

**ICANN Transcription
Privacy and Proxy Services Accreditation Issues PDP WG
Tuesday 14 April 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 14 April 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-14apr15-en.mp3>

Attendees:

Frank Michlick – Individual
Justin Macy - BC
Val Sherman – IPC
Griffin Barnett – IPC
Kathy Kleiman – NCSG
Darcy Southwell – RrSG
Steve Metalitz - IPC
Graeme Bunton – RrSG
Jim Bikoff - IPC
Volker Greimann – RrSG
Alex Deacon –IPC
Stephanie Perrin – NCSG
Phil Corwin – BC
Chris Pelling – RrSG
David Hughes – IPC
Tatiana Khramtsova – RrSG
Terri Stumme – BC
Holly Raiche – ALAC
Vicky Sheckler – IPC
Susan Kawaguchi - BC
Luc Seufer – RrSG
Michele Neylon – RrSG
Osvaldo Novoa - ISPCP
Roger Carney – RrSG
Kiran Malancharuvil – IPC
James Bladel – RrSG
Paul McGrady – IPC
Sarah Wyld – RrSG
Carlton Samuels – ALAC

Apologies :

Don Blumenthal – RySG
Todd Williams – IPC
Richard Leaning – Individual

ICANN staff:

Mary Wong
Danielle Andela
Amy Bivins
Terri Agnew

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

Terri Agnew: Thank you. Good morning, good afternoon, and good evening. This is the PPSAI Working Group Call on the 14 of April, 2015. On the call today, we have Holly Raiche, Steve Metalitz, Justin Macy, Sarah Wyld, Volker Greimann, Graeme Bunton, Kathy Kleiman, Philip Corwin, Val Sherman, Michele Neylon, Chris Pelling, Darcy Southwell, Alex Deacon, James Bladel, Terri Stumme, Roger Carney, Susan Kawaguchi, Tatiana Khramtsova, and Paul McGrady.

I show apologize from Dick Leaning, Todd Williams, and Don Blumenthal.

From staff, we have Mary Wong, 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: Welcome. This is Steve Metalitz and I want to thank everybody for participating today. I think we've had a fairly productive week on the list in terms of moving forward. I think, pretty close on this access date - maybe there at the station language and we will get into that in a minute but first, I wanted to just run through a discussion that Graeme and I had with the staff

earlier this week, or yesterday, on our call and our view was that while we did make some progress this past week, we've also had a lot of repetition on issues and a lot of, I could say, getting into the weeds, very detailed, relatively fine points that we're addressing and not a lot of necessarily progress on big issues.

Our conclusion is that we really should be wrapping up this aspect of the discussion and getting the initial report out for public comment. We're not - this group is not going to agree on everything in this disclosure framework. I think there are some important areas of agreement but there are going to be some things that in a realistic timeframe we're not going to be able to reach consensus on.

An initial report is, as its title would imply, an initial report. Everybody on the working group is free and encouraged to comment on it and even can include separate observations in their initial - in the document that goes out for public comment but in order to have a full public comment period before the Buenos Aires Meeting where we can start working on addressing the public comments, we need to move this along and get the initial report out.

So (Graeme) and I are proposing the modifications to the work plan that you see in front of you now. Basically, we'll continue this week getting to the annex which we have talked about but never actually discussed on our calls and asking the staff to take what we have and produce a revised version of the disclosure framework graph that's suitable for inclusion in the draft report.

We can get that out at the end of this week. That would also reflect where there are splits or where there are disagreements within the working group and that would be circulated at the end of this week, before our call next week and at that time, we can - if there are corrections that need to be made to that, we can discuss them and there are still a few non-disclosure questions that have been left hanging from our earlier discussion. Nothing too major, I don't think, but that would be the focus of our call next week.

Then the proposed final version of the initial report -- in other words, what would be ready to go out to the public, would be circulated by the end of next week, by the 24. We would have another call on the 28 to go over the initial report and if people wanted to make any additional statements, dissenting views, minority views if any, those would be submitted by the 30 so that we could get this report out to the public by May 4 for a 40 day public comment period.

That's what we're proposing to do at this point. I welcome your comments and questions about that but I think in order to move this process forward, we need to really drive towards a version that is ready for review by the public even if it doesn't, obviously, reflect agreement on every single point within the working group. So we'll open the queue for comments and questions on this. I see (Michele), (Graeme), and (James). Michele go ahead.

(Michele Neylon): Well, thanks Steve. (Michele Neylon) for the record and just yes. I'm very supportive of this. I think it makes a lot of sense that we move forward, get something out there, let people submit comments on this and then move forward based on the feedback because we're not - we might get some further agreement on some point between now and then but I think in many respects, we've pretty much exhausted those avenues. Thanks.

Steve Metalitz: Thank you (Michele). (Graeme), please go ahead.

(Graeme Bunton): Thanks Steve. This is (Graeme) for the transcript. Just to blend my support behind this plan, I think it's a great idea to get this out there and Steve and I think it's going to be really beneficial to get our draft report out there and get some comments and lastly, I'll highlight again that there isn't a ton of time between when we want to have this out there and when we would be looking to get minority opinions or additional statements or what have you. So if you have comments like that, it's a great idea now to start putting them down on paper and we can make sure to include them. Also, my apologies. I need to

drop off this call relatively shortly. Enjoy everybody. See you next week.

Thanks.

Steve Metalitz: Okay. Thanks - thanks very much (Graeme) and appreciate your comments on this. Let me turn to (James) who's next in the queue.

(James Bladel): Hi. Thanks. This is (James) speaking. I presume you can hear me okay.

Steve Metalitz: I can hear you.

(James Bladel): Great. I never quite trust the voice over IP features of Adobe Connect. So thanks Steve. (James) speaking for the transcript and just want to also lend my support for getting this out to comment. I think you touched on my comment or concern there at the end when you said that we would highlight those specific areas where there are splits of positions and I think that's great. I think that when we put something out for public comments, it's very helpful if we can actually lead the commenter's to those specific areas where there are differences of opinion or day light between the different positions.

I think that the reverse is also true. I think that we should also highlight all of the areas where we have reached agreement and have achieved some rough level of consensus, lower case fee, not upper case fee, but if we have reached agreement on those areas, I think that's worth highlighting as well so that we don't have or invite a flood of comments that reopen issues that perhaps were put to rest months ago. So thanks on the support and I look forward to moving this issue along.

Steve Metalitz: Thank you (James). I think that's a good point and it will be up to the staff to figure out the best way to flag those areas where there are disagreement and areas where we've reached some rough consensus. So we'll look forward to see their work product at the end of this week. Volker, I think - I thought I saw your hand up but it seems to have come down. Did you want to get in the queue?

Volker Greimann: Yes I did but I think (James) and (Michele) already raised those points very well so I didn't feel I had to add anything to that.

Steve Metalitz: Okay. Alright. Thank you. Does anybody else have a comment or question on this? If not, we'll proceed on this work plan. So be looking at the end of this week for a proposed version of the disclosure framework that's ready for inclusion in the initial report. I think our next agenda item - by the way, I'm sorry that I didn't ask at the outset if anybody had an updates to their statements of interest. Usually that's proforma but let me just do it now even if out of order. Any updates? Okay. If not, I think our next - our next agenda item - (James), is that a new hand?

(James Bladel): Yes it is. I'm sorry. Very quickly. The draft that goes out there is expected to go out at the end of this week will include changes or any discussions that we have today correct? It's not the draft that we have now. It's the draft we'll have at the end of this call right?

Steve Metalitz: That's correct.

(James Bladel): Thanks.

Steve Metalitz: Okay. This is the famous annex that we've talked about, talked around a few times, and basically there's a provision in the draft or the framework that references this as providing methods of resolving provider claims of false statements or misrepresentations, I think that maybe one other reference to it as well but that's really what this is directed to and not a generalized appeal mechanism and as I think we mentioned last time, there really are two options. Although you see three paragraphs here, there really are two main options that people have been talking about and one is an arbitration process and the outline, that's sketched out in the first couple of paragraphs there of how that arbitration process would work.

The second option would be that a requestor, as part of the template request would agree to be bound - it would agree to submit these disputes to the courts of the territory where the service provider is located. Again, disputes dealing with alleged improper disclosures caused by the false statements. I think Kathy mentioned before that this, perhaps, the same - the same system could be applied to disputes about whether the requestor had complied with its commitment to use the information obtained only for specific purposes having to do with resolving the dispute in question.

That's a feature of every part of the template and if there's evidence that it's being used differently or in excess of those restrictions, then presumably you could bring that to the same dispute resolution processes here but these two are kind of the two, and that's the fork in the road as to how these disputes should be addressed. I don't think we're going to reach consensus on it. Perhaps we will, but those seem to be the two main alternatives and I would assume that what we're likely to put out is some version of this annex given the two alternatives.

The trusted sender provision there I think has been a little bit overtaken by events. Just to remind you, the draft framework does allow a service provider to have some kind of trusted sender, trusted requestor, program in place. We know that some providers may well want to do this, others may not, and it's not necessarily a requirement and obviously, this could be a feature of it but in order to get into the trusted requestor program, you'd have to agree to one of these methods but I think the feeling now is that all requests should be subject to one of these methods.

Obviously if there's a trusted requestor program, that's up to the - that would provide for some type of accelerated process or facilitated process, that's really up to the service provider to develop. So I think we can probably drop that last trusted sender paragraph. At least that's my thinking on this but let me open the queue now if there are people that have questions, or concerns, or want to speak either about the arbitration provision or the jurisdiction

provision that's here in the annex, again, as a means of dealing with disputes arising from improper disclosures.

Kathy, I see you have your hand up and anybody else who wishes to speak, please raise your hand if you're in Adobe and if you're not in Adobe, then just please speak up and we'll get you into the queue. So Kathy, please go ahead.

Kathy Kleinman: Hi Steve. Hi everyone. Steve, do I just have to talk to the arbitration or jurisdiction or can I talk to some of the general language of the annex since this is really the first time we're focusing in on it? What would you prefer?

Steve Metalitz: No. I think you can talk to it. You can talk to the language in the annex.

Kathy Kleinman: Okay. Terrific. First, you outlined, actually, a very nice alternate use of the annex that we're looking for which is that the data is being used in excess of the allowed uses. So a consultant creates a database of all the data that got revealed for multiple clients and publishes it. That's an outright violation of the use of this particular set of this type of reveal. So I think you're right. I think we should - everything you outlined would be great to put into language as another type of use of the annex, another type of resolution of disputes arising from, in this case, not false statements but arising from use of the data in a way contrary to the allowed uses. So do we need drafting on that or let me pause and see how we get that reflected especially now that we're on a fast track to publication.

Steve Metalitz: Okay. Yes. I think you could actually just change the - perhaps change the heading of the annex and then you might need some other language in there but I guess if the consensus of this call today is that we want to expand this to such cases, and I think that we would probably ask the staff if they can come up with language to do that or peoples suggestions are certainly welcome on that. That's just my reaction. I open the floor to anybody else that wishes to ask about - to talk about that or about the substance of what Kathy is raising which is should this - should these procedures also apply to situations in

which there's been a disclosure that's proper but the information that was disclosed was misused beyond the scope of what's in the template? I see (Stephanie) and (Michele). Kathy, are you - can we...

((Crosstalk))

Kathy Kleinman: I'll take my hand down for now and...

Steve Metalitz: Yes.

Kathy Kleinman: ...continue in the queue as time arises for other issues. Thanks.

Steve Metalitz: Okay. Great. Thank you. (Stephanie) please.

(Stephanie Perrin): Hi. (Stephanie Perrin) for the record. Just a question. I'm wondering if you elect to send the dispute to an independent dispute resolution service. What about the possibility that in a jurisdiction with data protection law there is a data protection law that has been breached by the disclosure? You're almost going around that process by providing an independent dispute resolution. I mean, some of them would be darn happy to have fewer complaints. I'm thinking of Ireland (Michele) but I'm just wondering how you deal with that?

Steve Metalitz: Okay. Thank you. So one - I suppose one way of doing these to state - this is without prejudice to other legal means of redress that would otherwise be available.

(Stephanie Perrin): Remedies. Other legal remedies. Yes.

Steve Metalitz: That would otherwise be available. That would certainly be one way of dealing with it so I'd be interested in peoples comments on that. (Michele), I think you were next.

(Michele Neylon): Thanks Steve. (Michele) for the record. Just very briefly, I don't want to get into the weeds on some of this but I think Kathy raises an interesting and valid point. If we as a service provider disclose information to a reporter and then the reporter who be this directly affected or allegedly affected party or a contractor thereof, then uses that data for some other purpose, that is a problem, but I'm not sure exactly who should be dealing with this. I mean, essentially, being very simplistic about it, if, for example, I'll pick on - I don't know. Let's see. I'll pick on Volker.

So let's say Volker sends us complaints about stuff all the time and then he then goes - we cooperate and the next thing I know, Volker is either selling that data publicly or publishing it on his website or doing something with it that was not - which was not intended then I can think of several things we might want to do but I'm not sure whether that would be a matter of a simple dispute or whether that would be something which we might want to pursue through normal legal channels. Thanks.

Steve Metalitz: Okay. Thank you (Michele). I think - I believe (James) was next in the queue.

(James Bladel): Hi. Yes Steve. I lowered my hand. I need to think through my comment a little bit better and maybe even disclose on the list. Thanks.

Steve Metalitz: Okay. I'm sorry I did not have my screen up here. Okay. Kathy, your hand is back up.

Kathy Kleinman: Hi. So in follow-up to what (Michele) said and this is partially a question and partially statement Steve which is that the jurisdiction clause is in brackets and I wanted to ask you about that and the drafters of this section. So jurisdiction is in brackets but it seems that it shouldn't be in brackets. At the very least, requestor should agree to the jurisdiction of the service provider for disputes both about alleged and proper disclosures and also about invalid or unauthorized uses of the data because that will create an avenue where the service provider is located under the service providers laws, including

data protection laws. So whatever else we do with arbitration, can we take the brackets away and make this a recommendation of the working group? That at the minimum service providers for both sets of issues have access to their local courts.

Steve Metalitz: Well, excuse me. This is Steve. The issue isn't whether the service provider has access to their local courts. It's whether they can obtain jurisdiction over the requestor who's not in that jurisdiction.

Kathy Kleinman: Good point and this is a way where we do all the time including when we register domain names.

Steve Metalitz: Yes but this is not - this is not intended as a - this is intended as an either/or. So maybe they should both be bracketed if that would clarify it. It's not intended as a both/and.

Kathy Kleinman: Well, right now we have no arbitration mechanism for this. So at the least - and we don't - especially if we're going to publish in the next few weeks, we're not going to be creating one I don't think. So...

Steve Metalitz: That's correct. Yes. This is about as detailed as it's going to get.

Kathy Kleinman: So again, I think at a minimum, my recommendation would be we take the brackets off the jurisdiction to local courts for both parties...

Steve Metalitz: Right. Yeah.

Kathy Kleinman: ...at least. So I'd love to know what other people think about that. Thank you.

Steve Metalitz: And the queue is open if people want to...

Paul McGrady: This is Paul. Can I be in the queue?

Steve Metalitz: Yes. Paul, please - please go ahead and if anybody else wants to get in the queue, I see - okay. Go ahead Paul.

Paul McGrady: Yes. Thank you. Paul McGrady for the record. Apologies for not having Adobe in front of me. I didn't have any connections. My mobile phone is dead. So I understand Kathy's concern but I wonder whether or not if we end up in a situation where obviously the provider is not going to want to be involved in arbitration or litigation over a third party that keeps update that keeps the (ABT) individuals (unintelligible) involved in that. I just kind of wonder whether or not if the goal is to protect the registrant, if we limit the jurisdiction to the providers (unintelligible) which say that happens to China and the registrants in Switzerland and the questions of (are you abusing the data is) in Buenos Aires whether or not forcing that registrant to go to China to assert their rights under Chinese data protection laws, that seems like that's a weird setup to me.

I agree that the providers should not be called into court where the requestor is or where the registrant (unintelligible) all the other IP contracts but I wonder - but I sort of worry about whether or not (unintelligible) jurisdiction at this stage if we've had time to think that all the way through. So anyways, sorry this was rambling. Thank you.

Steve Metalitz: Okay. Thank you Paul. I see (Karen) is next in the queue. (Karen), go ahead.

(Karen): Hi. I just kind of wanted to add, I guess, a sort of anecdotal points around this or some color around this in context. The majority of the providers that we come up against that we would even get close to this point of the process because of course, the majority of the providers and most of them on this call that I know of would be reasonable to the point where we wouldn't have to go to arbitration.

The ones that do are often intentionally set up in jurisdictions which makes things extremely difficult for the requestor and have nothing to do with the

registrants and it just seems to me that we need to leave it open to the language that isn't bracketed that any court having competent jurisdictions that we can take into account, things like context and convenience, in the same that we often are asked to take into account in other legal procedures and other jurisdictional issues. To me, it doesn't make any sense to limit it specifically to the feet of the service provider. So, and I also kind of support Paul's comments as well. Thank you.

Steve Metalitz: Okay. Thank you (Karen). We have Volker and (Michele) in the queue. If you're in Adobe, please put up your hand and if you're not, just please speak up and let me know that you want to speak. Volker, go ahead.

Volker Greimann: Yes. Thank you Steve. Volker speaking. Just to clarify with the question that was raised before, the bracketed jurisdiction clause is, of course, only from when we thought about it was only intended to be for the relationship between the requestor and the privacy proxy service provider. The requestor would not have to agree to dispute between him and the registrant to be bound by the location of the service provider.

So it's mainly (predicaments) that arise where the service provider would have a beef with a requestor that did something wrong, that made some invalid representations that they would be able to go after them in their own jurisdiction. That was the intent behind it. It was not an intent to open up the venue for the registrant at least from when I was working on this when I was suggesting it.

Steve Metalitz: Thank you Volker. That's helpful background. (Michele) you're next.

(Michele Neylon): Thanks. I think I'm - sorry. Throats gone. (Michele) for the record. I think I'm agreeing with both Volker and (Karen) and a couple other people on this. From my perspective, as an Irish company, we're only going to do stuff when we're served with something from an Irish court or something that we can recognize and in any case, people are going to pursue stuff in the courts

whether we put language in here or not. So I don't know. Maybe we're kind of over thinking this to a certain degree. I mean, I'd be - I'd be happy for leaving this for feedback from others but I'm not going to start - I don't know if we should be getting into over specifying some of this stuff. Thanks.

Steve Metalitz: Thank you (Michele). So one question is do we need annex or do we just say there should be some method for resolving these disputes but if there is an annex, I think I'm hearing that there are some opposed to the jurisdiction option. We haven't had much discussion about, excuse me, the arbitration option in detail but I think we have tried to clarify, at least we have on the table that potentially these remedies should be available in cases of improper use of disclosed information as well as improper disclosure and I think we also have a point to note to the staff that there needs to be a sentence that says this is without prejudice to any other legal remedies that might exist in the absence of this framework. So I think that kind of sums up where we are on this.

In terms of the bracket issue, I think - I mean, this is a question because we've used brackets a couple of different ways in this text and we should be more consistent but I think this is one where it needs to be made clear that these are two options and I don't think we have consensus on - I'm not sure that we have consensus on either one although a couple of people have raised questions about the jurisdiction option. Let me ask if there are any other comments here on the annex at this point. Kathy.

Kathy Kleinman: Hi. Yes. I like your clarification, thanks Steve, on what the brackets may mean here versus other areas of the document. Okay. So now my question is about the second paragraph. It's the line under these standards. Disclosure (isn't bad face) and wrongful only when it is affected by the requestor having made knowingly false representations to the provider with the intent to deceive. There's a lot of legal language here. So I wanted to ask for a clarification of why the word only is used when I can think of a number of

other reasons why and I may talk about that in another comment. I think we should take out the word only.

And why we have to have the term intent to deceive? If the requester made knowingly false representations to the provider whatever they were thinking intent to deceive is a really high standard. That's really hard to prove. That means you have to go into the mind of the person requesting.

So it would seem like if we put the period after provider the requester has made knowingly false representations to the provider whatever their intent that would seem to be enough. So but again I wanted to ask the drafters and others on the list. Thanks.

Steve Metalitz: Okay. So questions have been raised about this first sentence of the second paragraph. So let me just see if anybody wishes to speak to that? Holly has her hand up. Holly please go ahead.

Holly Raiche: You know just to say I agree with Kathy that in fact proving intent is almost impossible unless somebody actually writes down and says I actually meant to do somebody over it's just not possible.

So absolutely put the full stop after the provider. And I also do not understand why the word only is there. So I would be comfortable with the sentence to be amended as Kathy has suggested. Thanks.

Steve Metalitz: Okay. Well let me ask on that point what other examples would you give assuming that the issue we take - that if we end the sentence at provider what other situations would you consider disclosure to be in bad faith and wrongful? I'm just - I'm directing that at any...

Holly Raiche: Yes.

Steve Metalitz: ...who is wants us to remove only.

Kathy Kleinman: Steve it's Kathy.

Steve Metalitz: The go ahead.

Kathy Kleinman: Okay. So obviously disclosure is in bad faith for the other reason that we were discussing which is that the intent is to gather the data for another purpose or to collect it both for the purpose that it's intended for the trademark or copyright infringement allegation as well as to assemble a database and then market it.

So it seemed - again intent to deceive is very hard to prove almost impossible. So one can imagine a set of false representations made for a number of reasons. Thanks. And we've talked about a lot of them over the course of the last few...

Steve Metalitz: Yes. Yes I'm trying to parse out here taking out the intent to deceive what situation other than knowingly false representation.

Now you're - you've been brought up to be, you know, getting with the intent to disclose it again you're looking at intent.

But if we expand this to cover actual false - actual improper disclosures does that take care of that problem?

Kathy Kleinman: If we put the period after provider?

Steve Metalitz: Yes.

Kathy Kleinman: And take out the word only...

Steve Metalitz: I mean I'm assuming that for the moment here. Okay.

Kathy Kleinman: Yes, yes.

Steve Metalitz: Okay. Okay let me see if there's any other comments that people wish to make on this? (Vicki) go ahead please.

(Vicki): And forgive me in advance. But my - I may be misunderstanding or forgive me in advance. I believe that we set up this annex and this concept to deal with the very bad actors right?

And that was how we came up with the standard in the first place in terms of bad actor requesters? And I'm worried with where the conversation is going that we're trying to push back again from that place where we came up with this concept.

And so as Steve was saying I don't know what there is besides knowingly false representation? If we go back to all the representations I think it covers some of the things that Kathy was already talking about.

But again I'm speaking without having gone back and right - rereading the document right now. So I think that we ought to consider keeping this language and going back and looking at the representations. And seeing if it doesn't cover the issues Kathy was saying.

Steve Metalitz: Okay. So thank you (Vicki). So let me just see. I think where we are on this is there's been concern expressed about the phrase with the intent to deceive.

And unless folks either on this call or very soon thereafter can explain why we need that language we may be able to stop the sentence at provider.

I think we still - I don't feel like we've really come to rest on this only issue because I don't think we've come up with other instances where an improper disclosure a disclosure in bad faith and wrongful would not involve a knowingly false representation.

But I think that's kind of where things sit on this. Are there any other comments on the annex at this point?

Okay well this has been helpful. I think we've given some guidance to the staff. They do have a bit of work to do here to make sure this covers improper uses, and includes that savings clause about the other legal remedies, and to make it clear that arbitration and jurisdiction are two sides or is an either/or at this point again obviously subject to public comments - public comment of when we get this in the initial report.

Why don't we seeing no other hands why don't we move on to the pretext issue. I think we have to go back now to the overall document.

And this is one that had some discussion on the list. And to be honest I think this may be one where we just we might just need to have different options put out for the public to comment on.

If you look at this this is at the bottom of Page 8 of the document that Mary has now put up on the screen and the top of Page 9.

So I mean I think the main issue here there's a few wording changes here but the main issue again is in this pretext situation where you have a bona fide intellectual property claim but you're motivated, you know, you're using it as a pretext in order to bind - get disclosure of the registrants identity for some more nefarious purpose it's been our - what we've been wrestling with is stating what that nefarious purpose is as whether it deals with human rights, with freedom of expression given this example or whether it deals with privacy.

So I don't know if people have any other comments to make on this or whether that question really, you know, we may just have to put that in the draft report with for discussion.

But we thought I thought we since we had not had too much comment on this on the list just to see if there is any - anyone has a bright idea about how we might be able to resolve this. Holly go ahead.

Holly Raiche: Yes okay. My thought has always been instead of using privacy rights because rights is a very funny word and privacy is dealt with differently in different jurisdictions.

I've always thought well it is protecting the customers' privacy because in fact the customer is already opted for a service that protects their privacy.

And by opting for the protection of their privacy through use of this privacy proxy server that is the mechanism by which they may protect other human rights and so forth.

But rather than use that human rights thing I've always thought just protection of privacy because that's what people are paying for anyway or have opted for. And that's just a thought. Thanks.

Steve Metalitz: Okay thank you Holly. I guess the - well let me ask Volker and Michele for their views on this. Volker go ahead.

Volker Greimann: And thank you. This is Volker speaking. I am pretty much on the same line here. And I think originally I had put privacy in there.

My thought my way of thinking was I wasn't trying to delve into a legal analysis that would delve into the rights on a certain jurisdictions that are privacy registrant might have or not have by law but rather the fact that he has opted for privacy and removal of that privacy would be another violation perhaps of the rights of the customer or the violation of his privacy.

So by just removing the words rights and just leaving privacy everything would be covered that we had discussed earlier i.e. privacy rights might be covered if such rights exist for that customer in that jurisdiction whereas human rights that might be violated by removing his privacy or anything that may follow from that. So I would be very much in favor of the proposal for removing that word.

Steve Metalitz: Okay Michele.

Michele Neylon: Thanks, Michele for the record. I'd love to agree with Volker but I kind of disagree because the privacy as a legal concept at least under Irish law is its inferred it's an automatic.

I mean if any of you enter into a contract with any Irish company you have a certain degree of privacy afforded to you automatically.

Now I understand that the discussion here is around the - a specific privacy service as it relates to Whois.

But expanding out from that let's just say for argument sake that you have ten domain names registered all with by Whois privacy service all of the reveal request is for only one.

I wouldn't be able to reveal the data raise it to the other domain names because that's - well first off that is not what you were asked for. And secondly that would put me into hot water with respect to the data privacy.

I'd be wary about the choice of words. I mean the word privacy as itself is something I'm wary of. I mean if you want to talk about privacy service okay but privacy by its self I'm uncomfortable with.

Steve Metalitz: Okay thank you Michele. (Val) you're next. Please go ahead.

(Val Sherman): Hi. This is (Val). I guess also, you know, it's I don't to some extent I'm reiterating what's already been said.

But also feel that private, you know, substituted privacy for human rights or whatever we had in there before kind of makes this particular section circular.

And in my opinion particularly if we use terms like mainly for the purpose of circumventing the customers privacy really kind of squishy.

It seems that, you know, at least as far as I was concerned this particular session section was meant to specifically focus on the issue of pretext which means -- and I think Volker I don't mean to put you on the spot but I think Volker in one of his email said it best.

If a complaint and only makes claims in order to remove the privacy i.e. uses them as a pretext so requests should be denied and I fully, you know, I - this is what I thought that we were targeting.

And if we do intend to have privacy in their I don't think we should be using terms like mainly it should be more like only as stated there to make sure that we're not enabling this section to serve some other means or making the rest of the document mute essentially if that makes any sense. Thank you.

Steve Metalitz: Yes. Thanks (Val). And Volker maybe did you want to respond to that since it was...

Volker Greimann: Yes. Thank you Steve and thank you (Val) I'm actually more in favor of the mainly because it's very hard to determine an only but if you can have certain evidence from your customer that says that states that there may be other interest involvement then just the interests that are claimed in the complaint then you will probably be able to say yes well that's mainly for this in that purpose and not for the purpose that he's claiming to do.

Having to claim - having to put that claim is only would be very much more difficult. And I would be very hesitant to put an only in there because it's - in many cases it's not and only. There's always multiple motivations driving a complainant.

So trying to figure out what this main interest is in this is easier for a provider then just saying it's just that.

Steve Metalitz: Okay thank you Volker. I think (Val) was just kind of reading back what you had said about only but I take your point.

I'll have to say my concern about and it maybe that we're just going to have to put this out for public comment as I think is being suggested in the chat.

But my concern about this always has been and I think if you say privacy you've got an exception that totally swallows the rule here.

I mean so remember this is a case where to use a phrase that we've decided not to use in this framework there's a slam dunk case that the domain name is being used to infringe copyright or trademark here.

You know, the templates been met. Everything is, you know, there's basis there. But that's not really what's motivating there's evidence that that's not really what's motivating the requester.

This was Kathy's example of the gang symbol that might have been trademarked or be a trademark infringement but that's being put up by the anti-gang group.

And so the gang just wants to expose who these people are so they can take some retribution against them.

Now I'm not I don't know how realistic that example is. But that's kind of the edge case that I think we are talking about here.

And if this last phrase is well the provider says well I don't think, you know, I think this is being done mostly to - in order to find out who the person is well that's the reason for every request however well founded or well-motivated it is. That's the reason for every request.

So this just seems to me to be if we just say privacy or privacy service that might even be more problematic than we're just saying whenever the provider wants to say I'm - the customer paid for this service and I'm going to give it to them no matter what is presented to me than this is kind - the whole this whole exercise becomes kind of pointless.

So maybe I'm not understanding this but that's my concern about privacy - saying privacy and particularly about saying privacy service because it just kind of trumps everything else. Volker I - perhaps you can explain to me why I'm wrong on this?

Volker Greimann: Yes. I understand your complaints. And I think we just - I think this should be solvable before we go to publish and because I don't think we are so far away.

I mean I don't have any problem with what you said with regards to finding out who the person is because that's the nature of the request.

You have to find out who the person is to be able to do something about the infringement. And that still has something to do with the infringement.

However when you have a complaint where you find out there is other motivations at play as well that may be private in nature, may be governmental enforcement in nature, may be problematic from a free speech issue then you would say would still have to say that the request that is made

to the products provided to lift the privacy is in its majority i.e. the main motivation behind the request is not the request itself but something that's not in the request then you will be able to refuse.

Otherwise you would have still the obligation to follow the procedure that we have - that we would outline i.e. if you find - if the majority the other intention behind it is just a minority interest then you was still follow the procedure.

It's on - the problem I have is with the word only and because then you would say yes there is even if there's just the slightest potential that the claim is right you would have to neglect all the other comments that are in there because there's the possibility that the claim is -- how to put it best -- is motivated in part by the motivation outlined by the complaint.

And then you wouldn't have the only and would be - still be forced to follow the procedure and wouldn't be able to deny on behalf of the concerns raised by the complainant. I think that is the main issue here.

Steve Metalitz: Okay.

Volker Greimann: That's why the only is too strict and too stringent because it forces you down the road even though you might have 95% interest view in front of you that say's this is a legitimate business just a pretext.

But the 5% of not having the pretext still of having the developed complaint in some form would trump the 95% of other concerns.

Steve Metalitz: Okay thank you Volker. So yes maybe we can find some magic words here. Let's - that would break - that would clarify this because I tend to agree with you. I think we're not that far apart. Mary had her hand up. So let me ask her and then (Val).

Mary Wong: Thanks Steve and thanks everybody. This is Mary from staff. And this is to follow on the discussion that we're now having including the suggestions made by Holly amongst others in the chat.

So since this is going to be our homework to clean up I just wanted to make clear that the different versions that we are talking about really are talking about different levels of different the different extent of scope for the disclosure or the reason not to disclose.

So for example perhaps the most clear but possibly the most stringent or limited is a privacy right which is a legal right and in some jurisdictions it could be the right to have your data protected in others it may be broader than that.

Then there is the concept of the human rights which would include the right to privacy as well as other rights such as the freedom of expression.

So then it seems to me that we're talking about something that is related to this which is the pretext. So the requester essentially is using the trademark or copyright complaint as a pretext for removing the privacy service without a well-founded reason.

And that seems to be where we are. So I know I'm sounding repetitive but I just wanted to say that out loud so that if I'm mischaracterizing anything or misunderstanding anything folks can let me know so that when we take this back we can try and make it as clear as possible. Thanks Steve.

Steve Metalitz: Okay thanks Mary. That's a helpful question. But yes but maybe we need a different phrase than the ones we've been trying to slot in here. (Val) please go ahead.

(Val Sherman): Hi. This is (Val). So I apologize again I'm probably also being repetitive. But I'm wondering and I don't like to really normally I'm for keeping it concise, and crisp and short.

But I'm wondering if maybe in this case perhaps, you know, just a sentence a policy statement that kind of more clearly clarifies what this provision is about might be helpful.

It might not but it might be if that is of course if we can't find the proper words to use in this particular provision, just a thought. Thanks.

Steve Metalitz: Okay. So you're suggesting one option would be kind of a paragraph a prose describing the edge cases that we're talking about? And...

(Val Sherman): This is (Val) again. Well perhaps not (unintelligible) as opposed. But just maybe a little bit - something to help to kind of make sure that everybody reviewing this paragraph any provider faced with it that did not participate in this group is clear that we're talking about these pretextual situations where the reason really isn't the one claimed.

And I'm finding - I also don't have the perfect word. So it's just an idea to kind of help to clarify what we're addressing here for those that have not had the benefit of participating on this group. Thank you.

Steve Metalitz: Okay. Thank you. All right well let me - I would certainly encourage folks over the next couple of days as the staff is preparing something here to put on your thinking caps and see if we can help them.

But I think at this point since we're near the top of the hour I would like to turn unless there are other comments on this pretext point I'd like to turn to the last thing that we've noticed - noted here which is the attestation and automation language.

And I and again I think we're pretty much I think we had some good discussion about attestation on the list.

And if you look at well obviously it appears three times in the three templates. But if you look on for example on Page 7 we now have some additional language.

I'm not sure if it's the same on all of these. But there is some additional language about requesting or providing sufficient proof of authorization.

And I think on the list there were also there's some suggestions that that should be when there's a reasonable basis for doubt, or when it's a new requester. Those would certainly be examples of this.

But let me just ask if people have comments on this language that is in changes at the bottom of page on Page 4, the bottom of Page 5 and at the bottom of Page 7 regarding attestation, any comments on this? Michele?

Michele Neylon: Thanks Michele for the record. Very briefly I think we're pretty close on this. I mean there's been some good backwards and forwards on this over the last week.

I mean I think, you know, I'm personally I'm not a lawyer so I'm not going to be the one to come up with the language.

And I do understand some of the concerns that some people have raised. But I mean ultimately as a service provider I want to be 100% sure that if I need to I can go back to somebody and say hey you say you're representing X show me some level of proof for that whatever form that may take.

I have no interest in going around and collecting it from every single person coming along. So I mean if we get takedown stuff and other things from various companies who we know exactly who they are.

And we know damn well they're big enough, and ugly enough that they're highly unlikely to make false claims. But if I get something from some random third party I want to be able to go who the hell are you? Thanks.

Steve Metalitz: Thanks Michele. Any other comments on this language, I thought I saw a hand flickering there but maybe it was retinal fatigue.

Okay. So that's the attestation language. And then the automation language as indicated in the chat this is kind of at the bottom of Page 9.

And I think that again there might need still to be a little tweaking on this. But I think we are pretty much on board with this as far as discouraging strongly discouraging treating these requests in an automated fashion without human intervention. So I'll just leave it at that unless there are other comments on this question.

Yes obviously we can continue discussion on the list but I think we're far enough along as we said at the top of the call that we'll ask the staff to try to pull this together into a version that can be inserted into the draft report.

We will see that by the end of this week. And we will focus on that and also on a few yet to be answered nondisclosure questions on our call next week.

So seeing no other hands in the queue and it's the top of the hour let me thank everybody for their participation today and encourage you to remain active on the list over the next couple of days. And we'll look forward to the staffs draft by the end of the week.

Woman: Thank you.

Man: Thank you Steve.

Woman: Thanks Steve. Thanks everybody.

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

Coordinator: Once again the meeting has been adjourned. Thank you very much for joining and please remember to disconnect all remaining lines. Have a wonderful rest of your day.

END