**PROPOSED DRAFT TEXT FOR UPDATED SECTION 1.3.2 (TO BE INCLUDED IN THE WG’S DRAFT FINAL REPORT**

**1.3.2 Specific topics on which the WG sought community feedback prior to finalizing its recommendations**

In its Initial Report, the WG requested community feedback on certain aspects of “relay” and “reveal” for which it had not yet reached agreement. The following sections describe these questions and summarize the WG’s deliberations subsequent to its review of the comments received.

On Escalation of Relay Requests:

At the time it published its Initial Report, the WG had reached preliminary agreement on a P/P service provider’s obligation to act in the event it becomes aware of a persistent delivery failure ; however, it had yet to agree on obligatory next steps regarding escalation by a Requester. The question that the WG requested public feedback on was as follows:

* What should be the minimum mandatory requirements for escalation of relay requests in the event of a persistent delivery failure of an electronic communication?

In addition, the WG requested community input on the following language, which the WG intended to use as the basis for a possible final recommendation on the escalation issue:

*“As part of an escalation process, and when the above-mentioned requirements concerning a persistent delivery failure of an electronic communication have been met, the provider [should] [must] upon request forward a further form of notice to its customer. A provider should have the discretion to select the most appropriate means of forwarding such a request [and to charge a reasonable fee on a cost-recovery basis]. [Any such reasonable fee is to be borne by the customer and not the Requester]. A provider shall have the right to impose reasonable limits on the number of such requests made by the same Requester.”*

A Sub Team comprising several WG members was formed to review the public comments received. The Sub Team’s (Sub Team 1) summary and analysis can be found in Annex \_\_. These conclusions and recommendations were presented to and discussed by the full WG, which subsequently reached consensus on the issue of escalation of relay requests as described below.

The WG agreed with Sub Team 1 that the public comments did not demonstrate strong support one way or the other on the question whether it ought to be mandatory for a provider to forward on to its customer a further notice as part of the escalation of the relay process. The WG also agreed with Sub Team 1 that since no consensus was reached on this question, the further question of charging a fee for such forwarding would no longer be relevant.

The following is the WG’s consensus recommendation regarding the steps to be taken during an escalation of the relay process:

*As part of an escalation process, and when the other requirements (as specified by the WG in its other recommendations) concerning a persistent delivery failure of an electronic communication have been met, the provider should upon request forward a further form of notice to its customer. A provider should have the discretion to select the most appropriate means of forwarding such a request. A provider shall have the right to impose reasonable limits on the number of such requests made by the same Requester for the same domain name.*

On Disclosure and Publication in relation to Requests by LEA and other Third Parties other than Trademark and Copyright Owners:

In its Initial Report, the WG reached preliminary agreement in respect of a proposed Disclosure Framework for handling requests from intellectual property (i.e. trademark and copyright) rights-holders, but it was not able to develope a similar framework or template to apply to other Requesters, such as LEA or anti-abuse and consumer protection groups. The WG had noted that certain concerns, such as the need for confidentiality in relation to an ongoing LEA investigation, may mean that different considerations would apply to any minimum requirements that might be developed for such a framework. It therefore sought community input on this general topic, as well as on the following specific questions:

1. Should it be mandatory for accredited P/P service providers to comply with express requests from LEA in the provider’s jurisdiction not to notify a customer?
2. Should there be mandatory Publication for certain types of activity e.g. malware/viruses or violation of terms of service relating to illegal activity?
3. What (if any) should the remedies be for unwarranted Publication?
4. Should a similar framework and/or considerations apply to requests made by third parties other than LEA and intellectual property rights-holders?

On Question 1, the WG agreed with Sub Team 1’s conclusions that in general commenters believed that providers should comply with such express requests where they are required to do so by applicable law. As such, the WG has reached the following consensus recommendations on this Question 1: (i) any recommendations it makes on this topic are not intended to prevent providers from either adopting more stringent standards or from cooperating voluntarily with LEA; and (ii) express LEA requests not to notify a customer are to be complied with where this is required by applicable law.

On Questions 2 and 3, the WG agreed with Sub Team 1 that the public comments generally seem to support the WG’s Recommendations #6 - #8 regarding mandatory terms of service. The WG notes that providers generally and already have the discretion to terminate service for breach of their terms of service, which in effect would result in Publication. As such, the WG has reached consensus that it will not recommend mandatory Publication. The WG believes that there should be no restriction on providers being able to terminate service to a customer on any grounds that are stated in the terms of service, subject to any other specific limitation/recommendation by the WG.

Additionally, on Question 3, the WG notes that it will not be possible to create a general policy that would in all cases prevent Publication via termination of service where the customer is ultimately shown to have been innocent (i.e. not in breach). The WG also notes that in many cases the question of whether any, and if so what, remedies are available will be dealt with by applicable law. Nevertheless, the WG encourages all providers to adopt as a best practice the prior notification of a customer before terminating service, at least where the alleged ground for termination is malware.

On Question 4, the WG agrees with Sub Team 1 that this could more appropriately be considered during the WG’s deliberations on Sub Team 3’s recommendations concerning the WG’s proposed Illustrative Disclosure Framework for trademark and copyright owners. The WG’s final conclusions on this question are therefore summarized below, in Section \_\_\_.