Illustrative example of Disclosure standards for intellectual property
(trademark or copyright) requests

Policy Purposes

[title reset to original; discussion requested]

By facilitating direct communication among Requestors, 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 requestors a higher degree of certainty and predictability as to if, when and how they could obtain what level of disclosure; to preserve for service providers a sufficient degree of flexibility and discretion in acting upon requests for disclosure; and to include reasonable safeguards and procedures to protect the legitimate interests of customers of accredited proxy/privacy service providers.

# Service Provider Process for Intake of Requests

## 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 Requestor. 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.

## [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:

Requiring Requestors to register themselves and/or their organizations with Service Provider.

Authenticating complaint submissions as originating from a registered Requestor (e.g., log-in, use of pre-identified e-mail address).

[Assessing a standardized nominal cost-recovery fee for processing complaint submissions, or to maintain Requestor account so long as this does not serve as an unreasonable barrier to access to the process].

Qualifying requestors meeting certain reliable criteria as “trusted requesters” whose requests would be subject to a streamlined process.

Revoking or blocking Requestor access to the submission tool for egregious abuse of the tool or system, including submission of frivolous or harassing requests, or numerous requests that are identical, i.e., that concern the same domain name, the same intellectual property, and the same requestor.

vi. Nothing in this document prevents Service Providers from sharing information with each other regarding Requestors who have been revoked or blocked from their systems or who have engaged in misconduct of this system, including frivolous or harassing requests.

## 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.

# Request templates

## **Where a domain name allegedly infringes a trademark**

Requestor provides to Service Provider:

### The domain name that allegedly infringes the trademark

### 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, and of any responses thereto;

### Full name, physical address, email address, and telephone number of the trademark owner, and for legal entities, the country where incorporated or organized;

### 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;

### The trademark, the trademark registration number, 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;

### A good faith statement[, either] under penalty of perjury [or notarized or accompanied by sworn statement[[1]](#footnote-1) (“Versicherung an Eides statt”),] from either the trademark holder or an authorized representative of the trademark holder, that —:

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

##### allegedly infringes the trademark holder’s rights and

##### is not defensible;

#### states that Requestor will use Customer’s contact details only

##### 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.

##### c) includes the signatory’s name and legal relationship to the trademark owner. Signatories shall be limited to those with “first-hand” knowledge of the alleged infringement: “Owner” (if trademark owned by individual), “President,” “Vice President,” “General Partner” or “Principal” (if trademark owned by legal entity) or “Attorney” with country and state/province/region of attorney’s bar membership (if legal representative appointed by trademark owner)

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

Requestor provides to Service Provider:

### The exact URL where the allegedly infringing content is located

### 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, and of any responses thereto. Evidence of previous attempts to contact the web host or the domain name registrar with regard to the subject matter of the request, and of any responses thereto (Requestors are encouraged but not required to attempt such contacts).

### Full name, physical address, email address, and telephone number of the copyright owner; and for legal entities, the country where incorporated or organized;

### 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;

### 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

### [The exact URL where the original content is located (if online content) or where the claim can be verified.]

### A good faith statement, under penalty of perjury, [either notarized or accompanied by sworn statement (“Versicherung an Eides statt”),][[2]](#footnote-2) from either the copyright holder or an authorized representative of the copyright holder —:

#### Providing 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;

#### Providing a basis for reasonably believing that the copyright protection extends to the locale the website targets;

#### Stating that Requestor will use Customer’s contact details only (i) to determine whether further action is warranted to resolve the issue; (ii) to attempt to contact Customer regarding the issue; and/or (iii) in a legal proceeding concerning the issue; and

##### d) includes the signatory’s name and legal relationship to the copyright owner. Signatories shall be limited to those with “first-hand” knowledge of the alleged infringement: “Owner” (if trademark owned by individual), “President,” “Vice President,” “General Partner” or “Principal” (if copyright owned by legal entity) or “Attorney” with country and state/province/region of attorney’s bar membership (if legal representative appointed by copyright owner)

## **Domain name resolves to website where trademark is allegedly infringed**

Requestor provides to Service Provider:

### The exact URL where the allegedly infringing content is located

### 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, and of any responses thereto. Evidence of previous attempts to contact the web host or the domain name registrar with regard to the subject matter of the request, and of any responses thereto (Requestors are encouraged but not required to attempt such contacts).

### Full name, physical address, email address, and telephone number of the trademark owner; and for legal entities, the country where incorporated or organized;

### 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;

### The trademark, the trademark registration number, 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

### A good faith statement[, either] under penalty of perjury [or notarized or accompanied by sworn statement (“Versicherung an Eides statt”),][[3]](#footnote-3) from either the trademark holder or an authorized representative of the trademark holder —:

#### Providing a reasonable basis for believing that the use of the trademark on the website

##### infringes the trademark holder’s rights and

##### is not defensible;

#### Stating that Requestor will use customer’s contact details only

##### 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.

##### c) Including the signatory’s name and legal relationship to the trademark owner. Signatories shall be limited to those with “first-hand” knowledge of the alleged infringement: “Owner” (if trademark owned by individual), “President,” “Vice President,” “General Partner” or “Principal” (if trademark owned by legal entity) or “Attorney” with country and state/provice/region of attorney’s bar membership (if legal representative appointed by trademark owner)

# Service Provider Action on Request

Upon receipt of the information set forth above in writing, Service Provider will take reasonable and prompt steps to investigate and respond appropriately to request for disclosure, as follows:

## 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 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 Requestor; and

## Within [x] calendar days after receiving the Customer’s response, or after the time for Customer’s response has passed, Service Provider shall take one of the following actions:

### disclose to Requestor the contact information it has for Customer that would ordinarily appear in the publicly accessible Whois for non-proxy/privacy registration; or

### state to Requestor in writing or by electronic communication its reasons for refusing to disclose.

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

## Disclosure can be reasonably refused, for reasons consistent with the general policy stated herein, including, but not limited to:

### the reason that the Service Provider has already published Customer contact details in Whois as the result of termination of privacy and proxy service;

### that the Customer has objected to the disclosure and has provided [adequate] reasons against disclosure;

### that the Provider has found [adequate] reasons against disclosure

###  that the Customer has surrendered its domain name registration in lieu of disclosure, if the Service Provider offers its Customers this option; or

### **that the Requestor has not provided clear and compelling evidence** of trademark or copyright infringement or that the Customer has provided a reasonable defense for its use of the trademark or copyrighted content in question.

## [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 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.]

## If refusal to disclose is based on objection to disclosure by the Customer, Requestor must be informed of the reasons for objection.

## For all refusals made in accordance with the policy and requirements herein, Service Provider must accept and give due consideration to Requestor’s requests for reconsideration of the refusal to disclose.

###   [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.[[4]](#footnote-4) as appropriately limited to exceptional cases, and not every refusal; and as similarly accessible to the Customer for appeals.]

**DRAFT LANGUAGE ON DISCLOSURE AND HUMAN RIGHTS**

The WG held extensive discussions regarding the need to ensure that its recommended framework for Disclosure provides adequate safeguards for P/P customers with serious concerns over the effect of a Disclosure of their identities and contact information. The WG acknowledged that a Disclosure request could in some cases involve threats to free expression, individual liberty and other possible infractions of human rights as well as suppression of legitimate competition. While the WG recognized that these cases may not be the norm, it also agreed that the seriousness of each such potential case meant that any recommended Disclosure framework must not only be fair and balanced as between a provider, requestor and customer, it must also ensure that protecting the rights of each customer are not overridden by considerations of expediency or cost. At the same time, there may also be clear-cut cases where a provider should have little difficulty handling in an efficient and expedient manner.

More generally, the WG also considered the interplay between the need specified in the P/P context and the broader ICANN environment, where concerns have been expressed regarding the extent to which ICANN’s policies and procedures respect human rights and take full account of public interest considerations. The WG accepted that its deliberations on Disclosure requests necessarily form part of that broader discussion. It therefore devoted considerable time to develop a voluntary mechanism that it believes can be implemented without delay as part of an ICANN Accreditation Program while that broader discussion continues to unfold.

As a result, the WG has developed a set of illustrative examples[[5]](#footnote-5) of the types of “edge cases” that could raise fundamental human rights issues within the P/P environment, and has come up with two specific recommendations on how to deal with these more extreme situations.

The illustrative examples include:

* Religious minorities with a need to maintain secrecy of their members or location
* Domestic abuse victims and shelter organizations who need to maintain secrecy of their identities or operations
* Registrants and website operators exercising free expression rights against oppressive regimes and persecution
* Ethnic or other social groups who are victims of harassment, discrimination or “hate speech”
* Journalists operating in/from hostile territory who need to protect the identities or locations of themselves and their sources

The WG recommends that in implementing the P/P Accreditation Program:

***[ALTERNATIVE #1:***

***ICANN establish a [standing] [ad hoc] [informal] Complex Case Advisory group consisting of [attorneys specializing in] [subject matter experts on] freedom of expression and competition laws. Solely at the provider’s discretion, a provider may elect to send what it believes to be a complex “edge case” to this group for a rapid review and a non-binding recommendation [within X days].]***

***[ALTERNATIVE #2:***

***ICANN strongly encourages, and works with, P/P providers to put in place a voluntary mechanism by which providers may seek timely assistance in making their determinations on whether or not a Disclosure request impacts human rights or legitimate competition and thus refused. Such a mechanism should be at no, or low, cost to providers. The intention behind such a mechanism is not that it would constitute a “safe harbor” or other limitation of liability for a provider, but rather operate as a kind of “release valve” for those difficult decisions for which a provider may incur additional costs or otherwise find it easier or more expedient to simply accede to a Disclosure request. The non-exhaustive list of “edge cases” noted above are intended to provide examples of the type of situations that the WG expects to be those for which providers may find recourse to such a voluntary mechanism useful.]***

The WG recognizes that the creation of this mechanism by ICANN could potentially raise issues of conflict of interests, e.g. if ICANN funds and provides compensation to any personnel needed for the effort. Provider adoption could also be problematic, as could determining the scope of such a mechanism (including the possibility that it could be adapted and used for other issues outside the P/P context.) **For these reasons, the WG therefore seeks public comment and community input on the following specific questions:**

* Is there a need for an additional safeguard mechanism along the lines of Alternative #1 or #2 above, over and above the WG’s recommended Disclosure framework, to facilitate provider decisions in cases involving potential human rights infractions?
* What is ICANN’s role in developing such an additional safeguard mechanism?

The WG also recommends that its deliberations and illustrative list of examples be taken into account by other ICANN groups and initiatives aimed at evolving the discourse on human rights and the public interest within ICANN. While it recognizes that this may lie outside its chartered remit, the WG specifically requests that ICANN’s Public Responsibility Department consider the development of mechanism(s) that can assist ICANN Contracted Parties, registrants and the community with ensuring that the development and implementation of ICANN policies fully consider and allow for the effective protection of human rights. Such mechanism(s) could include the establishment of advisory expert groups or other informal yet neutral means to resolve difficult questions involving the balancing of the rights and interests of different stakeholders.

ANNEX: [Note: changes deleted pending more thorough discussion of Appeals to Third Parties and this Section on Challenges to IP Owners based on “wrongful disclosure by Provider” – by those who drafted this section. Tx! Kathy ] some options for resolving disputes arising from alleged false statements leading to improper disclosures

Arbitration:

Any controversy, claim or dispute arising between the Service Provider and the Requestor as a result of alleged wrongful disclosure 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 in bad faith and wrongful only when it is effected by the Requestor having made knowingly false representations to the Provider with the intent to deceive. Disclosure is not wrongful if the Requestor had a good faith basis for seeking disclosure at the time the Request was submitted to the Provider.

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

[Jurisdiction

In making submission, Requester agrees to be bound by jurisdiction at seat of the Service Provider for disputes arising from alleged improper disclosures caused by false statements.]

[“Trusted sender”

Include arbitration or jurisdiction in list of permissible request submission management criteria (under I(B)).]

1. TO BE DETERMINED: Method of resolving provider claims of false statements/misrepresentations. [Options include: jurisdictional provision, arbitration, etc.] [See Annex] [↑](#footnote-ref-1)
2. TO BE DETERMINED: Method of resolving provider claims of false statements/misrepresentations. [Options include: jurisdictional provision, arbitration, etc.] [See Annex] [↑](#footnote-ref-2)
3. See above re dispute resolution method [↑](#footnote-ref-3)
4. 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 Requestor, 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 Requestor’s claimed rights in a manner that is not defensible. This Provider shall have extensive expertise in both Freedom of Expression and Human Rights principles and laws as well as Intellectual Property, Fair Use and Fair Dealing principles and laws. [↑](#footnote-ref-4)
5. In developing this non-exhaustive list, the WG relied on, among other sources, the examples noted by the Expert Working Group (EWG) when considering the possibility that certain groups of persons may need additional protection (in the case of the EWG, the specific protection in question was the provision of secure protected credentials). [↑](#footnote-ref-5)