

SUMMARY OF SUB-TEAM 3 ANALYSIS TO DATE (5 SEPTEMBER 2015)

I. Overview

Annex E was included in the [Initial Report](#) to outline procedures relating specifically to requests made by intellectual property rights-holders or their authorized representatives. In some areas, Annex E included proposed alternatives where public comment was sought. ICANN staff identified approximately 80 public comments specifically addressing Annex E. In addition, the [Save Domain Privacy](#) petition with more than 10,000 signatories addressed issues discussed in Annex E. Sub-team 3 prepared this summary based on those comments.

Generally speaking, the majority of non-petition public comments does not support Annex E or otherwise represents a negative opinion of Annex E. [1]The public comments in support of or opposition to Annex E are discussed in more detail below.

Further, the Save Domain Privacy petition, which had 10,042 signatories and also included [x] number of additional statements, argued that “privacy providers should not be forced to reveal my private information without verifiable evidence of wrongdoing.” We as a sub-team could not agree on how to interpret “verifiable evidence,” and will leave that discussion to the larger WG. Some on the sub-team viewed these comments as supporting Annex E because the requirements in Annex E as currently formulated can be interpreted as constituting verifiable evidence, while others on the sub-team interpret ‘verifiable evidence’ as requiring a court order and therefore not in support of Annex E.[2] However, some also noted that the word “verifiable” does not imply that the evidence has been tested through a legal process; rather, it simply points toward requiring that evidence provided must be credible/provable enough so that, in a legal proceeding, it would withstand legal scrutiny, but does not necessarily imply that there must have been a court process in all cases.[3]

II. Support for the basic premise of Annex E

Our sub-team reviewed and analyzed 28 comments that accepted the basic premise of Annex E (though some then proposed specific changes to Annex E, as outlined below).¹ Of those, nine comments (from the BC, MPAA, INTA, IACC, Cui (ADNDRC), Mike Fewings, Time Warner, IPC, and Turner Broadcasting) included statements of general support for Annex E; those can be summarized by the comment from Mike Fewings, who said: “The safeguards that have been put in are reasonable.”

Thirteen comments also included statements of support for specific sections of Annex E. Some of those statements of support were explicit, like the five commenters (MPAA, INTA, Time Warner, RIAA/IFPI, and Turner Broadcasting) who explicitly noted their support for Section III(D).

¹ There was disagreement though among the commenters who supported Annex E as to its applicability beyond trademark and copyright infringement notices (to areas such as law enforcement requests, for example). Given our sub-team’s explicit focus on Annex E itself, this is a topic that may be more relevant for other sub-teams, or the WG broadly.

Others were implicit: while not explicitly referring to a section of Annex E by name, they expressed support for general concepts reflected in the different sections of Annex E while in some cases seeking different standards for disclosure and options to disclosure. Those were:

- The comments from the NCSG and Cyberinvasion, while not referencing Section III(C)(iv) explicitly, supported its reference to P/P Customer surrender of a domain name registration as an option in lieu of disclosure. That said, while Section III(C)(iv) refers to surrender in lieu of disclosure as an option, both the NCSG and Cyberinvasion strongly supported requiring P/P Providers to offer that option.
- The comments from Stefan Grunder, Phil Crooker, the NCSG, CDT/ Open Technology Institute/Public Knowledge, Cyberinvasion, and Jawala, while not referencing Sections III(A) and (B) explicitly, supported the requirements of notice and an opportunity to object that those sections afford to P/P Customers.
- The comment from Phil Crooker, while not referencing Section III(F) explicitly, supported the P/P Customer's ability to appeal.

That said, while the 28 comments that we reviewed accepted the basic premise of Annex E, many proposed changes to Annex E. Some comments suggested substantive changes in the form of additions – things that Annex E left out. Those were:

- The comments from CDT/ Open Technology Institute/Public Knowledge, the NCSG, and Cyberinvasion argued that language should be added to Annex E allowing P/P Customers to note as part of their response to a notice of infringement whether disclosure or publication could endanger their safety, and that P/P Providers should be able to deny a request for disclosure on that ground.
- The comments from the NCSG and Cyberinvasion noted that Annex E should add a specific retention period for any data disclosed.
- The comments from the NCSG and Cyberinvasion argued that language should be added to Annex E requiring that for reveal requests where the address of the registrant is located within the EU, the Requester must be able to provide evidence of compliance with EU Data Protection Directive 95/46/EC or the relevant compliant national law, including but not limited to identification of the Data Controller and technical security safeguards for the information once received.
- The comments from the NCSG, Cyberinvasion, and Reagan Lynch all noted that Annex E should make clear that disclosure should only be made using encrypted/secure communications channels.
- The comment from CDT/ Open Technology Institute/Public Knowledge argued that within a short time after implementation of the WG's new accreditation standards, ICANN should have a mandatory review process to survey customers to understand the impact of those new standards.
- Aaron Myers commented that Annex E should be modified "to only make sharing of details with 2 watch dog organizations mandatory when someone chooses to use private registration, and charge those organizations to only disclose details if they can be directed to an infringing link, ad, or illegal activity."
- Nick O'Dell commented that "There should be a global blacklist of 'vexatious litigants' maintained by ICANN, and a P/P provider responding to a request from one of these organizations would not be required to disclose any information about their customers."

Other comments suggested changes in the form of edits – parts of Annex E that should be changed. Those were:

- The IPC, INTA, Time Warner, and Turner Broadcasting all suggested changing the timeframes in Sections III(A) and (B) (which are currently 15 calendar days and x calendar days, respectively), though they offered different suggestions on how to do so:
 - 1) INTA suggested that the timeframes in Sections III(A) and (B) should be 10 calendar days each.
 - 2) Time Warner and Turner Broadcasting suggested that the cumulative total of the timeframes from Sections III(A) and (B) should be no more than 14 calendar days, though they did not specify how to divide those 14 days between Sections III(A) and (B).
 - 3) The IPC suggested that the x in Section III(B) be replaced with “3 calendar days after receiving the Customer’s response, or 1 calendar day after the time for Customer’s response has passed.”
- INTA, Time Warner, and Turner Broadcasting all suggested changing the language in Sections II(A)(5) and II(C)(5) to clarify that Requesters could submit notices for unregistered, common-law trademarks.
- Reid Baker suggested changing the information that would be disclosed under Section III(B)(i) from “the contact information [a P/P Provider] has for Customer that would ordinarily appear in the publicly accessible Whois for non-proxy/privacy registration” to the equivalent of what somebody could find from a public-records search. So, for example, the P/P Customer’s name and mailing address would be disclosed, along with the contact information for an agent for service of process. But the P/P Customer’s email address and phone number would not be disclosed.
- The RIAA/IFPI comment suggested changing the language of Section II(B) in three ways:
 - 1) To make identification of the infringing URL less rigid to account for the use of dynamic URLs, such as by stating: “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.”
 - 2) To clarify that there is no requirement for a Requester to use the relay function before making a disclosure request.
 - 3) To remove the requirement that the Requester identify the exact URL where the original content is located (if online content) or where the claim can be verified, given that the original content, even if online, may not be located at a URL.
- Vanda Scartezini suggested changing the language in Section III(B) from “shall” to “encouraged but not required to.”
- Tim Kramer suggested adding requirements for temporal data to Sections II(A) and (C). Specifically, Mr. Kramer recommended requiring the Requester to include in its notice the dates for when it acquired its trademark, and for when the P/P Customer acquired the domain in question, to prevent trademark owners from submitting notices against senior domain names.

Other suggested edits to Annex E gave rise to differing answers and options. Specifically:

- There was disagreement over the appeal process outlined in Section III(F). INTA, Time Warner, the IPC, and Turner Broadcasting all argued that the appeal process outlined in Section III(F) should only be available to Requesters, not to P/P Customers. The NCSG argued that the appeal process in Section III(F) should be limited to prevent Requesters from appealing every denial from P/P Providers or, better yet, eliminated altogether, such that Requesters' recourse following refusals to disclose would be through ICANN compliance. The IPC also acknowledged that if the problems with Section III(F) could not be resolved, a better solution could be to eliminate it altogether, such that Requesters' recourse would be the reconsideration option outlined in Section III(E) (and then, presumably, through ICANN compliance, as noted by the NCSG). So there is at least some overlap in the NCSG and IPC comments and suggested resolution in that regard.
- There was also disagreement over the cost-recovery provision in Section I(B)(iii). The MPAA, INTA, Gary Miller, Time Warner, the IPC, and Turner Broadcasting all opposed it. Cyberinvasion and "Name withheld" both supported it. The philosophical disagreement between the two sides was over how to define the benefit in question. Those against the cost-recovery provision argued that the P/P Provider and the P/P Customer are the only two parties enjoying any benefit from the P/P Service, and thus that they should split any costs arising from that P/P Service between themselves. Those in favor of the cost-recovery provision argued that because the Requester is the beneficiary of the disclosure, they should bear the costs of it.
- There was disagreement as to the two alternative options given for the ICANN-approved dispute-resolution process referenced in Section III(G). The IPC expressed a preference for the arbitration option, arguing that a Requester should be entitled to seek the registrant contact information that would be publicly accessible but for the registrant's use of a P/P Service, so long as the applicable standards for disclosure are met, without subjecting itself to the jurisdiction of a court in a territory that may have been chosen by the P/P Provider for its difficulties for Requesters, and without regard to the ability of such courts to adjudicate such disputes fairly or to accommodate foreign litigants. Phil Crooker argued for the jurisdiction option, stating that "otherwise the process is meaningless" (though we're not sure what he meant by that).
- Finally, there was disagreement over which standard to use in Sections III(C)(ii) and (iii). INTA, Time Warner, the IPC, Thomas Smoonlock, and Turner Broadcasting all argued that the standard should be "a reasonable basis for believing that the Customer is not infringing the Requester's claimed intellectual property rights, and/or that the Customer's use of the claimed intellectual property is defensible." Thomas Smoonlock also added one slight caveat to that: when it is the P/P Customer providing the "reasonable basis" (*i.e.*, for Section III(C)(ii), rather than for Section III(C)(iii)), Annex E should add appropriate follow-up guidelines to prevent abuse by P/P Customers "playing dumb". On the other side, the IACC and Vanda Scartezini argued that the standard should be "[adequate] [sufficient] [compelling] reasons against disclosure." Of those three adjectives, Vanda Scartezini expressed a preference for "sufficient," while the IACC expressed no preference.

III. Opposition to the basic premise of Annex E

Our sub-team reviewed and analyzed 11,037 comments that oppose the basic premise of Annex E. The comments fell into 1 of 4 categories:

- Category 1 - No disclosure/publication ever.
- Category 2 - No disclosure/publication unless following a court order.
- Category 3 - No disclosure/publication unless following a court order or other legal process (such as a UDRP)
- Category 4 - No disclosure/publication unless following a court order or other legal process (such as a UDRP), but with some exceptions for cases of abuse.

For Category 1 - No disclosure/publication ever, four comments were explicitly opposed to disclosure/publication ever and included Ralf Haring, Liam, Sam and Dylan Henderson.

For Category 2 -- No disclosure/publication unless following a court order, the Working Group received more comments than on any other issue. More than eleven thousand comments were opposed to disclosure/publication unless following a court order and included 1&1 Internet, Access Now, Key Systems, Greg McMullen, Evelyn Aya Snow, Dr. M. Klinefelter, Dan M., Adrian Valeriu Ispas, Not Your Business, TS, Cort Wee, Alex Xu, Kenneth Godwin, Shahed Ahmmed, Sebastian Broussier, Andrew Merenbach, Finn Ellis, Aaron Holmes, Michael Ekstrand, Donuts, M.B., J. Wilson, Simon Kissane, Jason Weinberg and the Respect our Privacy comments, which had approximately 11,000 individual submissions.

Notable comments seeking disclosure only when a court order has been obtained, or when an independent adjudication taken place, or when due process more generally has been complied with included:^[4]

- 1&1 Internet stated that it should “be remembered that any complaint of abuse must be in relation to the domain name only.”
- Key Systems does “not support the proposed Disclosure Framework as it assumes disclosure if certain process steps are followed regardless of the merits of the complaint.”
- 11,000+ comments of individuals originating from the Respect our Privacy website which each stated:
 - “- Everyone deserves the right to privacy.
 - No one's personal information should be revealed without a court order, regardless of whether the request comes from a private individual or law enforcement agency”
- Google wrote: “Accredited privacy and proxy services should not be required to either Publish or Disclose registrant contact information other than when required by relevant law and utilizing relevant legal procedures.” Google’s Senior Trademark Counsel further wrote:

- “Privacy and proxy providers should not be required to present, process or honor any forms required by ICANN in place of relevant legal processes. Similarly, frameworks for responses to both Intellectual Property Rights-Holders and Law Enforcement should be replaced with a general requirement for privacy and proxy services to operate in accordance with relevant law.”
- Internet Services Provider and Connectivity Provider Constituency wrote: “... we acknowledge that intellectual property rights holders and private anti abuse organizations should be treated as complainants and not indisputably wronged parties, and accordingly an independent adjudicator should determine the merits of their claim before rights that users would otherwise have are abrogated by reason of those lawyers' claims.
- The Save Domain Privacy petition allowed signatories to add additional comments to the overall petition language. At least 15 people separately and independently addressed the need to reveal registrant data only through a court order. Their comments include:
 - Jake W: “There is already a well-designed system ensuring that ownership records will be provided in response to a court order, and the only reason anyone (the entertainment industry) wants to change that is for the exact purpose it was set up in the first place - harrassment. The entertainment industry wants to be able to harrass people who they feel should be giving them money. That's a good reason to keep the current privacy protections in place. If laws are being broken, there are plenty of avenues for accountability without making any changes.”
 - Muhammed A: “No one's personal information should be revealed without a court order, regardless of whether the request comes from a private individual or law enforcement agency. Private information should be kept private.”
 - Clay H: “We use domain name privacy to keep our personal information "personal". I do not want our information released without a court order.”

Blacknight wrote: “any policy that would require us to divulge our client’s information in the absence of either a request from law enforcement, Irish consumer protection agencies or a court order with jurisdiction over us is incompatible with Irish law.”

- Access Now wrote: In order to comply with human rights standards, any rules forcing PPSPs to disclosure or publish user data upon request must comport with legal due process and require a court order or a subpoena for its execution whether the request is a private party or a law enforcement authority.
- Endurance Int’l Group wrote: “[T]he framework for processing intellectual property complaints set out in Annex E is concerning because it allows for the circumvention of existing due process. The proposed framework would essentially allow a copyright owner to bypass existing DMCA processes to obtain private registrant information.

Establishing an accreditation program that allows any one party (i.e., intellectual property owners) to bypass due process opens the door for other parties to do the same (e.g., law enforcement agencies). Further, the proposed framework ignores existing jurisdictional and legal rights applicable to registrants and privacy providers around the world.”

- Jeff Wheelhouse wrote: [T]here are a few situations where disclosure is legitimately warranted. Those situations largely involve litigation or law enforcement action. In those cases, to balance against the harm of inappropriate disclosure society has already established a system of warrants, court orders, and subpoenas that is used to justify and validate obtaining those types of records. In most jurisdictions, the bar set by these processes is not particularly high. Yet the working group proposes to expressly prohibit adherence to existing, time-tested due process, a position which is very difficult to defend.”
- Dan M wrote: There should be no instances except under a sanctioned court order that anyone's private information is made public to any form. It violates due process, is blatant privacy infringement, and endangers millions of domain registrars and domain owners by enabling personal information to be available not only unnecessarily but also irrelevantly pertaining to their website or business. It is both directly and indirectly harmful and dangerous.
- TS wrote: Due process per the law of the domain owner's country should be required before revealing information.”

For Category 3, six comments were opposed to disclosure/publication unless following a court order or other legal process such as a UDRP or URS and included the Internet Commerce Association, Google, Endurance International Group, Jeff Wheelhouse, Homer, Michael Ho and Reagan Lynch. Some of the criticisms raised in some of these comments included the criticisms noted above and/or criticisms about the DMCA and a view that Annex E as a DMCA like process, and/or that there was insufficient due process provided in Annex E.

For Category 4, two comments were opposed to disclosure/publication unless following a court order or other legal process such as a UDRP or URS, but with some exceptions for cases of abuse. The exceptions noted were for disclosure to law enforcement [or in connection with a material breach of the service provider’s terms of service]. For example, Mark Jeftovic (EasyDNS) wrote: we believe that absent a breach of service terms such as net abuse, the only basis for disclosing underlying Registrant data, especially to copyright and trademark complainants should be subject to a court order (in a competent jurisdiction to the Proxy provider), a subpoena (in a competent jurisdiction to the Proxy provider), a pending civil action [or] a URS or UDRP action. In other words, we feel that Section D of Annex E of the Initial Report should have precisely the opposite requirement that it now proposes.” The Internet Commerce Association commented that disclosure should only be made following “ a court order or a subpoena (in a competent jurisdiction to the P/P provider); a pending civil action; or a URS or UDRP action”.

IV. Other criticisms of Annex E included the following:

- Trademark complaints should be excluded because of existing dispute resolution procedures available to trademark owners (Google, ICA)

V. Comments that did not fit neatly into any of the above categories:

Finally, our sub-team reviewed and analyzed 21 miscellaneous comments that did not clearly state support for or objections to Annex E. Unfortunately, some of these comments were simply expletives without further content while others didn't speak specifically to Annex E. Those that provided more material comments under this heading include:

- Robert Lukitsh states, "Any are fine," but doesn't provide any feedback about the various forms of proposed language in Annex E.
- Five of these commenters clearly do not support Annex E, and four provided comments:
 - Sven Slootweg, Adam Miller, and Arthur Zonnenberg express concerns about the effects of Annex E on individual privacy and freedom.
 - Lucas Stadler cites concerns about placing the burden of proof on the registrant.
- Six other commenters make generally negative comments against Annex E, including these specifics:
 - Adam Creighton comments, "the language is too loose, and opens individuals up to frivolous litigation from IP rights owners and third-party agencies whose contracted relationship is to expand IP brand presence."
 - Anand S. expresses concerns about individual privacy and freedom.

Sven Slootweg also points out that "a proposal to 'unmask' WHOIS data upon a copyright complaint is effectively a backdoor" to the DMCA.