

**Revised Illustrative Draft Disclosure Framework for Intellectual Property Rights-holders (DRAFT – 4  
September 2015)**

**Policy Purpose:**

By facilitating direct communication among Requesters, ~~Service~~ Providers, and Customers, this policy serves the public interest and seeks to strike an appropriate balance among the interests of all parties concerned. It aims to provide Requesters a higher degree of certainty and predictability as to if, when and how they could obtain what level of disclosure; to preserve for ~~service p~~ Providers a sufficient degree of flexibility and discretion in acting upon requests for disclosure by not requiring that disclosure automatically follow any given request<sup>[1]</sup>; and to include reasonable safeguards and procedures to protect the legitimate interests and legal rights of ~~customers~~ Customers of accredited proxy/privacy service providers. Once sufficient time has passed after implementation of these accreditation standards, the Working Group suggests a review to determine whether these three objectives have been met and fairly balanced.<sup>[2]</sup>

**Policy Scope:**

The following procedures were developed by the Working Group to apply to requests made by intellectual property rights-holders or their authorized representatives. The WG has not developed a similarly detailed process for other types of Requesters, e.g. law enforcement authorities or consumer protection agencies.

Given the balance that this Policy attempts to strikes, evidence of the use of high-volume, automated electronic processes for sending Requests or responses thereto (without first being subjected to human review) to the systems of any of the parties involved (Requesters, Service Providers, or Customers) by any of the parties in performing any of the steps in the processes outlined herein shall create a rebuttable presumption of non-compliance with this Policy.

**I. Service Provider Process for Intake of Requests**

- A. Service Provider will establish and publish a point of contact for submitting complaints that registration or use of a domain name for which the Service Provider provides privacy/proxy service infringes copyright or trademark rights of the Requester. The point of contact shall enable all the following information (in II below) to be submitted electronically, whether via e-mail, through a web submission form, or similar means. Telephonic point of contact may also be provided.
- B. [Nothing in this document prevents a Service Provider from] [Service Provider is encouraged, but not required, to] implement measures to optimize or manage access to the Request submission process. This could include:
  - i. Requiring Requesters to register themselves and/or their organizations with Service Provider.
  - ii. Authenticating complaint submissions as originating from a registered Requester (e.g., log-in, use of pre-identified e-mail address).

- iii. ~~Assessing a standardized nominal cost recovery fee for processing complaint submissions, or to maintain Requester account so long as this does not serve as an unreasonable barrier to access to the process.~~<sup>[3]</sup>
  - iv. Qualifying Requesters meeting certain reliable criteria as “trusted Requesters” whose requests would be subject to a streamlined process.
  - v. Revoking or blocking Requester access to the submission tool for egregious abuse of the tool or system, including submission of frivolous, vexatious,<sup>[4]</sup> or harassing requests, or numerous requests that are identical, i.e., that concern the same domain name, the same intellectual property, and the same Requester.
- C. Nothing in this document prevents Service Providers from sharing information with one another regarding Requesters who have been revoked or blocked from their systems or who have engaged in misconduct under this Policy, including frivolous or harassing requests.
- D. Nothing in this document prevents a Service Provider from adopting and implementing policies to publish the contact details of Customers in Whois, or to terminate privacy and proxy service to a Customer, for breach of Service Provider’s published Terms of Service, or on other grounds stated in the published Terms of Service, even if the criteria outlined in this document for a Request have not been met.<sup>[5]</sup>

## II. Request templates for Disclosure

- A. Where a domain name allegedly infringes a trademark

Requester provides to Service Provider verifiable evidence of wrongdoing, including<sup>[6]</sup>:

- 1) The domain name that allegedly infringes the trademark;
- 2) Evidence of previous use of a relay function (compliant with the relevant section of accreditation standards regarding Relay) to attempt to contact the Customer regarding the subject matter of the request, if any, and of any responses thereto, if any<sup>[7]</sup>;
- 3) Full name, physical address, email address, and telephone number of the trademark owner, and for legal entities, the country where incorporated or organized;
- 4) Authorized legal contact for trademark owner and his/her name, title, law firm, if outside counsel, physical address, email address and telephone number for contact purposes;
- 5) The trademark, the trademark registration number (if applicable)<sup>[8]</sup>, links to the national trademark register where the mark is registered (or a representative sample of such registers in the case of an internationally registered mark), showing that the registration is currently in force (if applicable)<sup>[9]</sup>, and the date of first use and/or of application and registration of the mark<sup>[10]</sup>;  
<sup>[11]</sup>and

6) A good faith statement, either under penalty of perjury or notarized or accompanied by sworn statement<sup>1</sup> (“Versicherung an Eides statt”), from either the trademark holder or an authorized representative of the trademark holder, that:

a) provides a basis for reasonably believing that the use of the trademark in the domain name

- i. allegedly infringes the trademark holder’s rights and
- ii. is not defensible; and

b) states that Requester will: ~~use Customer’s contact details only~~

- i. only use Customer’s contact details to determine whether further action is warranted to resolve the issue; to attempt to contact Customer regarding the issue; and/or in a legal proceeding concerning the issue;
- ii. ~~to attempt to contact Customer regarding the issue; and/or~~ only retain Customer’s contact details for as long as is necessary to achieve the objectives outlined in Section II(A)(6)(b)(i); and
- iii. ~~in a legal proceeding concerning the issue.~~ comply with all applicable data protection laws while retaining Customer’s contact details.<sup>[12]</sup>

7) Where the signatory is not the rights holder, he/she must attest that he/she is an authorized representative of the rights holder, capable and qualified to evaluate and address the matters involved in this request, and having the authority to make the representations and claims on behalf of the rights holder in the request, including the authority to bind the rights holder to the limitations on the use of Customer data once disclosed.<sup>2</sup>

8) Where the signatory is not the rights holder, an officer of the rights holder (if a corporate entity) or an attorney of the rights holder, and the Provider has a reasonable basis to believe that the Requester is unauthorized to act on behalf of the rights holder or seeks to verify a new or unknown Requester, the Provider may request, and the Requester shall provide, sufficient proof of authorization.

## **B. Domain name resolves to website where copyright is allegedly infringed**

Requester provides to Service Provider verifiable evidence of wrongdoing, including<sup>[13]</sup>:

<sup>1</sup> ~~TO BE DETERMINED: Mechanism for resolving provider claims of false statements/misrepresentations. See Annex 1 for two options discussed by the Working Group.~~

<sup>2</sup> An example of such an attestation: “I attest that I am the rights holder / authorized representative of the rights holder, capable and qualified to evaluate and address the matters involved in this request, and have the authority to make the representations and claims in this request.” The same attestation statement can also be used in situations arising under Section II.B(8) and Section II.C(7), below.

- 1) The exact URL where the allegedly infringing work or infringing activity is located, or a representative sample of where such work or activity is located.<sup>[14]</sup>~~The exact URL where the allegedly infringing content is located;~~
- 2) Evidence of previous use of a relay function (compliant with the relevant section of accreditation standards regarding Relay) to attempt to contact the Customer with regard to the subject matter of the request, if any, and of any responses thereto, if any. Requesters are also encouraged (but not required under this Policy) to provide evidence of previous attempts to contact the web host or the domain name registrar with regard to the subject matter of the request, if any, and of any responses thereto, if any.<sup>[15]</sup>
- 3) Full name, physical address, email address, and telephone number of the copyright owner; and for legal entities, the country where incorporated or organized;
- 4) Authorized legal contact for copyright owner and his/her name, law firm, if outside counsel, physical address, email address and telephone number for contact purposes;
- 5) Information reasonably sufficient to identify the copyrighted work, which may include, where applicable, the copyright registration number, and the country where the copyright is registered;
- 6) If possible,<sup>[16]</sup> ~~The~~ the exact URL where the original content is located (if online content) or where the claim can be verified; and
- 7) A good faith statement, either under penalty of perjury or notarized or accompanied by sworn statement (“Versicherung an Eides statt”),<sup>3</sup> from either the copyright holder or an authorized representative of the copyright holder, that:
  - a) ~~Providing~~ Provides a basis for reasonably believing that the use of the copyright content on the website
    - i. infringes the copyright holder’s rights and
    - ii. is not defensible;
  - b) ~~Providing~~ Provides a basis for reasonably believing that the copyright protection extends to the locale the website targets; and
  - c) Stating States that Requester will: ~~use Customer’s contact details only~~
    - i. only use Customer’s contact details to determine whether further action is warranted to resolve the issue; to attempt to contact Customer regarding the issue; and/or in a legal proceeding concerning the issue;~~to determine whether further action is warranted to resolve the issue;~~

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<sup>3</sup> ~~TO BE DETERMINED: Mechanism for resolving provider claims of false statements/misrepresentations. See Annex 1 for two options discussed by the Working Group.~~

- ii. only retain Customer's contact details for as long as is necessary to achieve the objectives outlined in Section II(B)(7)(c)(i); and~~to attempt to contact Customer regarding the issue; and/or~~
- iii. comply with all applicable data protection laws while retaining Customer's contact details.~~in a legal proceeding concerning the issue.~~<sup>[17]</sup>

- 8) Where the signatory is not the rights holder, he/she must attest that he/she is an authorized representative of the rights holder, capable and qualified to evaluate and address the matters involved in this request, and having the authority to make the representations and claims on behalf of the rights holder in the request, including the authority to bind the rights holder to the limitations on the use of Customer data once disclosed.
- 9) Where the signatory is not the rights holder, an officer of the rights holder (if a corporate entity) or an attorney of the rights holder, and the Provider has a reasonable basis to believe that the Requester is unauthorized to act on behalf of the rights holder or seeks to verify a new or unknown Requester, the Provider may request, and the Requester shall provide, sufficient proof of authorization.

**C. Domain name resolves to website where trademark is allegedly infringed**

Requester provides to Service Provider verifiable evidence of wrongdoing, including<sup>[18]</sup>:

- 1) The exact URL where the allegedly infringing content is located;
- 2) Evidence of previous use of a relay function (compliant with the relevant section of accreditation standards regarding Relay) to attempt to contact the Customer with regard to the subject matter of the request, if any, and of any responses thereto, if any. Requesters are also encouraged (but not required under this Policy) to provide evidence of previous attempts to contact the web host or the domain name registrar with regard to the subject matter of the request, if any, and of any responses thereto, if any<sup>[19]</sup>;
- 3) Full name, physical address, email address, and telephone number of the trademark owner; and for legal entities, the country where incorporated or organized;
- 4) Authorized legal contact for trademark owner and his/her name, law firm, if outside counsel, physical address, email address and telephone number for contact purposes;
- 5) The trademark, the trademark registration number (if applicable)<sup>[20]</sup>, links to the national trademark register where the mark is registered (or a representative sample of such registers in the case of an internationally registered mark), showing that the registration is currently in force (if applicable)<sup>[21]</sup>, and the date of first use and/or of application and registration of the mark<sup>[22]</sup><sup>[23]</sup>; and

6) A good faith statement, either under penalty of perjury or notarized or accompanied by sworn statement (“Versicherung an Eides statt”),<sup>4</sup> from either the trademark holder or an authorized representative of the trademark holder, that:

a) ~~Providing~~ Provides a reasonable basis for believing that the use of the trademark on the website

i. infringes the trademark holder’s rights and

ii. is not defensible; and

b) Stating that Requester will: ~~use Customer’s contact details only~~

i. only use Customer’s contact details to determine whether further action is warranted to resolve the issue; to attempt to contact Customer regarding the issue; and/or in a legal proceeding concerning the issue ~~to determine whether further action is warranted to resolve the issue;~~

ii. only retain Customer’s contact details for as long as is necessary to achieve the objectives outlined in Section II(C)(6)(b)(i); and ~~to attempt to contact Customer regarding the issue; and/or~~

iii. comply with all applicable data protection laws while retaining Customer’s contact details ~~in a legal proceeding concerning the issue.~~<sup>[24]</sup>

7) Where the signatory is not the rights holder, he/she must attest that he/she is an authorized representative of the rights holder, capable and qualified to evaluate and address the matters involved in this request, and having the authority to make the representations and claims on behalf of the rights holder in the request, including the authority to bind the rights holder to the limitations on the use of Customer data once disclosed.

8) Where the signatory is not the rights holder, an officer of the rights holder (if a corporate entity) or an attorney of the rights holder, and the Provider has a reasonable basis to believe that the Requester is unauthorized to act on behalf of the rights holder or seeks to verify a new or unknown Requester, the Provider may request, and the Requester shall provide, sufficient proof of authorization.

### III. Service Provider Action on Request

Upon receipt of the ~~information~~ verifiable evidence of wrongdoing<sup>[25]</sup> set forth above in writing, Service Provider will take reasonable and prompt steps to investigate and respond appropriately to the request for disclosure, as follows:

A. Promptly notify the Customer about the complaint and disclosure request and request that the Customer respond to Service Provider within 15 calendar days. Provider shall advise the

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<sup>4</sup> ~~TO BE DETERMINED: Mechanism for resolving provider claims of false statements/misrepresentations. See Annex 1 for two options discussed by the Working Group.~~

Customer that if the Customer believes there are legitimate reason(s) to object to disclosure, the Customer must disclose these reasons to the Provider and authorize the Provider to communicate such reason(s) to the Requester; and

B. Within ~~3~~ calendar days after receiving the Customer's response, or 1 calendar day<sup>[26]</sup> after the time for Customer's response has passed, Service Provider shall/is encouraged but not required to<sup>[27]</sup> take one of the following actions:

- i. disclose to Requester using secure communication channels<sup>[28]</sup> the ~~contact information it has for Customer that would ordinarily appear in the publicly accessible Whois for non-proxy/privacy registration~~ name, mailing address, and contact information for service of process that it has for Customer<sup>[29]</sup>; or
- ii. state to Requester in writing or by electronic communication its specific reasons for refusing to disclose.

In exceptional circumstances, if Provider requires additional time to respond to the Requester, Provider shall inform the Requester of the cause of the delay, and state a new date by which it will provide its response under this Section.

C. Disclosure can be reasonably refused, for reasons consistent with the general policy stated herein, including [without limitation] any of the following:

- i. the Service Provider has already published Customer contact details in Whois as the result of termination of privacy and proxy service;
- ii. the Customer has objected to the disclosure and has provided ~~[[adequate] [sufficient] [compelling] reasons against disclosure, including without limitation a reasonable defense for its use of the trademark or copyrighted content in question]~~ [a reasonable basis for believing (i) that it is not infringing the Requester's claimed intellectual property rights, and/or (ii) that its use of the claimed intellectual property is defensible]<sup>[30]</sup>;
- iii. ~~[the Provider has found [adequate] [sufficient] [compelling] reasons against disclosure]~~ [the Provider has a reasonable basis for believing (i) that the Customer is not infringing the Requester's claimed intellectual property rights, and/or (ii) that the Customer's use of the claimed intellectual property is defensible]<sup>[31]</sup>;
- iv. the Customer has surrendered its domain name registration in lieu of disclosure, ~~if the Service Provider offers its Customers this option~~ — which all Service Providers must allow<sup>[32]</sup>;
- ~~iv-v.~~ the Customer has removed the allegedly infringing trademark and/or copyright material in lieu of disclosure; or
- vi. that the Customer has provided, or the Provider has found, specific information, facts and/or circumstances showing that the Requester's trademark or copyright complaint is a pretext for obtaining the Customer's contact details by effecting removal of the

privacy/proxy service for some other purpose unrelated to addressing the alleged infringement described in the Request; or

~~v.vii.~~ that the Customer has provided, or the Provider has found, specific information, facts and/or circumstances showing that disclosure to the Requester will endanger the safety of the Customer.<sup>[33]</sup>

D. Disclosure cannot be refused solely for lack of any of the following: (i) a court order; (ii) a subpoena; (iii) a pending civil action; or (iv) a UDRP or URS proceeding; nor can refusal to disclose be solely based on the fact that the request is founded on alleged intellectual property infringement in content on a website associated with the domain name.<sup>[34]</sup>

E. For all refusals made in accordance with the policy and requirements herein, Service Provider must accept and give due consideration to Requester's requests for reconsideration of the refusal to disclose, in instances where Requester has discovered and submitted additional evidence or information which warrants consideration<sup>[35]</sup>.

~~F.~~

~~G.F. In the event of a final refusal to disclose by the Provider, Provider must participate in an ICANN-approved review process for determining whether the reason for refusal to disclose complies with the general policy stated above,<sup>5</sup> as appropriately limited to exceptional cases, and not to be used for every refusal; and which should be similarly accessible to the Customer for purposes of an appeal.~~<sup>[36]</sup>

~~H.G.~~ In the event that a Provider is alleged to have made a wrongful disclosure based on a Requester having provided false information, the Provider and Requester shall participate in an ICANN- approved dispute resolution process. A framework for such a review and dispute resolution process is outlined in Annex 1, below.

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<sup>5</sup> ~~The ICANN-approved dispute resolution provider will provide a neutral and impartial panelist who, after providing due notice to and opportunity to be heard by the Requester, the Service Provider, and the Customer, will determine promptly and confidentially, at minimal expense, whether disclosure should be made. In accordance with the general policy stated above, the dispute resolution provider shall order that disclosure be made if there is a reasonable basis for believing that the Customer has, as alleged, infringed upon the Requester's claimed rights in a manner that is not defensible. This Provider shall, as far as practicable, have extensive expertise in human rights law, including freedom of expression principles, as well as intellectual property, including principles concerning fair use and fair dealing.~~



## ANNEX I TO DISCLOSURE FRAMEWORK: ~~TWO OPTIONS~~ **PROCESS** FOR RESOLVING DISPUTES ARISING FROM DISCLOSURES MADE AS A RESULT OF ALLEGEDLY IMPROPER REQUESTS

### **PRELIMINARY NOTE:**

~~The following set of options were initially drafted to apply to instances where there may be a dispute as between a Provider and a Requester concerning wrongful disclosure of Customer contact details as a result of alleged false statements made by a Requester. However, following its deliberations, the Working Group has included language to cover situations where a disclosure was made properly but the Requester nonetheless misused the data disclosed to it, i.e. used the information beyond the scope of the specific purposes stated in the Policy.~~

~~Neither option below is intended to preclude any party from seeking other available remedies at law.~~

### **OPTION #1**

#### **Arbitration:**

~~Any controversy, claim or dispute arising between the Service Provider and the Requester as a result either of: (i) alleged wrongful disclosure by Provider of Customer's contact information; or (ii) alleged misuse by Requester of Customer's contact information shall be referred to and finally determined by a dispute resolution service provider approved by ICANN, in accordance with standards established by ICANN.~~

~~Under these standards, disclosure is wrongful only when it is effected by the Requester having made knowingly false representations to the Provider. Disclosure is not wrongful if the Requester had a good faith basis for seeking disclosure at the time the Request was submitted to the Provider.~~

~~Under these standards, misuse occurs only when a Requester knowingly uses Customer contact information disclosed to it by a Service Provider for a purpose other than one of the specific purposes for which it had agreed to use such information (as listed in Section II.A(6), II.B(7), and II.C(6) of the Policy).~~

~~Judgment on an award rendered by the arbitrator(s) may be entered in any court having competent jurisdiction over the Requester.~~

### **OPTION #2:**<sup>[37]</sup>

#### **Jurisdiction:**

In making a submission to request disclosure of a Customer's contact information, Requester agrees to be bound by jurisdiction at the seat of the Service Provider for disputes arising from alleged improper disclosures caused by knowingly false statements made by the Requester, or from Requester's knowing misuse of information disclosed to it in response to its request.