

**ICANN Transcription
Privacy and Proxy Services Accreditation Issues PDP WG
Tuesday 31 March 2015 at 1400 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 31 March 2015 at 14:00 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-31mar15-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
Kiran Malancharuvil – IPC
Volker Greimann – RrSG
Alex Deacon –IPC
Sarah Wyld – RrSG
Stephanie Perrin – NCSG
Phil Corwin – BC
Luc Seufer – RrSG
Chris Pelling – RrSG
Paul McGrady – IPC
Carlton Samuels – ALAC
Richard Leaning – no soi
James Bladel – RrSG
James Gannon – NCUC
David Cake – NCSG
David Hughes – IPC
Tatiana Khramtsova – RrSG

Terri Stumme - BC

Apologies :

Don Blumenthal – RySG
Lindsay Hamilton-Reid – RrSG
Holly Raiche – ALAC
Vicky Sheckler – IPC
Susan Kawaguchi - BC

ICANN staff:

Mary Wong
Marika Konings
Amy Bivins
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 the 31st of March 2015.

On the call today we have Volker Greimann, Graeme Bunton, Sarah Wyld, Steve Metalitz, James Gannon, Val Sherman, James Bladel, Todd Williams, Paul McGrady, Alex Deacon, Justin Macy, Stephanie Perrin, Griffin Barnett, Dick Leaning, Kathy Kleiman and Darcy Southwell.

I show apologies from Holly Raiche, Don Blumenthal, Victoria Sheckler and Lindsay Hamilton-Reid. From Staff we have Mary Wong, Marika Konings, Amy Bivens 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 and welcome everyone. We've had a very lively exchange on the list over the last - especially over the last 24 or fewer hours. So - and I think we need to reflect that and a little bit of a change to our agenda.

But I would just like to ask people to be sure to take a deep breathe before you speak or write. Sometimes we get a little distracted by the rhetorical flourishes that many of us - and I certainly include myself in this number - like to include in our very eloquent and persuasive comments.

So we sometimes need to look a little bit past that, get to the merits of what's being discussed, and try to engage on that level. So I would just encourage people to be conscience of that today on the call and also in the discussion on the list, which I think has moved the process forward.

And that's why I would like to suggest a little bit of a modification to our agenda. First of all, I will just ask if anyone wants to give an oral update to their Statement of Interest. I see we have James Gannon, a new participant in the working group; welcome James.

But does anybody have an update to the Statement of Interest that they want to share? Okay, thank you.

So in terms of the agenda, I would like - I think we've had a discussion on this agency question that we probably need to continue a little bit here even though we had a slightly different approach in the written agenda.

I think we are circling around three issues here; I'm calling them the three A's. And the first is attestation, the second is automation, and the third is the annex which was up on your screen. They all get to this question I think of trying to reduce the risk of frivolous or unbaseless, let's say, requests.

I think the attestation piece we've had a lot of discussion about whether the person making the request has to have a certain title or specify a certain relationship to the trademark owner or copyright owner.

I think the discussion has moved on somewhat to looking at whether what we already have in the draft, if you look at for example, template 2A or 2B where you have to state under penalty of perjury that you're the trademark owner or authorized representative of the trademark owner.

Does that need to be flushed out some more or clarified? So that's the attestation piece of that to guard against I guess unauthorized requests.

The second I would say is the automation piece which has come out in a lot of the comments about from those who think we need something stronger on attestation, they're considered about automated requests that are being pumped out, no one is looking at them, creating a lot of perhaps unnecessary work but also increasing the risk of a false positive, if you will, of a baseless request or request that doesn't meet the criteria.

So automation is another aspect of this, and I noticed that Todd has put some language up on the list and he'd be interested in getting people's reaction to that.

And the third is the annex which we haven't really talked about very much at all. And the goal of the annex was to provide - which grew out of the original proposal that several from the IPC and from the service providers had worked out - was to provide some options for dealing with the situation -- hopefully a rare one -- in which there is a disclosure but it turns out to have been based on some type of false information and what would be the remedy for that. So that's what the annex which was to be our first agenda item originally addresses.

But I think these are all kind of parts of the same puzzle. What do you have to show in terms of attestation to show that you have the authority and you've actually, you know, have done some due diligence on this domain name and how it's being used before you make a request for disclosure.

Second, automation; should we be doing something to make sure that this system is not drowned by automated requests.

And then third, the annex; what if despite those two, something based on false information, gets through the system and something isn't properly revealed.

So I would encourage us to focus on those things for a little while. We do want to get to the other main topic here which is a suggestion on 3C or a couple of suggestions on 3C which are the non-exhaustive list of reasons that disclosure could be denied.

But since we've had so much discussion about this agency point or attestation point, I wondered if people could focus first on that, if they have some suggestions about how to deal with attestation or this automation question, which seems to be linked, and then we can turn to the annex.

So I will open the floor for comments on those topics.

Seeing no hands and since I think Todd is on the call, Todd would you like to - because not everyone necessarily had been looking at the list in the few minutes leading up to this, would you like to explain your suggestion with regard to automated requests or automated responses?

Todd Williams: Sure, thank you. Todd Williams for the transcript.

So in looking at a lot of the discussion that we have had on this question on the table, I was trying to think of a proposal that would address this

automation concern but do so in a way that would not implicate or run into a lot of the issues that I think are legitimate that have been raised by Susan, Kiran and others.

And so I put forward some draft language. I suggested it be added to the preamble but certainly there's no magic to that.

And I would add I'm not, you know, wedded to that language. I see Paul for one has already offered a tweak to it which I think is a good one and certainly I would accept.

So, you know, we can dive into discussing the language itself if as a group we think that's a good idea. Or if, you know, there is I guess discussion on whether this is a route we want to go down at all, we probably ought to have that first before we get into the word-smithing.

But I just say that to note that I have no particular, you know, affinity for that language. I'm certainly happy to talk about that.

Steve Metalitz: Okay, thank you Todd. Again, just because I know not everyone has seen this language, I just put in the Chat within quotes. This is what Todd circulated, or you know, within the past hour or so.

And as he said this is a starting point, but just so you understand what we're talking about here, it's to add a sentence to the preamble in saying, "Given the importance of these interests and given the nature of the balance that this policy strikes, evidence of the use of automation i.e. the absence of human review by any of the parties involved -- requestors, service providers or customers - to complete any of the steps in the processes outlined below shall create a rebuttable presumption of non-compliance with this policy.

So it's to try to discourage - you know, this is an area unlike the relay area that we talked about in the past, this is an area where I think everyone seems

to agree that it's very difficult to automate this disclosure process in many cases. So this is the language that Todd has put forward.

I see James has his hand up, and anybody else that wants to get into the queue to discuss this please raise your hand.

Kiran Malancharuvil: Steve, this is Kiran. I'm not in Adobe Connect but can I please be in the queue?

Steve Metalitz: Yes you can. I have James, Kathy and Kiran. Go ahead James.

James Bladel: Hi, good morning. Can you hear me?

Steve Metalitz: Yes.

James Bladel: Hello?

Steve Metalitz: Yes.

James Bladel: Okay, great. James speaking for the transcript. Thanks Steve.

And I fully admit right out of the gate that I checked in on this thread late last week and I probably am woefully behind on all of the hype that's going on. So I'm kind of sticking my neck out there a little bit on the possibility that all of this has been discussed to death and I'm unknowingly poking a hornet's nest.

But I think that the language proposed by Todd is good and gets us a lot closer. I want to make sure that it doesn't rule out any automation for example the processing and routing of tickets depending upon the nature of the complaint. Obviously there would still need to be a human review at some point in the process, but want to ensure that automation is defined as zero human review not some automation.

And then just sticking out here a little bit, you know, I would go back to the RAA, which I know that we use as a parallel document for some of the requirements for privacy providers, that does have similar restrictions and warning relative to access in Whois data.

And essentially saying, you know, that registrars, in this case, can impose limits and terms on the use and access of their Whois systems, you know, so long as it doesn't - I don't have the exact language in front of me. Something about, you know, preventing high volume automated processes that send a lot of traffic to registry or registrar systems.

And I think we could probably borrow some of that language to address the concerns about automation and just essentially say, "Look, you know, providers are free to implement things like capture or whatever to vent that automated high volume process." Thanks.

Steve Metalitz: Okay, thank you James. Kathy?

Kathy Kleiman: Hi, can you hear me Steve?

Steve Metalitz: I can.

Kathy Kleiman: Okay. Good morning/good evening all.

I just wanted to make sure that what we're talking about is this language and not a replacement, but this language in addition too but not as a replacement to the other types of signatory issues or attestation issues, as you call them, that we've already been talking about.

It's very important to prevent automation but that's not the sum total of the issue that we're talking about.

I think there was a really robust discussion last time about the difference between authorized representatives and authorized legal representatives' representative, and I'm not going to go into it now. I just want to make sure that we're spending/saving that time because there's been a great discussion on the list about that and about our concerns; not just about who is submitting this request, and making sure that they have the standing and the background to make the infringement allegation.

Or that whoever is signing it, not necessarily whoever is writing the letter, but whoever is signing it because they are also the ones receiving this personal or sensitive data.

So I just wanted to make sure - I think everyone probably agrees on the automation and we can work on the language to reflect, you know, the nuance so it doesn't capture the wrong thing. But I just wanted to make sure we're not replacing the larger issue. Thanks Steve.

Steve Metalitz: Okay, thank you Kathy. This is one of the A's and they're all interlinked by they're not identical.

I think Kiran was next and then I see Todd in the queue. So Kiran, please go ahead.

Kiran Malancharuvil: Hi, thanks Steve.

I think that actually James may have captured a little bit of the question I want to raise which is a question about what do you mean by automation. I guess I'm not entirely sure what the service providers are attempting to restrict.

I think Paul made a good point on the list about, you know, how brand owners - sorry, I have a baby in the background. I apologize (unintelligible).

Paul raised a good point on the list about how brand owners send complaints and how that may be through kind of an automated service or some sort of kind of digital kind of dashboard that helps us keep track of, you know, what we're sending and to whom and what stage it's at.

And I want to make sure that whatever process that we put in place to restrict automation that we don't actually eliminate the convenience of those kind of systems from, you know, the brand owners repertoire.

And I think that James kind of already addressed that, but going forward let's be very, very clear about what we mean so that we know exactly what we're restricting. Thanks.

Steve Metalitz: Okay, thank you. I see Todd, and again, if anybody else wants to get in the queue please raise your hand. Or if you're not in the Adobe room, please speak up. So Todd, please go ahead.

Todd Williams: Well just quickly, you know, I did intend this draft language as a substitute for some of the thornier issues that we were getting into in terms of, you know, notice having to come from I think it was a VP or an attorney or things like that.

You know, certainly we can I guess we can break apart attestation and automation and discuss the two separately, and that maybe is helpful. Because I think in some of our discussions or in some of the emails, they were getting lumped together. And it may be that they have different solutions to either one.

But again, I mean, you know, I think others on the group have raised some of the issues of requiring notice to come from, you know, certainly or from a certain high level, and that's what this language was intended to get too.

Steve Metalitz: Thank you. Any other comments on automation at this point?

Obviously people have just gotten this language, and I think everyone agrees there's certainly some tweaking. But I do hear a certain degree of support for the concept.

So I would encourage Todd and others to work offline and try to refine this language and make sure it isn't, you know, doesn't capture things we're not trying to capture.

And I think James had a good suggestion as to whether - that language has been in the RAA forever about high volume automated processes. Is that something that could slide in here as well? So I think there's, at least so far, a good level of agreement on this.

Let me get back to the attestation question, and you know, whether this is a substitute for that which obviously we have differences of opinion on.

But let me ask folks, if you would, just take a look at what we have in the document now regarding - and in the basic document regarding attestation. And if you look for example in paragraph - in what's on your screen, if you look on Page 3, Paragraph 6, this is in the templates for the three types of trademark or copyright complaints. And this is what we have now or what we're working from now.

We have a Good Faith Statement under penalty of perjury or notarized and accompanied by sworn statement, and it's about the basis for reasonable believing that there's infringement going on. It's making a promise about how you will use the information that you obtain.

And then we're getting a hung up a little bit on whether there should be a third paragraph here with what the legal relationship is and the nature of the authority to speak for the trademark owner or in the other template for the copyright owner.

So we've had some discussion, and I know it was proposed that there be certain titles or certain roles that would be the only ones allowed to make this request. There was a good deal of pushback against that.

And then we have this other language about stating the legal relationship and his or her authority and whether that is sufficient.

Let me just throw two other possibilities into this mix. One is, again, along with the ban on automation or the discouragement of automation, would it make sense to make it part of this statement that the requestor has personally reviewed the material as a basis for the request, and that's the basis for the reasonable belief; that could be incorporated into the A language, you know, based on personal review or something like that.

Is that something that would enable a greater degree of confidence in the attestation?

And then the other thing is that the way this is drafted, it's not clear whether, you know - we might need to make it clear that, in some way, that the statement under perjury or accompanied by sworn statement/notarized actually also goes to this assertion of agency. It goes to not only to what the basis is and the promise about how you would use the information, but also in some way to the authorization that the requestor has.

Those are just two ideas to perhaps stimulate some more discussion on this and see if we can make some progress on it.

I see Volker has his hand up and I welcome anybody else who wants to get into the queue, but for now let me turn it over to Volker.

Volker Greimann: Hi Steve. I think you made some very good points here already and took some off of what I was wanting to say.

I'm certainly not married to the language that was proposed. It was just an effort to encapsulate the thought process that we had gone through to make sure that the proposed - that someone who knows what he's doing is behind this and who has some authority to bind the attitude (sic) to making the claim to make a statement that would be a (technicord).

Basically what we're looking for is some form of authorization that would be binding on the principle, and some form of making sure that the person who is making the complaint knows what he is talking about.

Steve Metalitz: Thank you.

Kiran Malancharuvil: Hi Steve, this is Kiran. Can I get back in the queue at some point?

Steve Metalitz: Yes you can, and then we'll have Kathy after you. So go ahead Kiran.

Kiran Malancharuvil: Hi, I just have another question. Some of the language that is being proposed - or not language being proposed but I guess statements that are being made, I just don't really understand.

So I guess I would - this question is directed to Volker. What exactly do you mean by they know what they're talking about? Because, you know, obviously in a situation where somebody has agency to speak on behalf of another in those matters, you know, it's up to the person who gave agency to appropriately train that person, and then of course to accept liability and responsibility for the action of the person that they gave agency too.

And you know, frankly, somebody can be an attorney or a CEO or a president, and you know, every other person in San Francisco is a CEO or some sort of startup. That doesn't mean that they know what they're talking about in my opinion.

So perhaps you can explain to me in more detail what you mean by that so that, you know, we could possibly wrap our head around this in a narrow enough way that we can get to some sort of resolution. Thank you.

Steve Metalitz: Volker, do you want to respond briefly to the question to clarify what you meant?

Volker Greimann: Yes, yes. Basically what I mean by that is that if I'm a provider and get a complaint, I want to be able to follow the trail. I want to see who gave the order, who made the research, who is sending this, who are you who is sending this in relation to the person who has title or the right that is claimed to be infringed upon. What is the trail, and if possible, all evidence of how this (unintelligible) is derived and since when does it exist, so evidence basically.

Provide us with as much information about the case as you can, tell us who you are, tell us who authorized you, under what authority you are operating and how to get - what kind of contracts are between there?

So we do not want to say - perhaps someone who has just been asked to do that, we want to see someone who has been granted to act on behalf with the voice of the principal in some form or shape. That can be contractual, that can be an officer or the principal, that can be an agency relationship. But that should be evidence.

Steve Metalitz: Okay, thank you Volker. I would just say in terms of part of what you're saying, and tell us about the basis for this, this is what Paragraph A of these templates is addressed too; provides a basis for reasonably believing that the use of the trademark and the domain name is an infringement is not defensible.

So presumably that would come there. And if you didn't have that, then you wouldn't necessarily have to act on this. But I thank you for clarifying what you are looking for here.

I've got Kathy and then I've got James Gannon and Paul McGrady. So Kathy, please go ahead.

Kathy Kleiman: Great, thanks. And I, you know, as you know, we think this is a very important discussion.

Okay. So the real question I think is does agent or the term authorized representative -- we've been doing both -- do they serve the purposes -- the high level that Volker is talking about?

And an agent or an authorized representative -- unless I'm completely wrong and please stop me if I am -- can be a secretary, a clerk, a consultant.

So if we really want to believe that level of trust into the relationship, into the document, into the presentation, into the request that we're talking about, attorney is kind of the short-hand word that people use around the world for that kind of - for a person representing a company, speaking with the authority of that company because there's an attorney/client relationship, and presumably speaking with some authority in the field in which they are presenting. So you wouldn't want a real estate attorney presenting a copyright infringement claim.

And attorneys are bound by several rules of ethics. (Unintelligible) not to do that; you know, real estate attorneys no they're not allowed to present copyright infringement claims unless they happen to be one of the unusual experts in both fields.

So the reason we also have officers of the corporation was because it was presented last week and we had actually anticipated it. Besides small businesses, certainly trademarks and copyrights can be owned by individuals and small businesses that would not want to go to the expense of hiring an attorney for this purpose (unintelligible) or the corporation has the high level

of trust, knows the trademark and copyright, and you know, one presumes that they could make the attestation the signature.

We're not saying that the President of Facebook has to do it. This is kind of - the President of Facebook will go through attorneys; this is an opening provided for small businesses.

So I put language into the Chat Room that I had put into the email that we had been discussing. And it's a much more narrow presentation. And the reason why is not just because of who is signing this presentation but who is receiving the data.

And the customer and the provider, I don't think we want to go - speaking as a customer, as a registrant, if my data is revealed through an improper channel because a consultant or someone without proper authorization and expertise requested it, and then I have to track down the consultant and challenge the agency, that's not really a fair burden.

My data should be revealed to the legal representative or the official representative of the company requesting it. And then there is some accountability.

Steve Metalitz: Thank you Kathy. James Gannon and then Paul McGrady.

Val Sherman: Steve, this is Val Sherman. Can I get in the queue?

James Gannon: Thanks, (unintelligible).

Steve Metalitz: Val, I will put you in after Paul. Go ahead James.

Val Sherman: Thanks.

James Gannon: I think some of these kind of discussion later on, then many of the people who are discussing it at the moment might have a little bit of perspective.

I think what this is, it's not necessarily a discussion about an individual title or role needing to be attached to the requestor. What this is about is applying a certain standard of practice and a strong, strong assurance that this reveal/request has actually been considered at a sufficient level within a company, and that it's not something that an intern came up with or something that has been just done as part of a standard business practice by a low-level employee.

That's the gravity of what the request is is being considered by the company which is putting in the request or the IPO or the authorized agent. It's about the gravity of the request and having that reflected in the requestor.

Steve Metalitz: Okay thank you James. Paul and then Val. Volker, I see your hand is up. Did you want to be in the queue again?

Volker Greimann: Sorry, old hand.

Steve Metalitz: No. Paul and then Val.

Paul McGrady: So I think we're sort of now going, you know, around and around this issue. And I don't know how to resolve it because the notion that, you know, companies who have a problem are going to have to either track down somebody who is an executive of the company to sign a complaint like this, or always pay outside counsel to do it, which by the way, you know, would be the full employment act for me. So I'm speaking against my own economic interest here.

That notion is just - it's a non-starter. That's not how corporations run, it doesn't give any credence to the idea that someone who is not an officer of a company might actually understand their job and what they're doing, and it

also is not based in the reality of the volume of problems that big brands have.

If each corporation had one of these complaints to file a year instead of dozens a day or whatever they're doing that's making them automate this - you know, go out to vendors and other folks, you know, then that would be a different situation. But unfortunately the abuse level out there is way too high to justify going to a corporate officer each time or spending, you know, going to outside counsel each time that that corporate office is unavailable.

You know, I share everybody's concerns about low-end providers who maybe don't know what they're doing. But some of these (unintelligible) counsel who review these things, again not speaking to that business model or trying to defend it because it's not my particular business model, I don't think we have to reach that issue.

I think the issue that needs to be reached is is it practical to expect corporate officers to be available to sign these things, or in the alternative each time that one of these needs to be signed, if that corporate officer is not available then it has to go outside to outside counsel, essentially that level will ensure that brand owners can't use this mechanism. It's simply not a standard that's going to get any buy-in from the branding community.

So we need to figure out where the line really is and start to, you know, come up with new ideas because we're stuck here and we've been stuck here for a couple of weeks. Thanks.

Steve Metalitz: Okay, thank you Paul. I think Val Sherman was next in the queue.

Val Sherman: Hello everybody, this is Val Sherman.

I understand the concerns that are raised really on all sides of this. Somebody, you know, actually I guess several of us mentioned before that

using titles can, you know, is potentially dangerous and for various reasons; various people perform these types of functions in different organizations and they're not always attorneys. And so we don't necessarily want to exclude people that are confident to speak to these matters but that might not hold a certain title.

I'm wondering, and I don't want to oversimplify it, but I'm wondering if perhaps the exclusion of, you know, maybe a statement that says something like, "I am an authorized representative of the trademark owner," - if it is not the trademark owner of course filing the request - "and capable and qualified to speak to the matters herein." And maybe something to that end might help to just straighten the idea of the agency that whoever is submitting the request is qualified, authorized and can bind the principal.

I don't know if that would be helpful but that's just one thought. Thank you.

Steve Metalitz: Okay Val, thank you for that suggestion. I'm going to - Volker is back in the queue so I will recognize him.

Is there anybody else who wants to speak on this or else we'll wrap up this part and move on to 3C? Volker, go ahead.

Volker Greimann: Actually that's pretty close to what I would like to see happening - what I would like to see documented.

In the end, we would like to hear from the complainant, "This is who I am, this is who authorized me and this is how I am authorized to bind the principal in this matter."

So if you have a general agreement with the principal that hands you the authority to bind him to make such claims, all the power to you. If the principal is willing to bind himself to that, good.

But I don't - I need to see somewhere - I need something more than what we have in current complaints, what we have in the place where they just say, "I am an agent and you have to believe me."

Steve Metalitz: Okay. All right.

Kiran Malancharuvil: Steve, this is Kiran. Can I just make a quick question?

Kathy Kleiman: Actually I was going to raise a quick question too.

Steve Metalitz: Yes, Kiran and then Kathy.

Kiran Malancharuvil: Yes, I guess as I was listening to Volker speaking, I was sincerely certain that what we have in there actually represented what he requested. And then at the end he said he needed more than what - I'm sorry, what we had already presented in the document. And then at the end he said that he needs more than what's in there.

So can I just ask that he propose specific language that we can look at instead of going back-and-forth on this? Because to be honest with you, I think that what we have which is the information of the trademark owner and then the signatory and then a statement of agency that says that they are acting on behalf of the trademark owner with authority, does address the questions that he had.

So I guess it would better for me to see specifically what he wants because I think that his points are very good. I just don't see how the language that we've proposed doesn't actually meet those requirements.

Steve Metalitz: Okay, I will make that request to everybody that's contributed here. But specifically to Volker and to Val who had language that she was reading, please put this on the list and let's see if we can - and since I put forward

some concepts too, I will also put some language forward on the list. So please let's do this.

I think it's clear that neither, you know, that some of the language that's been put forward previously about corporate officers and so forth is not going to - we're not going to achieve consensus on that. And then simply leaving it open as it was in the original words just a statement from trademark holder and authorized representative without even any attestation that you are the authorized representative isn't going to fly either.

So I would encourage people to translate what they've said on this call. And you know, if you need to look at the transcript, fine. And let's get some of these ideas going because I think we have some or we're approaching some level of agreement, but we can't really do this until we have concrete language.

Kathy is going to have the last word and then we're going to move onto 3C.

Kathy Kleiman: Steve, I think the path you just laid out makes a lot of sense. And some kind of evidence would be useful; we're not talking legal, you know, corporate evidence. But how do we know that the trademark owner has agreed to this if a third party is presenting?

So I'm with Volker; we do need additional language here. We're not there yet. Thanks much. Bye-bye.

Steve Metalitz: Thank you Kathy. Okay, so I seem to have dropped out of the room here but I'll try to get back in. Okay, I'm back in.

So I think we're going to move onto 3C now. And we've got several with homework assignments on this agency, attestation - excuse me.

The one other thing we needed to mention before we move on to 3C is the annex. Again, this was deal with the problem of faults; when information has been revealed based on false pretenses.

Mary has put up on the screen a red line of this. I think we haven't even really had full discussion of the original annex, and this makes a very substantial change because these are intended to be, as I think those who prepared the original proposal can confirm, these are intended to be options.

One option is arbitration and one option is submitting to jurisdiction. And they're not layered on top of each other which it appears from this draft that it is.

Because of that, I'm going to suggest that we defer our discussion - I mean I'm happy to take comments on the annex or questions on the annex, but we may want to defer our discussion of it, and again, look at the original text. But again, this was intended to be a further safeguard against the risk of request based on false information.

Kathy, is that an old hand or a new hand?

Kathy Kleiman: Old hand Steve. I'll take it down.

Steve Metalitz: Thank you. Okay, all right. So let's come back to the annex during the week and let's turn now to 3C, which is back on the screen now. And if you scroll down to I guess Page 7, you see this. And this is the non-exhaustive list of reasons for non-disclosure.

And you see some new language there on 5 which I think again Todd may have been the source of. It seemed clear that with a lot of the discussion we were having about the level of proof that was needed or whether the request came up short, a big concern was this idea that even if there was a perfectly valid claim of trademark or copyright infringement, that wasn't really what was

motivating the request and the request was being motivated by an improper purpose. And if there was evidence of that, shouldn't the provider be in a position to refuse the request. So I think that's what this new language on 5 is intended to get too.

Let me ask Todd if you have any - because I believe you were the one that posted this language - if you have any introductory remarks you want to make on it.

And this is one where people have had at least a few days on the list to look at it; I think this was posted on Friday. So I welcome people's comments on it.

So we'll start with Todd, and anybody else please indicate if you want to get into the queue. Thanks.

Todd Williams: Sure, thanks Steve.

This was an exercise in trying to find language that narrowly addresses the hypotheticals that we were discussing. There was a lot of discussion on what the standard ought to be, whether we should look to the URS, you know, a slam dunk, things like that.

And you know, my concern was that a discussion of the standard as a kind of means of addressing the potential harm of requestors submitting a protectoral complaint in order to get contact information to then somehow harm the human rights of the beneficial user was just an ill fit. It was not going to catch everything that it was supposed to, and in doing so was actually going to block complaints that had nothing to do with pre-text.

So this new draft language is an attempt to, again, kind of more narrowly tailor what we are doing to the problem that we are trying to account for. But again, I'm certainly happy to discuss the language itself and word-smithing of it. Thanks.

Steve Metalitz: Thank you. So any comments on Todd - on C5 that's at the top of Page 8 on this text?

I've Kathy and Volker, and if anybody else wants to be in the queue, please raise your hand in Adobe or speak up if you're not in Adobe.

Kathy, go ahead.

Kathy Kleiman: Sure, thanks.

I think this language is good. I would clarify human rights with including freedom of expression and freedom of association, the kind of protectoral issues we've been talking about over time.

But I just wanted to point out that - and Mary shared with me the full-text markup - that Todd's excellent language is replacing a lot of other language that we had talked about. And I'm not sure if it's an or or an and, whether to be replacing it or including it.

So I just wanted to point out, as he mentioned briefly, that we've been talking about a standard of evaluation here; a standard of slam dunk or clear and obvious infringement that provided a different type of protection for providers especially if this goes up to some kind of review process.

And what this also replaced was the whole discussion that we had in here and that some of us liked and there was a request to kind of keep it into the public comment period about the human rights issues, the complex (sic) case evaluation.

So I'm not sure Todd's language should be replacing all of the language that was taken out with it. I think we really should be keeping that human rights

complex case evaluation language to at least alert the community to the types of concerns that we'd like them to evaluate as well.

And I would like to ask the providers whether a standard would be useful for the evaluation because here we're taking it out. Thanks.

Steve Metalitz: Okay, thank you Kathy, and we would welcome - I see we have a provider in the queue; maybe he's going to respond to that.

So we have Todd and then James Bladel. Todd, go ahead.

Todd Williams: Well just real quick to answer. No, I did intend it as an or precisely for the reasons that I was just outlining that I think more narrowly gets to the potential problem.

Now we can debate whether it should be an or for the previous language that was in C5 in terms of slam dunk, et cetera, separate from whether it should be an or from essentially the appendix that we have a four on human rights cases, and perhaps it would be useful to do those separately.

But no, certainly the intent behind it was that it was an or to more narrowly get to the problem that we were trying to solve.

Steve Metalitz: Okay James, go ahead.

James Bladel: Hi, good morning. James speaking.

So just this may be a tangent here because I don't necessary find myself disagreeing with the intent behind this new language. But just thinking down the road here, this policy or this idea would be implemented in the form of a contract between a commercial party and ICANN. And I'm just concerned that I believe this will be the first instance where some third party that is not a

signatory to that contract has an acknowledgement of rights and human rights at that.

So I mean it just feels like we are tap dancing into a mine field here by inserting something ambiguous into a commercial agreement between ICANN and a service provider. And I'm just a little concerned about that.

And I'm wondering if there's a way we can tap through the intent without using that specific language. Thanks.

Steve Metalitz: Okay, thank you. We'd welcome your thoughts about how to do that. Again, I think Todd was responding to the articulated concern about this that had been brought up by several members of the working group.

I see Volker's hand. Does anybody else want to be in the queue at this point? Go ahead Volker.

Volker Greimann: Yes, I'm just reading this for the first time so I'm a bit behind. I'm a bit concerned about the word demonstrating. Demonstrating seems to me -- maybe that's because I'm not a native English speaker -- but demonstrating seems to me that this almost goes right to the level of evidence whereas I would be, as a provider, rather in a position where reasonable doubt would be sufficient; reasonable doubt about the complainant's intent would be sufficient to move ahead.

So I'm just thinking if that word might be changed or should be changed, but that's just something I wanted to throw out there for discussion.

Steve Metalitz: Okay, thank you. And folks are welcome to respond to that point.

I see Stephanie's hand. Does anybody else want to be in the queue at this point? Go ahead Stephanie.

Stephanie Perrin: Hi, thanks. Stephanie Perrin for the record.

I just wanted to respond to James Bladel's remark about his lack of comfort with the human rights language.

Two things. Number one, some of these human rights are guaranteed in law, and therefore the inability to make reference to them I think is the problem. Let me give you an example.

In Canada, we change identities of individuals who we have found are entitled to protection because they're being pursued by religious groups or estranged (unintelligible). Previous language that we had in there demanding that they give sort of justification for why they need a privacy/proxy registration would in fact violate the terms of the commitment they made to the government to change their name and their social insurance number.

I just give that as one example. Rights are for everybody. And unfortunately at ICANN, the only right, human right that really has been recognized in the contracts to date, has been the right of copyright. And I know some people persist in bringing it up, but copyright is a human right; it's yours, it's in there.

But what about all the others ones that we haven't done anything about?

So I would say that given that this is the first time ICANN has made an effort to regularize the use of privacy/proxy services, we cannot leave out the human rights language. Thanks.

And I would say that there's, you know, other parties attempting to get ICANN to comply with the (Rugees) Principle; that's a whole other volley coming in from a different quarter. And we can discuss whether or not ICANN should be subject to the (Rugees) Principle, but let's at least respond to some of the things that come up in the context of the very subjects we are talking about; thanks.

Steve Metalitz: Okay thank you Stephanie. Volker, is that an old hand or do you want to comment?

Volker Greimann: It's going down now.

Steve Metalitz: Okay. Well let me just pull a couple of things together here.

First of all, in terms of whether this is a substitute for the standard, again remember the context of this which is C, disclosure can be reasonably refused, reasons consistent with the general policy stated herein including but not limited to any of the following. So there's a lot of reasons here; it's a non-exhaustive list. And at least in the current form, two and three are quite broad, but adequate reasons against disclosure.

And I don't know whether that, you know, language is final either, but this is I think - if you go back to the preamble to this, one of the things we're trying to achieve is an adequate level of discretion for providers. So I think they have a lot of flexibility here.

And they may not, you know, it may not even be strictly speaking necessary to address the human rights issue. But I think as Stephanie has pointed out, you know, that there may be some good reasons for doing so for listing that this is another basis upon which disclosure can be refused if this standard is met.

On demonstrating, yes I think it's worth, you know, Volker's point about that, that that's worth thinking about whether that's the right word there. I think it's a good word because it says you can't just base this on somebody saying, "My human rights are being violated therefore don't disclose even though I have no defense to copyright or trademark infringement." But there needs to be some facts on which (unintelligible) based.

I don't know how to respond quite to Stephanie's example of people in the witness protection program or something who've been issued new names and new social insurance numbers. But presumably what they would be asked to reveal here is their new name, not their old name. So, you know, it wouldn't go beyond that.

But I think there seems to be some general support for Todd's approach here. And I would ask people if they have tweaks to this language that they want to suggest or cogent reason why it shouldn't be included, then please bring that forward on the list, you know, as soon as possible.

I also want to - yes, and Mary thank you for reminding me. Marika had raised in the Chat earlier that some of these questions that we're wrestling with about/including the agency attestation question and so forth, may have been dealt with in ccTLDs.

I don't know if people have information about that or whether that's something the Staff can reach out to the Staff contacts at the ccNSO and see if there's any information that we can draw on there, but that could be a useful comparison to make.

Volker, I see your hand up again so I assume you want to get back in the queue.

Volker Greimann: Yes Steve, just to respond your comments regarding what I said before.

I think - I posed this in the Chat. If we could change specific evidence demonstrating to the words sufficient information to assume that would - or maybe consume could be made stronger. But it should be a certain level of information that has to be provided to make that assumption, but - and should be more than just here say but it should not need to be evidence because once we go into the field of evidence having to be provided, I think reasonable belief is envisioned in this case.

Yes, that's what I wanted to say. Thanks.

Steve Metalitz: Okay, thank you. So the term might be with evidence rather than - and not just demonstrating. So we might say facts and circumstances if we want to avoid the legal sounding word evidence. You could say something like specific facts and circumstances showing that the, you know.

Volker Greimann: For example, yes, yes.

Steve Metalitz: This is pretext. So maybe that's something that could be considered.

Paul McGrady.

Paul McGrady: Just to be - Paul McGrady for the record. Just to beat the high-standard drum, again this is an area where we appear to be having two different standards where one party is being asked to sign under oh, and running down and signing a notary and all this other stuff, and then the other party that we're concerned about is not even using the word evidence.

Again, maybe we don't need to use the word evidence but maybe we don't need the other higher-standard for the other party either. I just, again, would like for us as we're building a new standard, ask ourselves why we have different standards for a complaining party than we have for a responding party. So far I have not heard any good explanation for that. Thank you.

Steve Metalitz: Okay, thank you Paul.

All right, so we're near the top of the hour here. I think we've covered a lot of territory.

We're asking people to provide any tweaks to the language that Todd had presented just before this call regarding automation. We have a couple of

people who I think are on the hook to come up with some language about attestation or agency that can get us out of the gridlock we're currently in on the topic, and I think there were some good suggestions there and I hope people will come forward with that language.

We have reserved the discussion of the annex - and again I apologize for the change in the agenda but I felt it was justified given the level and intensity of the discussion that we had had on the list just in the hours leading up to this call.

And then on this one I think there's some agreement in principle or there's a level of agreement in principle on this what's now in here as number five. But there had been some wording changes suggested or floated, and again I would encourage people to look at the whole section and see how this fits together as one in a list of non-exhaustive list of reasons for which disclosure can be refused.

Is there anything else that people wish to raise on either this pre-text language or on the attestation/agency language before we wrap up?

If not, I want to thank everyone for their participation and I think we had a good substantive discussion, a good tone of discussion here. And as I said at the outset, sometimes we just need to take a deep breath and also look past some of the colorful language that people sometimes tend to use on email lists and so forth.

So let's not get too hung up on that. Maybe the deep breath approach will lower the incidents of that colorful language, but let's also kind of put that in the context and try to respond to the substance. People did it, I think in my view, did an excellent job of that today.

So since we're just about at the top of the hour, we will wrap up here. Looking forward to a lot of activity on the list this week and to talk to everybody again next Tuesday.

Man: Great, thanks.

Woman: Thank you.

Man: Thank you very much Steve.

Group: Thank you very much.

Terri Agnew: (Francesca), if you could please stop the recording.

Once again, the meeting has been adjourned. Thank you very much for joining. And please remember to disconnect all remaining lines.

END