well maybe we'll get to this about what reasons would be considered adequate. Let's just see if

people have other comments on C3, or should we move on to - I guess the next substantive change is in C5. Okay, C5. Kathy?

Kathy Kleiman: Okay, thanks. So this is - let me just review. This is kind of - this may be a compromise between creating a complex case type of advisory group or some other kind of group. This is being presented kind of as a middle ground. So Number 5, which is at the top of Page 7 on the document on the screen.

Requesters shall understand and honor the standard that PPSI reveal will be limited to, quote, slam dunk, close quote, cases of obviously clear-cut infringement, in which the requester presents an obviously, clear-cut case of trademark or copyright infringement, and in which the provider - the customer, sorry - the customer does not provide or the provider is unable to find a clear reasonable dissent to the use of the trademark or copyright, including but not limited to - and here.

This is a list basically from the URS, that the customer's commonly known by the name, such as last name; the customer's using the domain and/or trademark before the requester's trademark existed; the customer's making or using - hello?

Steve Metalitz: Yeah, go ahead.

Kathy Kleiman: Okay, using the copyrighted material or trademark for fair use, fair dealing, parity under tribute sites, and/or education research and advertising using competitors' names and countries where such conduct is legal. So there'll be a lot of, you know, words and changes offered. But the concept is the slam dunk case of clear-cut infringement without a really good defense.

Steve Metalitz: Okay. Thank you. Let's see. I see Todd has his hand up. And if anybody else wants to comment, either put your hand up or speak up if you're not in Adobe. Go ahead, Todd.

Todd Williams: Thanks. Todd Williams for the transcript. And Kathy, you may have already answered the question I was going to ask. You used the phrase middle ground. I was a little confused when these came in because this draft and the draft from staff that included the detailed language on the complex case advisory group, came in kind of around the same time.

And I wasn't sure if we were supposed to view these as mutually exclusive. My guess is the answer to that is yes, because presumably if the standard is slam dunk, there would not be any cases to send to the complex case advisory group. It would be an empty set. And I think that was what you were hinting at when you prefaced the comments. But I didn't know if there was any further explanation on that.

Kathy Kleiman: Steve, may I?

Steve Metalitz: Yeah, go ahead. Go ahead, Kathy.

Kathy Kleiman: Todd, it's an excellent point, and I don't want to speak for all the people on the call. I mean this is something we really need to discuss. But last week when the complex case advisory group was presented, there was a lot of concern about it.

So Todd, you're right. This is envisioned as an either/or. And if you have the slam dunk case, then you probably don't need the advisory

board. That's what I'm thinking, but others who have thought about this, you know, for the whole week, may have other views. Thanks.

Steve Metalitz: Thanks, Kathy. I see Kiran's hand is up. Kiran, go ahead.

Kiran Malancharuvil: Hi. I'm really kind of uncomfortable with this whole paragraph. And I think it's not necessarily the obvious clear cut cases issue, but rather the kind of attempts to boil down like trademark law in general, I guess, into this paragraph.

I think that - I understand that you have the language here including but not limited to, but it's just - it seems like there's an attempt to put some fairly, you know, complex and nuanced concepts into this agreement in a way that limits - kind of, I guess, limits the rights of the requester, and kind of expands the rights of those, you know, attempting to make a fair use argument.

I don't know what the solution is, I think, for this. But I certainly don't want this to be the language in here. So I think I preferred the more kind of open language we originally had around this issue. I guess I'm curious to see what the other IP pros on the call think. But it just seems a little like we're attempting to encapsulate a very, very large concept into a very small paragraph here.

Steve Metalitz: Okay. Kathy, did you want to respond?

Kathy Kleiman: Yeah. If you're uncomfortable with everything after including but not limited to, it was more illustrative than other things. But here what we have is a situation where the registrant side, the customer side, is very concerned about these complex cases and, you know, which we've

talked about as fringe cases or minority cases which, from a speech and expression perspective, are very, very important

And so putting something in is very important for a number of us. And so we've been experimenting with different ways to do it, and this one seems to work. But if it would make you more comfortable to cross out kind of the illustrative examples, anything after including but not limited to, unless others had objections, that would be fine.

Kiran Malancharuvil: Yeah, so I think that would probably be a good start. I think also I would not use the phrase slam dunk, to be honest with you. I would look like - maybe I would say something that made it a little less - I don't know what I'm trying to say here.

Would it be possible maybe to go and look at something else that we've done, like when we did all the language for the URS, to see if there's, you know, a somewhat - yeah, okay, so Mary put in the chat probably what I'm struggling to say.

It's a culturally difficult term. It's also - and I don't agree with (Stephanie)'s comment about irrefutable, because I don't think that that's what we're aiming at either. I think we're going for - what's (unintelligible)? Clear and convincing evidence? And so I get what we're trying to do here, and I get that we don't want a turn privacy proxy providers into, you know, people that are making determinations on nuances in the law.

But the whole language of this paragraph, including the part that you said you would take out, which is great, is just a little bit too tilted in the wrong direction to me. It's not as clear. It's not as easy. It's not as

usable. And I think that we have good examples of language that we've developed around this same concept, and I think maybe we should look at that and try to put that language in as opposed to this language as it reads now. Thanks.

Steve Metalitz: Okay, James?

James Bladel: Hi, Steve. James speaking. And to Mary's point, I think - yeah, slam dunk needs to come out, and that we should probably, wherever possible, mirror the language that was used - that is used and is in effect for URS, as that was essentially what was in front of mind when I think we were trying to hammer out this compromise between what the providers have to do and what the registrants, what sort of protections the registrants are seeking.

So I think that's a good - that paints us a roadmap in the right direction. If we can take a look at URS and say what standards have been established there and can we mirror that language where appropriate? Thanks.

Steve Metalitz: Okay so there seems to be interest in looking at the URS. I think slam dunk will not - or slam duck - will not be used. But I guess again I'm just looking at this and I see two standards.

One is obvious clear cut infringement and then this is obvious clear cut case of trademark or copyright infringement. So I'm assuming those are the same thing basically.

Kathy Kleiman: Yes.

Steve Metalitz: So in other words, you're saying Kathy that the provider should look and say, "Is this an obvious clear cut case based on what was submitted under Part 2?" And then, you know, the provider has told the customer and the customer has come back with something. Is that a clear or reasonable defense? That's question two.

And then question three is even if the customer doesn't come back with anything, you're suggesting the provider should look and decide whether there is a clear or reasonable defense.

Kathy Kleiman: That providers may look. And maybe we need to (unintelligible).

Steve Metalitz: May, yes, yes.

Kathy Kleiman: May look and see. Again the classic example is a battered women's shelter.

Steve Metalitz: Well I don't think that's classic of anything because that's not about whether there's a clear cut case of infringement or whether there's a reasonable defense. That's about the character of the registrant or of the customer.

So I'm not sure that that's really relevant here, but I just think that we need to - you know, I think (Kirin) had mentioned earlier, you know, if we can make these standards as objective as possible and maybe - and there's a limit to what we can do with that, I'm sure.

But I just would focus on these phrases - obvious clear cut on one side; clear or reasonable defense on the other side, and see if - as

people think about whether those are the right phrases or again maybe whether we can borrow something from URS that is more useful here.

I would just point out that URS of course only covers a subset of the kinds of cases we're talking about here. But in terms of the level of evidence, perhaps we can borrow from that. So...

Kathy Kleiman: And for what it's worth, that's what we were working on over the weekend was URS type standards. That's where the term "slam dunk" comes from. Even though it's not embedded in there, that was kind of what we were talking about in the early days of the URS. So yes, that's a concept.

Steve Metalitz: I think you mentioned that in your earlier post.

Kathy Kleiman: Right, so the concept being embodied. Thanks.

Steve Metalitz: Well okay, let me just see if there's any other comments at this point on C5. There's clearly some more thinking and work to be done on this.

If not, can we move on to - D I think you just added "lack of" in a few - "lack of" was originally there in one place. We added it in two other places and you put it in two more. So...

Kathy Kleiman: Exactly, so that is lack of UDRP, lack of URS. You know, if anything else is going on we stay out.

Steve Metalitz: That's fine, okay. And of course that remains in brackets. Then we have E...

Mary Wong: Steve sorry, this is Mary. I think Val had her hand up and I did as well.

Steve Metalitz: I'm sorry. I apologize. I'm trying to multi-task here and not successfully. So Val please go ahead and then Mary.

Val Sherman: Hi this is Val Sherman again. I'm sorry, I don't mean to back track but I wanted to make a point about C5. And perhaps I'm reading something into it that isn't really there, but I'm a little bit - I'm wondering what the terms "shall understand" and "honor the standard" of these, you know, slam dunk, obvious, clear cut infringement cases.

I'm just - I guess because we still have yet to talk about, you know, sanctions and potential information sharing and black lists of providers who engage in this kind of, I just want to make sure that this is not kind of going there - what if clear cut might be - I don't want to say debatable - but, you know, a requester that submits a case that may, you know, ultimately be refused as perhaps not as clear cut as a requester thought I hope will not be sanctioned.

I guess I'm just wondering if we can table the discussion of sanctions in that particular terminology till some point of time and not, you know, accept it as agreed-to language. I don't know if that was clear or not. I'm just a little bit concerned about the understanding in honoring the standard (unintelligible).

Steve Metalitz: Yes, Kathy do you have any comment on understand and honor and why that's in there?

Kathy Kleiman: I think we can definitely work with the wording.

Steve Metalitz: Okay because again this is to the requester, and it's not clear - if I were a requester I'm not sure what I would be supposed to do as a result of this. But okay. Mary go ahead. I'm sorry to overlook the hand.

Mary Wong: No worries Steve. Thanks very much. This is Mary from staff again. So I had two comments. I think both have been covered to some extent by Steve and Val so I'll just make it quick and do as a follow up.

I think in terms of the understand and honor, I think staff looking at it from a drafting perspective we're a little concerned that this seems to be placing some sort of affirmative obligation through a non-contractual framework. And so to the extent that Val's suggestion about putting it elsewhere under a more general heading might work better in that respect.

Secondly - and this is I think related to something Steve said earlier that in terms of what is a case of obvious clear cut IP infringement, again just thinking about it from drafting and mirroring, it didn't really seem that it was sort of the exact opposite or reflection of the setup important minority cases we were discussing earlier.

There seems to be either some overlap or some gap in there. And so my question I guess was to the group that put this forward as well as to the requesters and providers that worked on the framework, if language in C5 right now goes forward, then essentially this is the universe of the disclosure request that will be honored.

And if that's what's intended then that's great. We should put it in there. If there is something that's missing or something that's

supposed to be broader then we probably want to reevaluate this language. Thanks.

Steve Metalitz: Okay thanks Mary. That's a good point. I mean I think, you know, there's a couple references in here to what's the general policy and what's the general standard but we don't actually spell it out. And the question is, is this it? And if so, is this sufficiently clear and definite on both sides?

What's an obvious clear cut infringement? What's a clear or reasonable defense? How would you establish those things? Those are good questions to think about in terms of how this would be phrased.

Unless there is other comments on C5 and we've already been through D - Kathy do you want to move on to F and explain your proposed edits there?

Kathy Kleiman: Sure, but just to note regarding C5 that this is probably the right section for this because we're talking about disclosure and when disclosure can be reasonably refused. So whatever the final wording, this is the right place for it, probably not someplace else. Okay so D was lack of...

Steve Metalitz: I think F was your next...

Kathy Kleiman: F. Okay this is about making sure - well, this is about something we really haven't discussed and I think we need to, which is the annex. And the annex is where the appeals are or the arbitration, the right to go to a third party for a review of the provider's decision.

And so this is a much longer discussion and we really haven't got to the annex. But certainly before we close Category F we really should, and talk about what are the standards for an appeal for lack of a better word. We may call it something else later.

Do you want it - do we want to draft it so that there's a high standard, a high threshold for appeal or a low threshold for appeal? Can everybody appeal or can only certain special cases appeal? Do we defer largely to the provider's discretion or not? There are lots and lots of open questions.

The purpose here was to make it as accessible - whatever standard we create high or low - to make that appellate process as accessible to customers as it is to requesters. But again I think this is a big open issue. Thanks.

Steve Metalitz: Okay, other - let me just make one clarification on this. The annex actually is not about appeals. The annex is about a method for dealing with disputes when there's been a disclosure based on a false statement. And this was very important to some of the providers, which is why it's in there that we have some way of dealing with that problem.

The appeals thing I think is what - what you see in F is - and the footnote - is what was - that's about it in the framework as far as appeals go. So just to clarify, those are two somewhat different things.

You know, one takes place after disclosure has occurred and someone claims that it was based on false pretenses if you will. The other is

within the process of deciding whether a disclosure will occur I guess is the way to put it. So there are two separate things.

I guess the other question I would have about customer appeals is how that affects the timeline because again the timeline here -- and whether it's 15 days or whatever we come up with - it kind of marches through and after 15 days unless there's been an extension in an unusual case, you would know whether you would get disclosure or not.

But if there's going to be a customer appeal, then presumably, you know, there has to be some method for telling the customer we're going to disclose and the customer gets a second bit at the apple if it hasn't responded the first time. These are just questions that would have to be addressed I think about the appeal process.

Kathy Kleiman: Steve can I ask a question? And maybe I misread but isn't it drafted now that the provider - no sorry, the requester who gets turned down - has a right of appeal?

Steve Metalitz: Yes that's how it drafted. It's how...

Kathy Kleiman: In each and every case.

Steve Metalitz: Well first there's a reconsideration. And then there's a - you know, basically just asking the provider to relook at it and then as it's drafted - and this was bracketed - that there would be this ICANN approved review process.

Kathy Kleiman: Okay.

Steve Metalitz: So that's how the framework was drafted. I'm just raising some issues that if we went to a system in which both sides can appeal we would have to incorporate that into the timeline and so forth.

Okay let me see if there are any other comments on F. Okay so two things in F. One is that an appeal would be from both sides and second that there would be some threshold. Appeals could only go in exceptional cases.

Kathy Kleiman: That's the proposal.

Steve Metalitz: That's the proposal, okay. Todd?

Todd Williams: Thanks. My question is on the second of those two points - the exceptional case threshold. I don't quite follow how that would be implemented. Obviously the party that wants to appeal files the appeal to the dispute resolution provider and the provider then either reviews it or doesn't.

I don't quite follow where in that the exceptional case threshold gets fleshed out unless we're assuming that the provider has some sort of bifurcated process where they first do a quick look and then go do a more full look. I guess I don't quite follow that.

Kathy Kleiman: Steve should I respond?

Steve Metalitz: Yes Kathy, sure, feel free.

Kathy Kleiman: Okay sorry this isn't a very good response Todd but can I recommend that we have actually - we set up a meeting, a Tuesday meeting, to

really talk about the annex, which seems to have many open sections and many - it seems to be an open process on all sides.

And so that, you know, we can put this language on hold for right now pending what happens with the annex, but I think kind of the one-page annex is really a set of notes on an appeals process that hasn't been fleshed out on...

Steve Metalitz: Kathy?

Kathy Kleiman: ...on the standards on anything.

Steve Metalitz: The annex is not about appeals. It says, "Some options for resolving disputes arising from alleged false statements leading to the improper disclosure." So it's a different process. I think your appeals question is separate.

But if you're suggesting that we have a call that's focused on appeals that, you know, that may make sense to do that. But it's just not the same thing as the annex. The annex is there...

Kathy Kleiman: But Steve any controversy...

Steve Metalitz: Maybe the providers can help out on this, but this is for a situation where there's been a disclosure. It's too late to appeal. It's been a disclosure and then the provider has some concern that the statements that were made under penalty of perjury that led to the disclosure were false. That was the concern that motivated this.

Kathy Kleiman: That is definitely one of the paragraphs for the annex. But there's another one. "Any controversy, claim, or dispute arising between the service provider and the requester shall be referred to and finally determined by a dispute (unintelligible).

Steve Metalitz: Right but it says as a result of alleged wrongful disclosure of the customer's contact information. I think you took that out but that's - I'm just describing how the annex...

Kathy Kleiman: Oh I see.

Steve Metalitz: ...read before you changed it. So you took out as a result of alleged wrongful disclosure of customer's contact information.

Kathy Kleiman: I think we really do need to talk about this annex because it has - I think it deserves its own discussion then.

Steve Metalitz: On the question of...

Kathy Kleiman: The question of who has access to it, when they have access to it.

Steve Metalitz: The question of false statements leading to improper disclosures.

Kathy Kleiman: On what was originally intended.

Steve Metalitz: Okay well...

Kathy Kleiman: Because those of us who weren't involved in the drafting appear to have some real questions about when it's available, how it's available, who it's available to.

Steve Metalitz: Okay well I'll ask - I don't know Volker or others who were involved in this - (James). Feel free to weigh in, but I'm just saying that this is not the same thing as appeals. But appeals is really dealt with very - in the framework - is dealt with pretty tersely. And it may well need a lot more discussion.

Okay let me just see in terms of the time here to see if we can get through this. Can we turn to 3 - unless there's other comments on 3F - can we turn to 3G?

Kathy Kleiman: Sure, very important. So 3G and also again the appeals - okay so the appeals are more embedded in the text of this itself, so interesting. So the annex and the appeals are both things to talk about in future meetings. Thank you for pointing that out.

Okay so 3G. "Nothing in this proposal shall prohibit a provider from determining the customer's use of the service, may violate its terms of service and reveal the underlying information despite the criteria of this proposal not being met."

I think this is an addition that very much reflects what's earlier in - let's see if I can go back to...

Steve Metalitz: In 1C?

Kathy Kleiman: 1C. And Volker - I hate to put you on the spot, mate - can I ask you to speak to this? Feel free to say no.

Volker Greimann: Apologies. I had to take an urgent call so I'm not quite up to speed where we are right now.

Steve Metalitz: I think we were talking about 3G Volker in Kathy's red line, and how this differs from 1C in the original framework.

Kathy Kleiman: Nothing in this proposal shall prohibit a provider from determining the customer's use of the service may violate its terms of service and reveal the underlying information, despite the criteria of this proposal not being met. So this is very much still the discretion is with the provider type of understanding...

Volker Greimann: We were discussing offline the - we were discussing offline the criteria that has been met, and I was just concerned that in the draft that we've been discussing and going over, this point was lost. So I wanted to raise that and I didn't have the entire paper in front of me so if that has already been covered, this business of duplication, then of course it can be removed at this stage.

I just wanted to clarify that it's the provider's prerogative to remain the provider as it is now, that if a domain name registration violates its terms of service then of course it would be able to take action even if the threshold level of the complaint has not met. If he makes a determination that the terms would be violated, then that would also be a reason for a disclosure.

So I just didn't want to have the disclosure limited to only cases that are brought by complainants but also give the provider a prerogative to say this is not something that we support. This is something that

violates our terms of services. This is something that we will stand for with our name.

Steve Metalitz: Right. Okay. Thank you Volker. Yes I guess I would just ask people to look at 3G and 1C and see if - they seem somewhat duplicative to me but maybe there is something that maybe they could be combined or maybe there is some need to have both. So let me just ask folks to look at that.

Okay can we go back to 2 where you made some changes in the templates as well or you suggested some changes? And we've skipped over that because we wanted to get to 3, which is kind of the meat of the meal.

But can you just briefly - because we are coming near the end - Kathy do you have any comments you want to make on 2, in particular I guess 2A-3? I think this is pretty much in all of the templates, so just maybe you could spell out where...

Kathy Kleiman: Right and thanks for the opportunity again, for this whole discussion today. So 2A-3 raises the question, the concern that the person filing may or may not be the trademark owner themselves. So that if it is a representative, how do you identify them?

So the communication may be through a lawyer but under the circumstances it makes sense to know who the trademark owner or the copyright owner is, especially as there may be different jurisdictions in place.

So it may be a U.S. company with a European lawyer or an Asian lawyer. So we hadn't really talked about that provision of if someone else is filing on behalf of the intellectual property owner.

And so in both the template A3 or B3 and other cases as well as the very, very bottom, that last line of each template, you know, clearly identifying who the signatory is because, you know, somebody is making a big statement here under, you know, penalty of perjury if we choose to go with that high standard, that there is an infringement action. It would be good to know who they are. Thanks.

Steve Metalitz: Okay let me see if there are any comments or questions on that. It's not that clear to me why the nationality of the lawyer makes a difference but maybe I'm missing something here.

Okay so these are the changes. I mean you've got that I think in all three of the templates, including the copyright one.

Kathy Kleiman: Right. So trademark needs to be changed to copyright, absolutely.

Steve Metalitz: Yes. So we'll just ask folks to take a look at that. Okay, so have we now gone through - now what comes next is this draft language on disclosure and human rights. And I think we were talking about - or there was some reference that this is an alternative way but that if your language had been the slam dunk language were in there...

I'm trying to understand what's the significance or the - where we are on this draft language on disclosure and human rights which was circulated during the week. We obviously should talk about it unless

people think it's become moot as a result of Kathy's proposal. Kathy do you have a - is that your sense or not?

Kathy Kleiman: Well the proposals haven't been accepted yet, so I think we're still kind of wrestling with the question of difficult cases. And so there are now various alternatives on the table for how to solve that. Does that make sense?

Steve Metalitz: Yes. Okay so I'll open - we just have a couple minutes remaining - but we could certainly open it to comments. This is the language that I think Mary circulated a couple days ago. And I'll ask if people have comments at this point on that. Todd and (Stephanie).

Todd Williams: I'll go real quick. This just gets to the question I was asking earlier. If this is an either/or as Kathy outlined, my recommendation would be to focus on getting 3C-5 to a point where, you know, there is consensus, which it feels like we're not that far away from and feels like a relatively discreet issue as opposed to diving into this which seems much more substantive. But that would just be my suggestion.

Steve Metalitz: Okay. Thanks Todd. (Stephanie) go ahead.

Stephanie Perrin: Thanks very much. (Stephanie Baron) for the record. I think there's already been raised some good arguments about why this concept could be problematic. On the other hand I think there's a widespread belief in civil society that ICANN doesn't have enough knowledge and expertise available on human rights and privacy issues.

So that while we have a tremendous amount of expertise in copyright and trademark law among the stakeholders that are present, there's

much less on the other side - with all due respect to everybody present on working group.

And in particular these are the knowledgeable folks that come to ICANN. We're trying to set rules for folks outside ICANN that might be just counting the dollars and figuring they'll just abandon their customers at the drop of a hat.

So even if we don't keep this concept I'd just like to put on the table that some sort of notion of a human rights impact assessment is useful when you're deciding on the difficult cases. Don't know how to implement it as an instrument. Don't want ICANN getting into content issues. But there is a kind of a vacuum there that we might want to ponder. Thanks.

Steve Metalitz: Okay thank you (Stephanie). Let me see if any - does anybody else have comments on this draft language document? This is Steve. I just had one that I think was reflected in the chat earlier on. I think (Keira) had mentioned this.

I mean these examples again are examples of registrants or customers if you will. They're not necessarily examples of the use they're making of the domain name.

So we do need to take into account the situation in which someone asserts that they fall within these illustrative examples but the use that they're making doesn't necessarily have anything to do with that or may involve some widespread illegal activities. So I just think if we do go down this route, we need to incorporate that perspective as well.

I think we also talked last week about the human rights perspective on the other side, particularly in the copyright area where there's a human rights --globally recognized human rights interest -- in material benefits of exploiting a work of which you're the author.

So you know if we do go down this route - and at this point it's not clear to me that we will -- I just think those are a couple of factors that we might want to take into account.

Okay let's see if there's any last comments that people want to make. We have identified - and some of these are reflected in Mary's notes - a number of areas where we need some further discussion. There's been a suggestion that we have a session focusing on appeals and perhaps as well on the annex if we're dealing with remedies for improper disclosure.

And there's been suggestions that we look at the URS for example as one source of finding some language that perhaps is less - a little more objective or clearer than what we have on the table now in terms of the standard.

But I think this has been a useful - I think this has been a useful discussion and I appreciate everybody's participation. And thanks particularly to Kathy who was on the spot for most of the call walking through these revisions. And I would call them extensive, but I think they were also valuable and I think we now have a little better understanding of it and can proceed from there.

So with that, we're past time and I will thank everybody for their participation.

Woman: Thank you.

Man: Thanks so much.

Woman: Thanks.

Man: Thanks Steve.

Woman: Thanks.

Woman: Bye all.

Woman: (Francesca) if you can please stop the recording. 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.

END