WHOIS Working Group A "Responsibilities"
Teleconference
TRANSCRIPTION
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http://gnso-audio.icann.org/whois-a-20070530.mp3

http://gnso.icann.org/calendar/#may

Attendance:

Steve Metalitz - IPC - wg chair

Carole Bird - observer

Eric Dierker - observer

Chris Gibson - observer

Adam Scoville - observer

Steve DelBianco - CBUC

Robin Gross - NCUC

Absent - apologies

Philip Sheppard - WHOIS wg chair

Avri Doria - Nom Com appointee to Council

ICANN Staff:

Maria Farrell - GNSO Policy Officer

Glen de Saint Géry - GNSO Secretariat

Coordinator: This is call is now being recorded. Thank you, sir.

Steve Metalitz: Okay, thank you.

We have on the call Eric Dierker, (Adam Scoville), (Steve Delbianco), (Chris Gibson), Carole Bird. And myself, Steve Metalitz:, and we have Glen Desaintgery and Maria Farrell from the ICANN staff.

Is there anybody whose name I didn't call?

Okay, well as Glen mentioned this is our last call as a subgroup. I believe the full group meets next Wednesday, week from today, and I'm not sure if the time for that has been finalized.

Carole Bird: As far as I know, (Steve), it is the same time as the previous call which is 13:30 UTC.

Steve Metalitz: Okay. Thank you and I'm sure we'll be getting a notice with the call-in number and so on.

Carole Bird: Yes.

Steve Metalitz: Anyway…

Man: Is that an hour and a half earlier than this call?

Steve Metalitz: Yes.

On our last call we had discussed - we discussed the discussion outline which I circulated and I sent out last Wednesday evening kind of revised version of that, making a few changes that (unintelligible) reflect the discussion that we have had.

Feel like we did not really get to the last page of that outline and the feeling on the call was that we should focus on that - on this final call which is the enforcement aspects and the how question, how would it be enforced.

And - but let me first open before people have any questions or comments on the revisions to the outline that were made since the last call.

Okay, and then what I would suggest that we do is that we turn to the how question, and then at the end of that discussion, let's kind of see where we are in terms of what will be reported for to the full group.

So let's turn to the how question. What is in the outline on this last page is really four categories of defaults, four categories of circumstances in which the system is not working as it should be, and its really just to identify those and open up a discussion of how - what would happen in those circumstances.

The first one really has to do, it's kind of in the interface between this group and subgroup C, if - I understand subgroup C has been discussing if the (OPAC) model only apply to natural person's registering for non-commercial purposes. And if somebody who didn't meet that category, meet those criteria designated in an (OPAC) then you would need some mechanism for dealing with that.

The second would be if there's a Who violation. In other words the (OPAC) lacks some of the capabilities that it supposed to have. Third would be another - as we've subdivided the Who question, if (OPAC) lacks them the relationship that we suppose to have for example, if we

require accreditation and more accredited. It's actually probably a fairly easy one in that spectrum.

And the fourth is as if the (OPAC) fails to performs its tasks, if it fails to perform at all which is the what issues, and (if the corporate fails) to perform in a timely manner. I think we generally agree we would defer discussion of what exactly would be a timely manner, but we opt to identify some issues.

(Steve Delbianco):   And (Steve), this is (Steve Delbianco). By deferred discussion, do you mean until next Wednesday's meeting? Do you want to resolve that today or is it going to be deferred sort of indefinitely?

Steve Metalitz: Well, I think if we get through How, we can turn to When…

(Steve Delbianco):   Okay.

Steve Metalitz: …a little bit, but there was some feeling this is kind of the implementation level, and if it was, you know, if there was a general agreement, we wouldn't necessarily have to say this has to be done in one hour, this has to be done in one day or whatever.

(Steve Delbianco):   Well, based on a more general question, what do you have in mind is our deliverables for the full working groups, the full task force by next Wednesday. Is it this document with how much more meat on the bones?

Steve Metalitz: Well, I'm assuming this is something like this document, and I guess one question is what can I practice it with. Can I say that this is, you know, use the terminology that I think we were asked to used or,

excuse me, the whole working group was asked to use at the end of its process. And we say whether there's agreement or support or an alternate view regarding some of these issues.

You know, I'm a little hesitant to say that because we really haven't had a very active list and we happen to had a huge turn out on our calls. But maybe at the end of the discussion today, we can turn to whether we can say in preface, you know, what degree of - with what degree of support or endorsement, or whatever the right word is, are we sending this thing forward.

I should add that all of the, you know, both of the detailed proposals that were put forward, yours and (Chris Gibson's) would also be attached to this. It's the standard protocol.

(Steve Delbianco): But at least in the case of my proposals, I feel that's if it evolved in this one.

Steve Metalitz: Uh-huh.

(Steve Delbianco): And I wouldn't necessarily want to throw it in the mix to create confusion about where we are in the consensus.

Steve Metalitz: Okay.

(Steve Delbianco): I'm happy to have this be one document as far as I'm concerned, but I did wondered about how we're adding more detail. The document that a couple of us has submitted its plans contained…

Steve Metalitz: More details.

(Steve Delbianco):   …excruciating detail about what to do in terms of penalizing (OPAC) and so on, and what the registrar needed to do. And if we add that back in, I know we definitely create controversy, but I was curious about how detailed you wanted our submission to be versus raising question.

Steve Metalitz: Well, I think we can and try to boil it down into a simplified form, but I think we should attach both proposals and point out that some may have been, you know, overtaken by events and further discussion.

But I think a lot of the detail comes in in the How area, and I know at least increases proposals. There's a lot of detail about under what circumstances the registrar which step in, and I believe that's also a feature of your proposal.

(Steve Delbianco):   Yeah.

Steve Metalitz: So maybe we should just turn to that now. And I put that down as a fifth question under How which is, you know, what role with the registrar have if the (OPAC) fails to step forward.

I suppose one answer could be doing all the things that the (OPAC) is supposed to do. But let me ask either (Steve) or (Chris) to kind of sketch out how they see the enforcement mechanism to this default.

First, have we left out any major areas of default, major failures that the (OPAC) might encounter - might commit, if you will? Or - and what do you see is the main enforcement mechanisms?

(Steve Delbianco):   This is (Steve). I might suggest that the (OPAC's) responsibility, they might evolve, initially reveal - sorry, relay. And if relay was unsatisfactory, then going to reveal and then potentially to remedy.

So one of the aspects of our conversation would be what is that the (OPAC) has to do with in escalating for varied sense of responsibility.

And then if you get to the bottom line and say that the (OPAC) has failed on one or all of its responsibilities, it's a general matter. I thought we were then turning to the registrar and to some extent the registry since they were under contractual relationships with ICANN, and had a much better opportunity to have them take action.

So we sort of take things out of the (OPAC's) hand given that the (OPAC) has failed to uphold the responsibility.

That's a very - and sort of philosophical approach that we're going to mess with trying to track down and take legal steps with an (OPAC), when we in fact have mechanisms available to go the registrar, and in one case the registry.

How do you feel about that approach?

Steve Metalitz: Well, let me just make two responses to that. One, we have talked about this whether this kind of an escalating set of steps that the (OPAC) is suppose to take or whether there are some cases where they would go right to one of the further steps.

In other words there would be some cases in which they would have to reveal immediately without having relayed.

(Steve Delbianco): I'm fine with that, by the way. We just describe which cases those are.

Steve Metalitz: Okay.

The second is, you know, right now registrars don't have these responsibilities. For example, you know, let's take a simple case where it's just a relay. You know, there's no obligation to reveal necessarily but the requester just wanted to be able to get in touch and communicate a message to the actual registrant.

But right now the registrar really has no responsibility in that regard. I mean if they're operating a proxy service, maybe but let's assume not. If I send in an email to register.com and said I want to contact a particular registrant, obviously that might, you know, maybe that Whois data is insufficient for me to contact them. Right now, the registrar wouldn't have any responsibility to do anything with that.

So, are we loading a new responsibility unto the registrar in this area? And particularly when it comes to, you know, a reveal or a remedy situation, is this a responsibility that we - that could be - is to be imposed on a registrar in this circumstance?

Eric Dierker: This is Eric. I don't see the need to increase the registrar's responsibility. I don't think that's what we're really tapped to do. It seems to me to be outside of the purview to switch now from what the (OPAC) is responsible in this (are too), now what the registrar's responsibilities are.

It seems to me that's something we're probably within the RAA, but I don't think - it seems to me beyond - and I don't want to use the term beyond the scope. I don't mean that we're treading on wrong territory. I just simply - we're going to come out with an approach. I don't think we are mandated to suggest what registrar should do.

(Adam Scholville):   Steve, can I get in the queue? This is (Adam).

Steve Metalitz: Yes, (Adam). Anybody else wanted to get in the queue at this point?

(Chris Gibson):   Yeah, this is (Chris).

Steve Metalitz: Okay. (Adam), (Chris), anybody else?

Go ahead (Adam).

(Adam Scholville):   Yeah, you know, I think that our mandate is to talk about stuff like this because it's to talk about both the responsibilities of (OPAC) and the enforceability, what happens if the (OPAC) doesn't fulfill its responsibilities. And that I think, you know, there's got to be someone who enforces those obligations or who takes action on the penalties. And in so far as through all of ICANN framework in terms of imposing obligations down to the registrant level, it all goes through the registrar.

And, you know, so there's no way - you have to be talking about what the registrar does and, you know, if this is sort an alternative to the registrars obligation of publishing the - or (visiting) obligation, or publishing to the registrant is in the Whois, then, you know, they are the natural place for natural party to possibly shut off the (OPAC) as a contact in the case where the (OPAC) is not doing its job.

I mean, that seems to me to be the most basic level of what would happen. I mean there's - I think there's questions about whether there should be more that happens.

But if the (OPAC) is just a road block and its just not doing its job on passing on communication and so forth, then you got to get rid of the (OPAC). And who's got to do that? Well, the party that puts the information in the Whois database in the first place and that's the registrar.

Eric Dierker: And why not the pseudo-regulator ICANN?

(Adam Scholville):   Because the - as I understand, ICANN doesn't have direct access to the Whois.

Steve Metalitz: They have contractual access so that wouldn't be an issue. But (unintelligible) ICANN who's doing the response to a failure of (unintelligible).

Okay. Let's just - can we get back in the queue. (Chris)?

(Chris Gibson):   Yeah, I wanted to echo I think first (Adam's) point. I believe it's important that we don't look at the role f the (OPAC) in a vacuum. And that you do have to consider questions as you put in option part, (Steve), if there's a default on the part of (OPAC), what's the role of the registrar.

And I think, you know, going back to the first page of your document, you have to think in terms of any potential role of the registrar in

relations to relay, relation to review, and of course in relation to remedy.

And working with your document, (Steve), I've had some small changes to the language at the very first page. All of those three obviously relate to the How question that we're talking about now.

Supplementally, one thing that I think (Eric) just said reminded me of something that I had put in my detail draft which is if you're suggesting that ICANN has more active role.

I do believe that, you know, one thing that might have to be highlighted is you need adequate resources on the part of ICANN in enforcing the role of the (OPAC) or of the registrar or of both because it will be the case that certain (OPAC) whether they fall on one of the three categories that (Steve) has previously mentioned or perhaps certain registrars are not fulfilling these roles.

And I'm today, for example, dealing with the matter where we're writing a letter, the general counselor of ICANN because our particular registrar is not following through on certain matters and you had a sense that those resources aren't adequately staffed.

So I for one think it should stay at least initially at the level of (OPAC) and then if the (OPAC) is in the default in the registrar before things are escalated to ICANN. But if they are escalated to ICANN, they have to be adequately resourced at that level too.

Steve Metalitz: Okay. Anybody else to the queue?

(Steve Delbianco):   (Steve Delbianco).

Steve Metalitz: (Steve). Anybody else?

Go ahead, (Steve).

(Steve Delbianco):   Following up on the previous comment, when we escalate to ICANN, I would suggest that it's a general matter, and then anytime we escalate to ICANN because ICANN need to enforce the responsibility of the contractual parties like registrars and registries. And this is it enforce the consensus policies and the contract that has with those party.

So that escalation is a general escalation in, it's not just with respect to Whois and the (OPAC) but almost anything that are registrars and registries do it.

So if we couch our request for ICANN, add staff necessary, to (believe its) contractual parties, I think that could be solve better as a general matter for all matters that ICANN needs to get us contractual parties to do what they're supposed to be doing.

In other words, it doesn't need to be a special set of resources that ICANN just looking after the (OPAC).

Steve Metalitz: Right. Well, I mean, I guess there are two ways to look at this. one is that its - the default would be the registrar, and if the registrar doesn't do those things, then ICANN would be asked to enforced its contractual agreement with the registrar.

The other is which I think is what (Eric) maybe suggesting is that you would go to ICANN when you have a problem. You wouldn't necessarily go to the registrar. You would go to ICANN directly would have some…

Coordinator: Excuse me. (Unintelligible) now joins.

Steve Metalitz: …would have some responsibility to ask.

(Chris Gibson): This is (Chris).

Steve Metalitz: Yeah, (Chris), go ahead.

(Chris Gibson): Just on that point, I think, you know, the comment is well taken that, you know, if you were going to include something on this point in a preface to this document, something you just highlight that, the purposes of the (OPAC), you know. But more broadly as well, you know, in order to enforce contractual responsibility, generalized in relation to the role of the registrar which may require an amended RAA and the (OPAC), you know, ICANN should have proper resources. But I'm not suggesting that it wouldn't be - that it would be any broader than what would define to the contractual chain for the various factors.

Steve Metalitz: Okay.

Well, let me get back to this question of what the registrar could do in these circumstances. If you have obviously, I think this is what (Adam) was saying, that obviously the registrar would be in a position to reveal the registrar has the data on the admin and tech contacts and the rest of the data on the registrant contact that has not been, it would not be

made available to the public, and it would be in a position to substitute those if there were default by the (OPAC).

So it has the capability. What are the - I guess the one question is what are the circumstances under which it should do that. And the second is what about a situation, you know, a relay-type situation where, you know, we don't may not go as far as making the information public but simply passing it - passing the message on the registrar.

Are there - I mean I guess I would ask (Adam). And you gave that as an example I think of what a registrar could do. Is that remedy that - is that enforcement mechanism we should be looking at in all cases?

(Adam Scholville): Well, you know, I guess thinking about (Eric's) comment, I mean first of all, I think that, you know, if we could get ICANN to have enough resources to this kind of enforcement, you know, ICANN might be a more impartial actor than the registrar. But I'm not sure whether ICANN wants the set up that kind of infrastructure to handle those kinds of complaint.

I mean, who knows, maybe ICANN does. After all, it has - it sets up the Whois data problem report and all sorts of stuff like that.

But, you know, it seems like to some degree if you look first to ICANN, all ICANN would do would be to go back to the registrar and say do this, you know. You take - slap out the name of the actual registrant that you have for the name of the (OPAC), you would basically be ICANN making the decision, but the registrar's still implementing it, and at least on the reveal side, in terms of other aspect, in terms of the relay side.

If we set up the registrar and a whole other relay, I guess its just my sort of initial reaction, then that kind of - is duplicative and defeats the purpose of an (OPAC), if, you know, you have the (OPAC) and they relay. And but then if they don't do what they're supposed to do, the registrar relays, you know, that's duplicative infrastructure and it's not really necessary to have the registrars involved in that level I would say.

Its - I know that others have raised questions about whether if the (OPAC) is not doing what it should do, whether the - whether there are other actions in terms of - causing, removing the names in the (DNS) or putting on whether your hold status. Those might be things that would be within the registrar's technical abilities to do it. It might make sense. You know, again, we have to watch for the sake of the registrants.

Those kinds of sanctions in terms of the registrar (fly-type) situation where, you know, obviously in a lot of cases working internally what if the registrant is doing something bad with their domain.

But the other situation of what if the registrant you just find, and the (OPAC) is, you know, about to go in (solve in) or is it bad actor or something, the registrar (fly-type) situation, we don't want the registrant necessarily to lose it's domain name because the registrar - because the (OPAC) is a bad actor.

But that's a realm that we're talking about.

Steve Metalitz: Okay. So you're breaking us down, you know, about in terms of our relay-revealing remedy. And the relay situation it turns out to be duplicative. Reveal is a situation I suppose where, I mean registrar certainly could do that then I guess we're talking here not about making it, necessarily making it public but revealing to the requester the full contact data.

(Adam Scholville):   Yes.

Steve Metalitz: And then remedy I think - (Adam), you're raising a point that's been raised before which is we have to be very careful about the circumstances in which someone will be empowered to, you know, put a registration on hold because there's certainly is a real possibility of abuse in that situation.

(Steve Delbianco):   Can I get in the queue? This is (Steve).

Steve Metalitz: Yeah. (Steve). Anybody else in the queue?

Go ahead, (Steve).

(Steve Delbianco):   I think you - I think you try to put a restatement on (Adam) that I would concur with. And that - lets deal will just relay and reveal right now.

And if an (OPAC) fail to relay or reveal within the timeframe we provided, I do believe that those two should result in the registrar revealing the registrar name holder to the complainant, not to the general public.

And, I agree with (Eric) that we should not pass the registrar with another round of relays but rather something that's simple, straightforward that they can do. Revealing the Registered Name Holder to the complainant because the complainant can document that the (OPAC) has failed to carry through the relays and it's a roundtrip on a relay. It's necessary. It's not simply a one way relay to the RNH. We get, we have to get information relayed back to the complainant from the RNH, and if you don't then that relay has failed. And a failure of a relay was a failure of reveal, I believe should cause the registrar to reveal to the complainant the RNH.

Eric Dierker: This is (Eric). That certainly sounds very reasonable to me.

(Steve Delbianco): Okay.

Eric Dierker: All right.

(Steve Delbianco): If we can get consensus on that, (Steve), then we can deal with a much more controversial question of remedy.

Steve Metalitz: Okay. Further comments on (Steve's) proposal which is if the (OPAC) fails to relay or reveal, then the registrar would reveal to the requester, not to the general public.

And the relay function is a roundtrip function. So let me - let's just figure how would this would work in practice. I make request. I mean, I send a legal request to the (OPAC) and I don't hear anything after a certain period of time.

Do I then go to - now we don't know whether that was because it was not relayed or to the Registered Name Holder, or because the Registered Name Holder - it was relayed to the Registered Name Holder, and the Registered Name Holder just chose to ignore it, or, you know, just decided not to answer it.

Should the outcome be the same in both those circumstances? I guess from the perspective of the requester, you can't really tell, you can't necessarily tell which is which.

You don't know…

(Steve Delbianco): That is an audit function in the (OPAC) sense some sort of confirmation back to the requester that it has in fact fulfilled its responsibility and set the stuff on.

(Adam Scholville): And yet, if we ware not having, if the complainant does not at this point, then having an interaction with the RNH, either through relays or the reveal, then the (OPAC) role has failed. Not that the (OPAC) person did anything wrong, but the role of (OPAC) has failed if the complainant is unable to communicate and seek a remedy, seek answers from the RNH.

Eric Dierker: This is (Eric). I think we need to always keep in mind that the other word that was used for this position is proxy. And the proxy simply stands in the stead of something else.

And so, I think it should be a fairly automatic, and I like to term fail, that's a good way to phrase it, for who cares what reason he went hiking in the canyon for two weeks and he missed his call.

Whatever reason, it's failed, so its get relayed both roundtrips by the registrar, fairly immediately. And I'm - since we're kind of avoiding timeline here, but I'm thinking like 48 hours to five days.

Steve Metalitz: Okay. Is there a general agreement that if - in a relay situation, if the requester doesn't here anything back - well this kind of gets into (Steve's) escalation approach. Can I make a request? It's a relay request. I don't hear anything back. So the relay has failed and that's that.

Do I then go to the (OPAC) and ask him to reveal, or do I go to straight to the registrar and ask him to reveal?

(Steve Delbianco): This is (Steve), and I'd recommend give the (OPAC) a chance to do their job before imposing on the registrar responsibilities that have been delegated to the (OPAC).

Steve Metalitz: Okay, and then if the request - if I say okay, now, there's been now effective relay now. Now its time to reveal, and the (OPAC) doesn't do that, then presumably you will go to the registrar for that.

(Chris Gibson): Yeah, this is (Chris). I know we're done at the detail level. I have two comments. One, I like the idea that - and for example if there is an accreditation requirement of some form, you have (OPAC) would be required to confirm that they received request so you know they'd received it? That will be one.

Second, I mentioned in my proposal for example that copy should be send to registrar since part of the (unintelligible) for that is you could

buy - have them copy down the initial communication sensitivity. (OPAC) would be able to tell them, okay, it's been whatever period of time and we have not heard back, then you'd be able to escalate it by showing the registrar, you know, this period of time has passed. There's been silence on the other end and we now need to come to you.

So - but I agree with that last comment that it should be first for the (OPAC) to do to perform its responsibilities.

Steve Metalitz: Okay. So maybe we're talking about a somewhat expanded definition of relay. Its not just send it to the Registered Name Holder. It's also kind of the BCC back to the requester, and a BCC to the registrar or something like that in order to document that you - it just occurred.

Again, I assume that could be done on automative basis.

(Chris Gibson): I agree. I think that's important…

Steve Metalitz: And we're talking about the email request here. Obviously, it might be a little different in a non-email request.

(Steve Delbianco): So much - this is (Steve Delbianco). The status quo is that with an accurate and open Whois that a complainant can communicate, can reach a registered name.

And we're simply trying to give that same capability to the complainant in an (OPAC) regime but respecting the role of the (OPAC) standing between the complainant and the RNH.

This notion of relay and escalating to reveal is all meant to simply replace the functionality that supposed to be there today, if Whois is accurate and open.

Steve Metalitz: Okay. All right, so if there were no - if the relay function fails then the (OPAC) is suppose to reveal. If the (OPAC) doesn't reveal, the reveal function fails and registrar reveals.

Is that kind of the model we're talking about here?

(Steve Delbianco): Yes.

Steve Metalitz: Okay.

Okay, now what about these remedy cases. I mean, we haven't really flushed out what would be the remedy cases, but - so maybe it's premature to talk about that, and I think (Adam) has sounded a cautionary note about that on a couple of occasions.

(Steve Delbianco): May I make a request? If someone can summarize, what is the status quo responsibility of a registrars that learns of illegal activity or infringing content on a site. Let's work of what the status quo is before imposing new obligation.

Steve Metalitz: That's a very good question and I'm not sure that we know the answer to that. Obviously, the registrar accreditation agreement requires that the registrar have a contract with the registrant that says I will not use the registered domain name in a manner that infringes the rights of others and so forth. And there maybe other terms of service on which the registrar provide the service to the registrant, but…

(Steve Delbianco):   Are those terms uniform between all registrars and registrants? Are they dictated by ICANN and the registrar accreditation agreement?

Steve Metalitz: Well, some aspects of them are, yeah.

(Steve Delbianco):   The aspects that are common and current would be worth repeating in our documents so that it's not seen as if we're raising the bar for legal and ethical responsibility but simply restating the status quo.

Steve Metalitz: Well, all I'm saying is that there is a requirement that the registrar have an agreement with the registrant that the registrant will not use the domain name for illegal purposes. But the remedy for that or the enforcement for that is quite murky because, you know, there aren't any third party beneficiaries of that agreement, and I think in practice, obviously some registrars will probably say if it falls within that category of misuse, they will say, well, go to the - use the UDRP or to remedy that. That's method should be use.

I mean, all I'm saying is at this point I think it would be hard to say that a registrar has an enforceable obligation to put on hold a domain name that's being used for illegal purposes.

It's done. It's certainly done on an informal basis, but I'm not sure you could say that they have a formal legal obligation to do that. They might have some -- they fail to do it, they might have some repercussions for their own liability, but I don't think that there is a set protocol that set within ICANN agreements that says under these

circumstances the registrar must make the site go dark or put in on hold or take any action in that regard.

I don't think we have any registrars on the call. So I can certainly stand corrected on that but that's my understanding.

(Steve Delbianco):   Do the responsibilities for the registrar differ with respect to intellectual property infringement versus a consumer fraud issue? Are those treated distinctly, or do they both go to UDRP?

Steve Metalitz: No. Only an intellectual - only certain categories of intellectual property problems can go to the UDRP. I just gave that as an example.

If you go to - I mean, (Chris) or (Adam), you may be able to flush this out. If you go to a registrar today and say, you know, xyz.net is being used for a range of illegal purposes. There might be a trademark infringement, there might be copyright infringing activity on the site to which that domain name resolve. There might be a fraud situation, a fishing situation. What response you're going to get from a registrar? Number 1.

And number 2 is there a legal obligation for them to - (Steve), what you're driving at is what is their legal obligation right now and are we increasing it in this proposal.

(Steve Delbianco):   (Steve), you said it exactly right because rhetorically when we argue for anything, the firm is ground, we can stand on this ground that it (unintelligible) current obligation rather than increases.

(Chris Gibson):   This is (Chris). As I see it, registrars normally -- and it would be very
                  helpful to have their input but -- and they have contractual rights. You
                  know, rights to do certain things but they don't as a matter of - and they
                  may have right to cancel their registration if there's inaccurate data.

                  They might have other right but they normally resist doing so. It's a
                  matter of discretion. If they wanted to exercises those and certainly
                  when it comes to trademark related issue, they will simply, you know,
                  say file your complaint under the UDRP.

                  For other issues, you can try to bring pressure on them and respect the
                  things like (unintelligible) scans and the may do something more but,
                  you know, that's - its not - there's no duty on them to do it, you know,
                  contractually they may have a (unintelligible) that's within their powers
                  but it's a different thing to say they would do it as a matter of course.

Steve Metalitz: Okay. That's certainly consistent with my understanding…

(Chris Gibson):   Yeah.

Steve Metalitz: …of where things stand out.

                  Well, I guess one question is should that change. Is there some
                  category, you know, is (OPAC) make difference, bringing in the
                  (OPAC), is that make - does that or should that make a difference?

(Chris Gibson):   This is (Chris). I think it highlights the importance that registrar have to
                  have access to the Whois data at a minimum so that they can perform
                  the Whois in a very prompt manner if things don't work at the level of
                  (OPAC) and the Registered Name Holder. Then the registrar could

essentially make available information that would then be the basis for what would normally occur in the absence of the (OPAC) system. That's at a minimum.

Steve Metalitz: Yeah. That's the reveal function if you will.

(Chris Gibson): Yeah. If there - and for example for some reason there wasn't a reveal that that could be implemented to the level of registrar, then you'd have to have stronger actions that could be taken by the registrar in certain cases, but perhaps, you know, its used for the (unintelligible) registrar, you know, other than taking our new responsibility for review of things, they're doing what they would otherwise do now.

Steve Metalitz: Okay.

Okay, so one option would be to say that the remedy - on the remedy phase or the registrar's responsibility to remedy is the same as it is now, to status quo, which I think is - we have the right to take this steps but in many cases, they don't have an obligation to take these steps.

And so again, the question is do we want - is there another alternative, or do we still want to flag this issue and say that they're - we weren't discussing whether there is any, there are other circumstances in which the registrar should be obligated to do more than their obligated to do now in this area, because, again, we're just looking at the (OPAC) system here.

Obviously, one thing that happens with the (OPAC), I think with the failure of the (OPAC) is if there's some delay. There's another step that you have to go through. Another hoop you have to jump through. And

that means if you have to go to the (OPAC) first, then you're delayed in going to the register.

And if the (OPAC) fails, and if we say - if we take a situation, and we haven't really flushed this out where remedy is required, and the (OPAC) fails to deliver it, do we - are we in a situation where the registrars should be required to delver it because the introduction to the (OPAC) is delayed getting to that point.

(Steve Delbianco): This is (Steve). Can I get in the queue?

Steve Metalitz: Yeah. Go ahead. (Steve), and anybody else want to get in the queue?

(Adam Scholville): (Adam).

Steve Metalitz: Okay. Anybody else?

Go ahead, (Steve).

(Steve Delbianco): (Steve), I really believe you hit the nail on the head and the introduction to the (OPAC) under the guys of creating privacy is a very effective tool for a bad actor to create delay. They might desire to create obscurity but they get delay for free.

And the delay can benefit them in the case of - commercially in the case of copyright or trademark infringement. It can benefit them in a criminal way with respect to fraud or fishing. And with the denial of service attack, a delay maybe all they needed which was the opportunity to create a denial of service attach or some sort of an

attack, and when you attack, the damage is done, and it really doesn't matter, what's revealed.

So, delay creates the opportunity for criminal conduct and financial gain that's in violation of ICANN policy. So the delay introduced by the (OPAC) can't be given away for free. There must be something that is given up for the opportunity to the delay.

I think that creates the rationale for more active remedy to be required. And the only person we can seem to impose that remedy on is the registrar, so we have to create a rationale for asking the registrar, requiring a registrar to take remedy action if the (OPAC) has failed and simply created a delay.

Steve Metalitz: (Adam), you're I the queue.

(Adam Scholville):   Yeah. Just basically what I was primarily got to say that, you know, it's hard to sort of - it's like there might be different responsibilities because of the fact that we are taking away, you know, elements of remedies that their parties would have otherwise.

You know, although I am a little reluctant on the idea that was floated several meetings ago about, you know, I guess the question was is there a point at which either initially or it fails to do anything, the (OPAC) is in someway liable for the site content, the premise being -- just sort of recap -- that the - that the current situation where our proxy service puts itself in as the name of the registrant for the Registered Name Holder under the RAA, that person is seemed to be the owner and there might be consequences under national law; someone who is the owner of the domain name at which illegal activity is going on.

So I'm not sure that it's going to, you know, out - it's all the way out of bounce but to some degree, we are taking what the currently the question of national law. The question being is there liability for content for someone who claims that they are the owner of the domain, you know, even they're not actually responsible for that content, and codifying it into the contract.

But then, you know, but then again part of the question is is that necessary because of the fact that we are deliberately replacing the proxy with someone who is affirmatively allowed not to say that they are the owner.

You know, so - I don't know. I can see possibly there being some sort of a safe harbor where the (OPAC) keeps itself in good graces, whatever those might mean, by fulfilling its obligation, and if it totally falls down on the job, then maybe there's some sort of a safe harbor that it losses, although I'm not exactly sure how to exactly how to phrase what the consequence would be.

But, you know, the I think, and just one other point, and that is to call up on the point of talking about, you know, do we treat things differently in terms of intellectual property infringement versus, you know, consumer fraud.

You know, that's a real sort of fuzzy line, I think, because, you know, to some degree, intellectual property is particularly in the copyright of patent cases, you know, is meant as property of monopolistic right that's given to the property owner to incentives them to create more.

In the trademark context, however, you know, the whole rationale behind the trademark laws worldwide is to, is that, you know, there are rights that are given to the trademark owner in order to keep the consumer from being confused. I mean the whole thing is a consumer protection rationale, and if the whole point is to prevent, you know, consumers from being defrauded and confused, then, you know, that doesn't look very different from the law enforcement rationale, and frankly its just taking work off of what the police might do if they have more resources.

So, you know, it's hard for me to make such a clean distinction between the two.

Steve Metalitz: Okay. Well, certainly a lot of the fraud cases involved trademark problems too. Think about deficient situation.

Well, I think you've introduced a new element here which is that one way of enforcing the obligation to the (OPAC) might be exposing them to greater liability if they don't perform them.

And I think you also put your finger on one of the murky areas here which is of course I cant create that liability that's a matter of national law. And so, what we have for example in the RAA with proxies to say that, you know, the license ore of a domain name who fails to reveal the contact information of the licensee when presented with reasonable evidence of actionable harm, maybe liable for the content or maybe liable for the actions of the licensee.

It says that in the RAA, it doesn't necessarily mean that a court particular case under national law would follow that. But, I suppose one

thing you could do is put a similar provision in whatever agreement there is between ICANN and the (OPAC) if there is one. And that might be (unintelligible) incentive for them to perform and I suppose a method of enforcement if they don't perform.

(Steve Delbianco):   (Steve), this is (Steve Delbianco). That's the first time I've heard a suggestion that ICANN had any relationship at all with (OPAC).

Steve Metalitz: Well, we talked about that last time about what the relationship would be and whether there would be accreditation. We haven't really resolved that, but there is some sense that that maybe beneficial.

Now, that would be needed if for - what (Adam) is talking about, it wouldn't necessarily be needed for the other types of enforcement we've been talking about here which are all (unintelligible) to the registrar which already has a contractual relationship.

(Chris Gibson):   This is (Chris).

Steve Metalitz: (Chris), go ahead.

(Chris Gibson):   Okay. I want to do, you know, agree with this point that it can be very fuzzy the distinction between cases of fraud and intellectual property issues. I think that it's hard to come up with some categorical approach that would device those two and say we have a different approach with respect to one versus the other.

And I think one thing that therefore important when we think about this is that, we're looking at three actors in the system. There's a Registered Name Holder, there's the (OPAC), and there's the registrar.

And I think it's important that each of those, obviously, the Registered Name Holder will have this, that the (OPAC) and any registrar have the authorization to take these various steps.

And that point itself should be made clear, and it can happen through the chain of contracts, so that means the (OPAC) should have the authorization to take action with respect to the name.

It maybe merely reveal or it maybe to agree with someone who's inquiring that it should be put on hold and therefore to direct the registrar to do so.

And then at the level of the registrar, that entity too should have the authorization within its contract that it has the right to, you know, reveal and also to take certain action.

And then it maybe impossible for us to spell out all of those various cases of what might be the type of action that would justify and approach in one case versus the difference. But if you have - if each of those parties have that contractual authorization, then the (OPAC) itself for example, if the (OPAC) that's preferably performing (unintelligible) third party, and they're receiving these notifications and the Registered Name Holder. Let's say it's a case of fraud, I would think in many cases, that party is going to disappear (unintelligible). They're simply going to respond.

Now the (OPAC) should in position to take they're requisite action, and it may be something much more than reveal. It maybe that there then direct the registrar to take all action necessary to make this go (black).

And if it's a responsible (OPAC), they should have that ability to do so. And of course if the (OPAC) is not, is in default, and they're responsible, then they can go to the registrar and you make your case for the registrar and they should have the same - so as a common matter, (unintelligible) parties should have that full authorization to take our responsible steps.

Steve Metalitz: Right. Okay.

We're running a little low on time here. It's about six minutes before the hour. So let me just see if there's anything else that people want to bring up about how. I think we've had a good discussion here and a good focusing with these issues.

So let me ask first if anybody else wants to be heard on the how question.

(Adam Scholville):   (Steve), its (Adam).

Steve Metalitz: Yeah. Go ahead.

(Adam Scholville):   One other sort of aspect this maybe a little bit tangential is to, we kind of talk about what happens on the particular domain name case with respect if the (OPAC) isn't doing its job from a systemic point of view. There might be, we might want to - and this maybe sort of a no-brainer but if we're under a situation where there's accreditation in order to get a contract that ICANN can have with the (OPAC) because that's really the only way we can dictate uniform responsibilities.

I mean, we can talk about the reveal and so forth, and what happens if the (OPAC) doesn't fulfill its responsibilities, but the question still rises how do we impose those responsibilities in the first instance, and that I think has to be to be - and I haven't heard any suggestions as to how else we would do that. That has to be by virtue of some sort of contractual link it ICANN and it seems like our discussion of a few calls ago about accreditation is the only - and yes I've heard it about how to do that.

From a systemic point of view, yes if, you know, I have complaint with regard to a specific domain name. The (OPAC) doesn't do their thing, then maybe the information for that domain name gets revealed. It might be a no-brainer but I would imagine that at some point the (OPAC) should lose its accreditation and should not be able to be an (OPAC) anymore, you know, because otherwise, there's going to be serial violator, and maybe that's a no-brainer but just thought its worth mentioning.

Steve Metalitz: Okay, thank you.

All right…

(Chris Gibson): (Steve), this is (Chris). One real quick thing, on the first point which was your number one on the improper (OPAC) violation.

Steve Metalitz: Uh-huh.

(Chris Gibson): You know, there is something that I have flushed out in the draft where I put into some degree, and I just wanted to highlight that, you know, the idea is that if subgroup C decides that, for example the system,

that one of the - the alternatives in their report is that legal versus natural person could be based on a (unintelligible) relation. That's some thing that's debated within that group. And commercial versus non-commercial activity could also be based on a self declaration made by the Registered Name Holder at the time of registration.

So the idea here is that if people self declare improperly, you know, they don't state whether (unintelligible) accurate, then there'd be a lightweight procedure to challenge that (OPAC) type of registration.

Steve Metalitz: Okay. We'll incorporate that.

All right, if there's nothing further on how, let me just - there are really two more things we need to do here. one I think (Steve) wanted us to look back again at this when question, and if we could, I mean, we've talked about some different timeframes and so forth, but I'm not sure that we're, whether we're in a position to actually come up with timeframes within which, the relay, the reveal, or the remedy would happen. But let me open the floor to any comments on those questions which are really I think it's spelled out on Page 3 of the discussion outline.

(Steve Delbianco):   (Steve), this is (Steve Delbianco). With respect to what we turnover to the full task force, its clear we'll be able to raise these great questions, but there are some cases where we would suggest consensus answers. And some cases where we'd suggest potential answers that weren't able to achieve consensus.

Steve Metalitz: Are you talking just about the when page or in general here?

(Steve Delbianco):   In general.

Steve Metalitz: Okay.

(Steve Delbianco):   And with respect to the when page, we ought to structure what we convey, as these are the questions we dealt with under the when and there are instances where we did have solid answers.

Steve Metalitz: Okay.

(Steve Delbianco):   And it's what we did.

Steve Metalitz: What are our solid answers then? I mean, I think one was that the relay would be immediate in all cases to which relay applies.

(Steve Delbianco):   I agree.

(Adam Scholville):   At least if its email.

Steve Metalitz: At least if its email. Yes.

(Steve Delbianco):   In which case we take the question marks sort of off there, or we go ahead and answer it?

(Chris Gibson):   This is (Chris).

Steve Metalitz: Yes.

(Chris Gibson):   I think on the timing, I think you want to at least list some different examples. And some of the different timeframes that have been

suggested by various measures, you could imagine there is certain types of activities that would require very immediate response, and others that might not be so pressing. I don't know if we'd reach consensus on those various types but at least list them out as different examples that might be helpful.

Steve Metalitz: Okay.

But on the other hand, we did - we also heard it's not always easy to draw the distinction between let's say a fraud situation and an intellectual property situation. There's a trademark situation.

(Chris Gibson): Right.

(Adam Scholville): But with respect to relay under When, the first part of the relay, the first leg of the relay we think should be immediate.

Steve Metalitz: Yeah.

(Adam Scholville): And that is the relay to the Registered Name Holder.

Do we also need to (unintelligible) what are the When obligations on relaying the second leg, getting back from the Registered Name Holder and relaying their response to the question if there was a question post by the complainant.

(Steve Delbianco): (Unintelligible).

(Adam Scholville): Well, perhaps immediately upon receiving the second leg of the relay from the Registered Name Holder but…

Steve Metalitz: Yeah, but remember that the (OPAC) supposed to be our 24/7 and has this capabilities. The registrant could be, could have a wide range of capabilities.

(Adam Scholville): Uh-huh.

Steve Metalitz: I mean, and at this point there aren't capability requirements to be a registrant.

(Steve Delbianco): Yeah. But, you know, whenever the registrant sends that communications back then it happens. It gets back to the appointed immediately.

Steve Metalitz: Okay. But I think (Steve) is raising a different question and we've talked already the enforcement. How do you know if relay isn't working?

You send your complaint in. Let's assume you get a BCC or something like that that says the (OPAC) has related to the Registered Name Holder. You notify with that some way. Then nothing happens.

So is there - obviously before you can go to the next step, which I think we said would be the reveal function asking for reveal issue. There would have to be some type of time limit there or time limits depending on the type of case.

I think (Eric) had mad suggestion earlier on our call about 48 hours to five days. I'm not sure if that was - what exactly which case is that was intended to cover.

Eric Dierker: This is (Eric). The 48 hours would be the time in which the (OPAC) has
                  to notify the registrant and the five days would the registrant's
                  response.

                  If you go any faster than five days, you're really kind of outside the
                  scope of this stored protocol. And five days for mailing, 10 days for
                  response, its usually legal type of documentation. So if we're doing on
                  the QT 7/24, 48 and five seemed to be very reasonable to me.

Steve Metalitz: Okay.

(Steve Delbianco):   Reasonable but - this is (Steve) - but its five days longer than the
                  status quo of me learning who is the registrar.

Eric Dierker: Well, for both - theoretically the (OPAC) would make it within two or
                  three hours of getting it and he'd be back within two or three hours.
                  There's no time limit now on when someone asked a response - a
                  query other then through UDRP.

(Steve Delbianco):   True to enough, but it's with status quo with an open and accurate
                  Whois, then complainant knows who the registrant is, and there isn't
                  any need for relay function, or simply a communication directly to the
                  registrant.

                  So we are introducing a delay, and even learning who the registrant is.
                  It's not just the delay of getting responsible registrant.

(Adam Scholville):   And it's also timely on the complainant or with the information about
                  who the registrant is, exercising their legal right.

Steve Metalitz: Well, are you suggesting there should be?

(Adam Scholville):   No. I'm just saying that, I'm just seconding (Steve's) point that this instance introduces that delay before the registrant - before the complainant, sorry, can exercise its legal rights.

You know, there is - as (Eric) said there's no obligation for the Registered Name Holder to get back but there's also no obligation for the complainant to wait for them to get back before taking legal action, but this system introduces a new delay before they effectively can do that because they don't know who the registrant is.

Steve Metalitz: Okay. But then, we have this problem of - again, when is it right - again, it's a relay situation. Let's stipulate its not a, you know, life or death, or immediate action type situation, (unintelligible) side what that might be.

You ask for the relay. The relay happens. You still don't hear anything back from the registrant. Now what point can you go to the (OPAC) and say, "Well, now you have to give - you have reveal."

(Steve Delbianco):   This is (Steve). I would say that the (OPAC) should be expected to use some level of reasonable action to followup with his client, the registrant, to say, "Sid you not get the email?" Try alternative ways of reaching them and to say we need to get these guys an answer.

I mean, the perfect world, the (OPAC) saying, "We need to get these guys an answer." and the time it takes for them to answer either on behalf of because remember they may have an agency relationship,

it's a successful (unintelligible). They can answer on behalf of the registrant.

So I don't think we have to go with five days. I'd like to see it be shorter than that.

Steve Metalitz: Well, it could be shorter I suppose. You know, they could agree with the registrant that will be shorter but we need to try to - if this system is going to work, I think at some point we need to define minimums, and (OPAC) will be in default if he doesn't reveal after he's done relay and there's been no answer to five days.

That's one way you can just establish a minimum.

(Steve Delbianco): Uh-huh.

Steve Metalitz: But I hear you that - is - this is compared to status quo. This is an element of delay.

(Steve Delbianco): And there was no element of delay created. There was no element of delay as a motivation for us to create the (OPAC) scheme. The (OPAC) scheme is created for the sole reason of privacy.

Steve Metalitz: Okay. Any further comments on this question? I mean, (Eric), what do you think about those arguments?

Eric Dierker: I - yeah, this is (Eric). I don't think the 48-hour return is a bad idea, and the reason for that is this. I've been around doing it's long enough to watch guys running to court in about two hours with papers and get a court order. And certainly that would override anything we're doing.

So if there's something really critical time sensitive, then the complainant is going to be able to do something much quicker than we're allowing for a year. We're certainly not stopping legal process.

Steve Metalitz: Okay.

Eric Dierker: I'm sorry. That brought me back to the fraud versus - just mistaken.

Steve Metalitz: Yeah.

Eric Dierker: And that's really important. Then its not just fraud. Its what, you know, negligence versus intentional.

So we started getting into dividing that up and deciding which one is which. Who? It's a lot of work.

Steve Metalitz: Yeah. It gets complicated very quickly.

Okay, well I'm not sure that we have agreement on this but we have - I think there's two schools of thoughts. One is that we should have a definite time minimum within which a reveal, after which a reveal would be appropriate others that maybe need to be more fluid, depending on the type of incident involved.

I mean a lot of these does focus our attention on which are the relay situations, which are the immediate reveals situations. Which situation where you can go of to the - because the old pocket say, well give me the registered holder data now, which we haven't clearly defined.

But I think the example that (Chris) asked that we list some examples, and I think we can certainly going to try to do that.

(Adam Scholville):   This is (Adam) for a process question.

Steve Metalitz: Yes.

(Adam Scholville):   Where do we go from here? Your document raises a lot of questions, and I think that there are a lot of cases where we've actually been able to…

Steve Metalitz: I think so, yeah. I think…

(Adam Scholville):   …to answer them but those answers aren't really indicated here. Where do we go from here?

Steve Metalitz: I guess, what I would just is that I circulate a new version of this to try to indicate where we've had some agreement among the participants. And again, where I don't have question marks, I think that's, that is generally an area of agreement.

But let me try to walkthrough that and see if people agree with where I've indicated agreement, and I think there are few areas where we don't have agreement, I mean, we have, you know, we have sort of different views and maybe some alternatives, and sure there'll be some things that still need to be flushed out, but I think we made a lot of progress today on the how questions as far as the role of the registrar, and I think that all can be reflected in the document.

So what I would suggest is that try to circulate something probably hopefully by the end of the day tomorrow. And I will ask people to give feedback on the list, you know, on our mailing list or directly (unintelligible) preferably on the list as to what their views are on that whether I've characterized things accurately, whether I've characterized the areas of agreement accurately.

And as I said I think we should in effect staple to this, (Chris's) proposal and (Steve's) proposal that I think that does provide some more, it kind of flushes out some of the areas some what more.

(Steve Delbianco): (Steve), if I may respond to that.

Steve Metalitz: Yeah.

(Steve Delbianco): This is (Steve) speaking. With respect to the proposal that I put in, I believe that it has the potential to splinter the discussion with the whole task force if it's attached as an alternative plan.

my recommendation would be to extract from document any answers to the who, what, when, and how, fits them in to the context of your document, so we would note under when for instance that I've indicated 12 hours of receipt for forwarding.

And put that in under the answer where it shows up under the when relay…

Steve Metalitz: Yeah.

(Steve Delbianco):   …rather than a fork in the road, because two separate documents stapled together, sort of bakes the question which is that we're recommending.

(Chris Gibson):   This is (Chris). And it had been my understanding that for example (Steve) would be pretty (unintelligible) with might be considered some form for summary document for the group, and it simply be suggesting that there were a couple of proposals received and these are attached as annexes. And - but the summary document is called the summary document, and, you know, that I would be I think people could distinguish between that and the annex that are attached.

Steve Metalitz: Particularly if you take information from those proposals where we think that there's been agreement.

(Chris Gibson):   Absolutely.

Steve Metalitz: And paste them in here as answer so they're not - so these document here is self contained and contains everything that you need to know about what we agreed and there's sort of excess about kind of the service source material, you don't necessarily need to go to them to know what we've agreed on and what our cases, where we've identified a couple of different possibilities.

(Chris Gibson):   This is (Chris). I just want to go back to the When, Where time because there's (unintelligible) out of the various discussion in the last few minutes.

I was thinking, you know, when we made the approach it that would be to having - excuse me - a non-exhaustive list of different examples and the type of timeframes that would be contemplated.

What I would want to avoid would be an (OPAC) hiding behind something that's somehow gets involved that are included in the contract that says, we only have to come back to you within five days or 48 hours when that particular instant that's been, you know, being brought before the (OPAC) requires much more immediate action.

So, you know, having something like a non-exhaustive list of different timeframes would be there for framework, but, you know, it would still. Someone in the system wouldn't be able to hide to behind some sort of timeframe in disrupting and delaying something that could - that should take place much faster.

Steve Metalitz: (Chris), would like to circulate a non-exhaustive list of examples of timeframes?

(Chris Gibson): Yeah. I can try to come up with (four or five), and then see what people think of it because what I think of it if everybody in the system as I've said earlier has authorization to take appropriate action, then, you know, you'd have almost like, you know, I think from the (unintelligible), there's non-exhaustive list of things but there could be other things, you know very different contexts, you have a non-exhaustive list of different timeframes which is guiding a (unintelligible) parties have the authorization to do what's need under the particular circumstances that would be presented in a particular case.

Steve Metalitz: Okay. I think I've got marching orders. I would welcome any further input people have, and I will try to get some thing out tomorrow afternoon, tomorrow evening for your review, and hopefully we will have something that we can submit to the full group next Wednesday.

Any last observations to make?

(Steve Delbianco):   Just thank you for putting all the extra time in leading this. I appreciate this.

Eric Dierker: Thank you, (Steve).

(Adam Scholville):   Yeah, thanks.

Man: Second it.

Steve Metalitz: Thanks to everybody for all their input and we've got some very good discussion here and hopefully our document would reflect that.

Okay, thanks everyone and we'll - please look for this in the next couple of days.

(Steve Delbianco):   Thanks. Bye-bye.

Steve Metalitz: Bye.

Carole Bird: Bye-bye.

END