
ICANN Transcription

Review of all Rights Protection Mechanisms (RPMs) Sub Team for Sunrise Data Review

Wednesday 27, March 2019 at 1800 UTC

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<https://audio.icann.org/gnso/gnso-rpm-review-sunrise-registrations-27mar19-en.mp3>

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MICHELLE DESMYTER:

Hello, I'd like to welcome everyone. Good morning, good afternoon, and good evening to all. Welcome to the Review of All Rights Protection Mechanism Sub-Team for Sunrise Data Review Call on the 27th of March 2019. In the interest of time, there will be no roll call today. Attendance will be taken via the Adobe Connect room. So, if you happen to be only on the audio bridge, will you please let yourself be known now?

Hearing no names, I would like to remind all participants if you would please state your name before speaking and to please keep your phones and microphones on mute when not speaking to avoid any background noise.

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With this, I will turn the meeting over to Julie Hedlund. Please begin.

JULIE HEDLUND: Thanks, Michelle. Actually, I'm going to go ahead and turn things over to David McAuley. Go ahead, David. Thanks so much.

DAVID MCAULEY: Thank you, Julie. Hello, everybody. This is David McAuley speaking. Welcome to the call and I expect that we'll have a few other folks get on the call in just a few minutes.

The purpose of this call is to continue discussions as we did in session three of four at the ICANN 64 meeting. That was the second of the sunrise meetings. And what we were doing was going through the agreed charter questions as we had tweaked them, with a view to discussion as appropriate but as a prompt towards possible recommendations to float before the group because we're at that stage where we're looking for recommendations.

Before I get on to doing a brief summary of that, let me just double check on statements of interests, if anybody has an update to their statement of interest prior to us proceeding with the call. I don't see any hands. I don't hear anyone, so we'll press on.

In that last call, we focused largely on question two. There was a spirited discussion. We didn't finish. I'm going to repeat the question now. I'll briefly summarize what we discussed. I clearly can't comprehensively summarize it but I think most of you will remember,

and of course the link and also a PDF copy of the transcript has been sent around from that meeting.

Question two has a threshold question to begin it and that question is: is registry pricing within the scope of the RPM Working Group for ICANN's review? And there were two sub-questions under it. Does registry sunrise or premium name pricing practices unfairly limit the ability of trademark owners to participate during sunrise? Then the second sub-question: if that's the case, how extensive is this problem?

We began the meeting, Griffin began the comments saying it was his view that we could at least discuss pricing. I think George agreed with that, thought maybe pricing would be a major concern for smaller trademark owners. Again, I'm just giving high level, trying to help us get back into the flow of things. We tried to eliminate use of the word predatory in favor of discriminatory pricing.

Kristine, Kathy mentioned that your view was that, no, pricing is not within the scope of this group. Susan said that she thought it was not also, except where there were instances where pricing might be specifically used to get around an RPM, such as in sunrise pricing.

Phil brought us back and mentioned that there are practical remedies that we need to consider and then we also got into a great building of analogies on the call between Greg and Michael and others.

So, with that background and recognizing that question number two is still open, I'm going to invite comments on question two. Or better yet, suggested proposals if anyone has anything to float. We did discuss

what we might be able to tell the SubPro group operating sort of in parallel with us about pricing.

Maxim, I don't know the page number. I think it's 11 of the summary table but we are on question two. I see a hand. Griffin's hand is up, so I'm going to go to Griffin and then we'll go to Susan. Please, everybody, give thoughts to your proposal so we can keep on moving through these. I'll now give the floor to Griffin. Go ahead, please.

GRIFFIN BARNETT:

Thanks, David. Just to say that having have thought about the discussion that we had in Kobe about the issue as you summarized it, I guess my proposal, if you want to call it that, would be for a possible high-level policy statement or recommendation that basically just says registry operator sunrise pricing should not discriminate against brand owners or otherwise circumvent the reasonable use of the sunrise mechanism. That's my suggestion for consideration and I'll leave it at that. Thanks.

DAVID MCAULEY:

Thank you, Griffin. I will ask Julie and staff to please capture anything like that. I'm not in a position where I can easily write things down. I'm working from my home office today and it's cluttered and I'm not going to be able to do that.

So, moving us on, Griffin, thank you for making a proposal. I'll next turn to Susan Payne. Susan, you have the floor.

SUSAN PAYNE:

Hi. I was going to say something sort of along the same lines as Griffin, actually. Perhaps I'll do that first and hopefully I'll remember the other point that I was going to make at the end.

I think perhaps it's sort of a high-level statement. It seems to me that this is something that could potentially be incorporated as a public interest commitment into a registry agreement, so that essentially it becomes a contractual provision that says that there shouldn't be ... Registry practices, or rather registries, should not adopt practices that are intended or perhaps have the inevitable effect of circumventing the rights protection mechanisms. And by way of example, that could include whether it's [inaudible] as pricing on something like a sunrise. But there may be other scenarios as well.

I think the advantage of that is, of course, there are already rights protection mechanism obligations in the registry agreement, but for whatever reason, ICANN compliance has either felt that they were unable to take action in relation to some of the areas where brand owners have had cause for complaint or have felt that they didn't want to take action. And the notion of a public interest commitment, which is that [inaudible] brand owner their own [inaudible].

So, that I think is something which we could practically do, and thereby we don't get into the notion of ICANN mandating a kind of pricing level but we do ask registry operators when they're considering how they operate to consider whether they're doing something which is intended or has the inevitable impact of circumventing the rights protection. That was the first thing.

The other thing I put my hand up to say was just I know it's a conversation that we started in Kobe. I'm not convinced that ... I'm not entirely clear on how we view what we might say in this working group as going into the Subsequent Procedures Working Group.

It seems to me that if we have a recommendation such as the one that I just suggested, that's a recommendation that we are making within the rights protection PDP in order to directly relevant to the rights protections and it may be that has to then get adopted somehow in terms of implementation but it doesn't seem to me that we have to make that recommendation to subsequent procedures and then the subsequent procedures PDP decides whether they accept our recommendation or reject it. I think we're perfectly entitled to make our own recommendation, that we don't have to be relying on SubPro.

I also say that bearing in mind the timing, where our timeline is now completely out of synch with the SubPro timeline, and consequently any recommendations we want to make SubPro will be done.

DAVID MCAULEY:

Thank you, Susan. Before I go to Maxim, I'll just take chair's [inaudible] and make two comments to what you said. First of all, with respect to comments to the SubPro, it wasn't just mentioned to SubPro – at least my recollection of what we discussed at ICANN 64. It wasn't that we would mention anything to SubPro with a view towards getting their blessing or their acceptance, but rather I thought there was discussion around the idea of, given the fact that they're moving forward and we're moving forward, could we inform them of progress and was there

progress made to the point where we would agree that there would not be any recommendation on pricing control? I may have that wrong but it's in the transcript. We can go back and look at that.

The other thing is I think that you and Griffin were sort of close in what you're suggesting. My only concern on circumvention is we will ... Assuming it becomes a proposal that we want to make as a group, we'll have to come up with something concrete. The concern I would express – and it's not a concern, it's just an initial reaction. The verb circumvent is something that might easily be gotten around so we have to think about how we would [inaudible].

Anyway, enough of that. I'm going to turn ... I was going to turn to Maxim but he's moved down in the queue as I see it. If that was intentional, I'll turn to George. But Maxim, did you want to speak now and somehow get misplaced in the queue? Not hearing, I'll go to George. George, you have the floor.

MAXIM ALZOPA: Hello. It's Maxim. Do you hear me?

DAVID MCAULEY: Okay. Maxim, I hear you. You moved in the queue and I was wondering if that was intentional.

MAXIM ALZOPA: No, my [inaudible] dropped, so I had to ...

DAVID MCAULEY: Alright. Excuse me, then, George. Maxim, go ahead. You have the floor.

MAXIM ALZوبا: Two items. First of all, I would like to remind us all about picket fence and I think it's highly relevant to this question. It's sort of [inaudible] in registry and registrar agreements with ICANN, and simplifying ... Basically, pricing can build [inaudible] by policy, first.

Second, about [inaudible] more preferential items, additional language. It's already in spec 11 to registry agreement first. Second, registries have no way to understand what trademark is or isn't because registries have [inaudible] TMCH, actually. So, there is no way to understand if something is a trademark or not for registries. And if for some reason we come to the conclusion that a registry is prohibited from something they cannot check, then it will create a situation where the current practice of premium names is going to be [inaudible] without deep, I would say ... Okay, let me stop here. Thanks.

DAVID MCAULEY: Thank you, Maxim. George, you're next in the queue. Why don't you go ahead, please.

GEORGE KIRIKOS: Thanks. In context, I don't support the continuation of sunrise and I did make an individual proposal to that effect. But let's assume, for the sake of argument, that sunrise survives, then I think this question can now

also be looked at in combination with question number three because they kind of overlap.

I think the key is what valuation a registry puts on a domain name? Is it [inaudible] entirely by the value of the trademark or is it just the distinctive value of that domain name because every domain name is unique? So, to what extent the registry should be able to justify that pricing. Is it one person might claim it's discrimination [inaudible] trademark holder, but if we [inaudible] we could look at ado.com dispute. The trademark holder in that famous dispute felt that half a million dollars was too much for that domain name was obviously driven by [inaudible]. But from a domain owners point of view, it was a case where it's a valuable one word three-letter dot-com and that alone justified it.

Now, let's look at it from a [new TLD] operator's point of view. They have no ability to be brought before a UDRP panel because the domain name is technically unregistered. But in some sense, they're in the same position as a classic domain investor or just anybody that wants to respond to an inquiry on a domain name. So, for [inaudible], if there's no bad faith use, [inaudible] whatever they want. So, in some sense, the pricing from a registry is purely a negotiation.

So, if it was a UDRP, the case would be one of [passive] holding, that the supply of the domain has a quantity of one and the demand for the domain name is only a quantity of one. So, the burden would be for the registrant to show that there's more demand than just the trademark holder. There could be other uses for it, including themselves. So, I think that's what we would look at when we get to question three.

So, I do agree that there's kind of a problem, but how we frame it is going to be very important because what's the appropriate test? I think we can be informed on that by looking at the passive holding kind of test. So, [inaudible] UDRP. Thank you.

DAVID MCAULEY:

Thank you, George. Before I go to Mitch, I'm going to make a comment and then a question. The comment is, George, I did see in the proposals your proposal that the sunrise remedy be eliminated and discussed it with Greg and we thought that that would best be brought up when we get to the preamble questions. And we will also get to question three in short order.

Then the question I was going to ask, Kristine, if you want to get in the queue, all I can say is last week Kathy did put forward what she believed was your position, that pricing should not be something that we consider. Anyway, Mitch, you're next in the queue. Why don't you go ahead, please?

MITCH STOLZ:

Thank you. Can everyone hear me all right?

DAVID MCAULEY:

Yes, I can hear you.

MITCH STOLZ:

Thank you. I would oppose this proposal because the ability to use sunrise registration is already an extraordinary benefit given to trademark holders that is not given to other lawful, legitimate users of domain names, particularly non-commercial users. It stands to reason that an extraordinary benefit may come with a higher price.

No matter how this language that we're tossing around here has been worded, what it amounts to is saying that ICANN – potentially ICANN contractual compliance or some complaining party – could decide on its own initiative that prices charged for registration in the sunrise period are too high. But without a real standard for determining that.

So, I don't think that this [inaudible] should be regulating prices, but I also don't think this recommendation that amounts to we're not really regulating prices but we are going to call you out if we think your prices are too high. It really amounts to the same thing and raises the same problem.

DAVID MCAULEY:

Thank you, Mitch. I was just going to comment on Susan's question or comment in the chat but I see her hand is up. So, Susan, why don't you go ahead, please.

SUSAN PAYNE:

Okay, thanks. I didn't put my hand up to comment on the question in the chat. You might want to circle back on that. I just wanted to respond to Mitch.

I do take what you're saying and I agree but we are being told and we do understand that we can't be ... ICANN can't be regulating pricing. So, we're trying to find a way around that that addresses a real issue that many brand owners have encountered without being so prescriptive as to regulate pricing.

We do have these obligations that every registry has to implement rights protection mechanisms. There are reasons for that and there has to be a means of enforcing that if they choose to implement it in such a way that it's effectively negated all of the benefits that it was designed for.

Now, maybe the way I suggested isn't perfect yet and it needs some working but there has to be a way to say at some point, you reach a point where they haven't offered the rights protection that they're mandated to offer because they've done it in such a way that it's not really offered to a brand owner in any real sense. And we have examples of that where many brand owners have encountered that and we have to find a way to fix it.

DAVID MCAULEY:

Thank you, Susan. Greg is next in the queue. Go ahead, Greg.

GREG SHATAN:

Thanks. I'm taking off my co-chair hat to [inaudible] here. Just looking at the registry agreement in section 2.10c which deals with renewal pricing, requires a registry operator have uniform [prices] for renewals. They've said that now this is the purpose of 2.10c is to prohibit abuse of

and/or discriminatory renewal pricing practices. I think the picket fence is not so black and white pricing and that the ... So, there is I think some room here for discussion. And I do think there is some difference between in how we deal with price-related issues and certainly is in the picket fence to deal with. Rights protection mechanisms and the enforcement of consensus policies.

So, I think what we do need to avoid is anything that would raise significant anti-trust concerns, price coordination in particular and the like. But then you have to look at the relevant product market, and as we noted, each TLD is unique. That's not say that each one is its own product market. But this is a discussion that needs to be taken in probably somewhat more depth, but I think as a proposal, trying to make sure that sunrise is not stripped of any of its ... It is basically less unrealistically priced to the extent that it's essentially useless as a mechanism for the intent for which it was created. That is a problem. Trying to figure out the right way to deal with it I think is something that is definitely worth looking at. So far, we have ... I don't know if we have multiple proposals on that. It would be good to hear about some other ideas about how to deal with that, especially from those who don't think the proposal on the table has been quite right but may have some other ideas. Thanks.

DAVID MCAULEY:

Thank you, Greg. I don't see any further hands in the queue. It strikes me that we do have a proposal from Griffin and I believe that Susan also basically suggested something. So, while we may not have the consensus that these should be put forward as recommendations from

the group, yet they are proposed recommendations on the table and we'll have to ... This is something that Greg and I will discuss but I believe that we should go to the list once we get these fashioned into shape as to what they are as proposals to see if there's consensus support for them.

But Kristine, I see your hand is up, so please go ahead and take the floor.

KRISTINE DORRAIN:

Thanks. So, if the proposals that are put forward are going to go forward – and this may be just something for David and Greg to discuss when we're talking about how we're going to implement this – I want to make sure that we [inaudible] for the community the picket fence. Not everyone in the community is aware of it. Maxim has stated and I seconded that pricing is firmly outside the picket fence. Implementation of it, etc., I understand Amazon has paid a lot of money for sunrise, etc. But ultimately, if you're thinking of the Lion King, everywhere the light touches is yours. Everywhere the light doesn't touch isn't. So, to spend a lot of time going over something we have no authority to even change or recommend seems like a possible waste of time. But if we do go down that road, I think we need to be really clear that people believe that we don't even have the authority to make this recommendation. Thanks.

DAVID MCAULEY:

Thanks, Kristine. If I implied that we would go forward with anything that was floated, I didn't mean to. I certainly didn't mean to. It's my

opinion that when a recommendation is proposed we have to sort of put it in shape as a recommendation so that everybody can see what the verbiage is rather than just something that we discuss and there has to be consensus support to put that forward as a recommendation.

What I heard Griffin talk about earlier, I don't know. It's possible that could be fashioned in a way that the ... I'm trying to think on the fly how it might not be affected by the picket fence but I can't right now. But before I go further, let me give the floor to Phil. Go ahead, please.

PHILIP CORWIN:

Yeah. Thank you, David. Phil for the record speaking on a personal capacity now and just sharing some random thoughts on the questions before us.

On question A, rather than unfairly limiting, as soon as you say fair, unfair is a subjective judgment. I think that we know that it affects the ... At a certain price level, it affects the willingness of a trademark owner to take advantage of a sunrise, period. They have to weigh ...

One, I would say it's not an extraordinary benefit to do a sunrise registration. If you got your trademark for free, that would be extraordinary. It's a benefit and it's really you do a cost-benefit analysis of is it worth doing this registration now to avoid the potential cost of monitoring for infringement and utilizing legal assistance for a cease and desist letter or a UDRP or URS or court suit or whatever. So, we know at a certain level they say it's not worth the price; I'll fall back on the other methods.

Then, there's a sub-category. If it's a unique trademark, they're going to be the only potential bidder and they're going to have a stronger case if it's infringed upon. If it's a dictionary word that's registered as trademark and in the Clearinghouse recorded by several parties, and to some extent it becomes an auction, are any of them willing to pay the premium price if the mark is like United or Delta and recorded. I'm guessing that those might be recorded in a Clearinghouse by more than one rights owner.

How extensive is this? We don't have hard data, but we know from anecdotal reports that it's significant, that it has had an effect at a significant number of new registries.

So, moving on, it has some ability, affect on willingness of rights owners to utilize sunrise and it is significant.

On question there, do we [inaudible] mechanism, I don't have a personal view on that yet but any mechanism is going to have to have some reasonably objective standard. So, for someone to measure whether the complaint when it's registered that the determination that it's a premium name or a reserved name is unreasonable. So, we're going to have to create a standard if we go with any kind of recommendation either within our working group or communicating some message on this to SubPro.

So, I don't know if those thoughts were helpful. I hope they are. But that's the way I'm approaching these questions. Thank you.

DAVID MCAULEY: Thanks, Phil. That is helpful. I'm going to go to Maxim. Please, go ahead, Maxim.

MAXIM ALZOPA: Actually, I'm looking at page 12 in summary of discussions. We talked a lot about picket fence and I think it deserves to be in a summary of discussions because it's [inaudible] relevant, it's really important, and we still not mention it. It's a bit strange. Thanks.

DAVID MCAULEY: Thank you, Maxim. I'm going to move to question three in just a moment. Before I do, I'm going to pose a question to staff to think about and see if you have any thoughts on it as we wind up at the end of the call. The question is I know that, for instance, Griffin's suggestion was put in chat. I'm not sure that's good enough to memorialize it. In other words, how do we make sure that the specific question, the actual verbiage of a proposed recommendation, is before the group? I'm thinking it might have to be on e-mail. I'm thinking out loud and I'll ask for your thoughts on that.

I do think Maxim and Kristine have raised a fair point about the picket fence. That needs to be considered. People have a right to propose, make a proposed recommendation and then when the picket fence is mentioned, to address whether or not that has some influence on it.

So, before I move to question three, then, I will call on Julie whose hand is up. Julie, go ahead.

JULIE HEDLUND:

Thanks, David. This is Julie Hedlund from staff. So, what staff [inaudible] to do for the calls where we've been discussing preliminary recommendations is to try to capture as clearly as possible whatever text has been suggested during a call and trying to capture them in a way that the recommendation addresses the question. So, making it clear whether or not there's agreement on maintaining the status quo but stating what that is or any changes to the status quo, with respect to the charter question.

What staff might suggest is that we could capture the separate document, just the text of the proposed tentative preliminary recommendation text as it arises from these calls and have that separately reviewed by the sub-team. In fact, actually, I think we can merge that into the summary table so that it's all in one place and able to be referenced there.

I'll just reiterate one thing that I've tried to make a couple of times both on this call and in previous calls is that there is a great limit to the notes. The note-taking that staff is doing must be very high-level for just a quick reference, not for record. So, not meant to replace the transcript, not meant to replace the chat, or the recording. But for the sake of capturing recommendations, we'll try to do a better job of getting the wording which is why I asked Griffin to actually put the wording that he suggests in the chat so I could pull it out of the chat. In fact, I think that to the extent people have recommendation text that they wish to have included, if they could call it out in the chat and then I could specifically take it from the chat and put it in the notes. But it's best, too, that it's also called out in the chat. I hope that's not too confusing. Thank you.

DAVID MCAULEY:

Thanks, Julie. I'll go to George in just a minute but thank you for that. And I think Greg and I will discuss it and probably get back to you on that. It's very good that we're putting pen to paper now on some recommendations. We need to make sure that we make a record of it, much like the individuals who are putting proposals on the table. George has a good point, e-mail. We'll make sure it gets to the attention of everybody in the group. These are all the considerations of getting to this. George, why don't you go ahead? You have your hand up. Then we can move on to question three.

GEORGE KIRIKOS:

One thing we discussed in the [inaudible] call was the fact that answers to some of the charter questions will interact with one another, so just going through them sequentially in one pass won't be good enough to actually answer all the questions. We'll probably have to go back and see which ones – interactions with one another and probably interactions between the two sub-teams as well. That was the point that Kathy raised on the [inaudible] call. So, this isn't the only time we're going to be going through them. We'll probably be going through them at least one more time. So, there will be chances to modify the recommendations based on how we answer the questions that we haven't arrived at yet. So, [inaudible] question three, too. Should I go to those now or do people still want to ...

DAVID MCAULEY:

Oh. Well, let me read question three. We're there, but just for the record, I'll go ahead and read question three. Good points. There are dependencies among the questions. But as we move from question two, I think [inaudible] top-level summary that there's some concern about discriminatory pricing. It's not shared universally in the group and there is a major concern that we make sure that we are aware of and stay within the picket fence. But let's go with question three. I'll simply read it out loud.

Question three begins with this question. Should registry operators be required to create a mechanism that allows trademark owners to challenge the determination that a second-level name is a premium or reserved name? Second question is, additionally, should registry operators be required to create a release mechanism in the event that a premium or reserved name is challenged successfully so that the trademark owner can register that name during sunrise and what concerns would either of these approaches raise? That question is now on the floor. George's hand is up. I believe that's a new ... George, you wanted to go on to question three, so I'll give you the floor right now.

GEORGE KIRIKOS:

Thanks. Yeah. For question three, I think this goes back to that passive holding test that I mentioned on the prior discussion. I put a link in the chatroom to WIPO's overview which had a discussion of that passive holding doctrine. There's like two really key parts of it, namely the degree of distinctiveness or reputation of the complainant's mark. That's point one. And also the [implausibility] of any good faith use with the domain name, to which the domain name may be [put]. I think a

test based on those principles would be something that would kind of balance the rights of a registry and also balance the rights of the trademark owner. It needs to be obviously codified properly because sometimes passive holding [inaudible] aware is interpreted incorrectly by panelists, so it would need to be perhaps codified better than the current UDRP. Thank you.

DAVID MCAULEY: Thank you, George. Maxim, you're next in the queue. Go ahead, please.

MAXIM ALZOPA: Actually, yes, reading about summary of discussions and comments, I [inaudible] the suggestion about limiting registries but I don't think [inaudible] saying that, for example, reserved lists are used for technical purposes. For example, following ICANN policies. Some [inaudible] are not allowed to be used because of [FCC] concerns, for example, or [inaudible] have legal issues of, for example, in our case [profane] language is forbidden. And I don't see this in comments and it makes me question why because legally some part of discussion while [inaudible] part of discussion doesn't seem to be [a very productive method]. Thanks.

DAVID MCAULEY: Thank you, Maxim. I'm sorry that those comments may not be there but when this comes up to bless or not bless a recommendation, please do weigh in with these kinds of comments like you did with the picket

fence in the last question. So, next in the queue is Griffin. Griffin, go ahead, please.

GRIFFIN BARNETT:

Thanks, David. This is not directly in response to what Maxim just said but I wanted to focus on possible responses to question three since that's what we're looking at now. I guess it's in answering the questions the way that I'm suggesting [inaudible] also encapsulates sort of a proposal or a recommendation I suppose. But I guess what I would say is I would support the creation of a uniform mechanism for challenging a designation of a particular name as premium and also potentially to challenge the designation of a name that's reserved.

Again, the basis for that is sort of taking a look at whether the name has been designated premium based on its value tied to a particular brand, and again with respect to reserved names, whether – again, kind of going back to some of the discussion that we had on the previous question, as to whether a registry is using – reserving certain names in order to circumvent their availability during sunrise.

So, I guess in answering question A, I would support the creation of some kind of mechanism, a uniform mechanism, to be able to challenge those designation, and then from that, I think the answer to B kind of naturally flows. That yes, if we accept that premise, then there would be some kind of release mechanism and then ...

We had some discussion about concerns about pricing issues and I guess this kind of speaks more towards the point that Maxim made about certain registries having to reserve certain names and not being

permitted to allocate them because of concerns that they may violate, say, national law, for example, or other ICANN policies requiring that they be reserved.

I guess my response to that is that's something that could easily be built into the kind of challenge mechanism that I'm talking about. So, for example, someone may challenge something and a possible defense, so to speak, would be, "Well, I can't allocate that name," or, "I have to maintain that as a reserve name," because to do otherwise would either violate ICANN policy or applicable law with respect to a certain name. That's kind of a lot and I'll try to put some of that in writing as well to help the group and help staff capture some of those ideas, but I just wanted to put that out there. Thanks.

DAVID MCAULEY:

Griffin, hi, it's David. Let me ask you a real quick question that Phil had put in the chat. I think it's a good question and I was wondering if you had thoughts on it. Who would be the person to make the determination of unfairness? How would that determination be made?

GRIFFIN BARNETT:

Sure. I think a lot of that needs to be worked out as part of implementing whatever suggest here, but there's a number of existing dispute resolution mechanisms in the ICANN space, obviously. I would say it could just fit the same model where it might be something that we outsource to a third party or perhaps, again, thinking off the cuff here, it could be something where there's an initial phase where the decision is brought to the attention of the actual registry operator and

they have an opportunity to change their decision in terms of designating something as premium or reserved given the circumstances that are brought to their attention. And then perhaps if that doesn't result in a certain outcome, then perhaps there would be an opportunity for a third party to make a determination.

Again, I haven't really thought through all the implementation type details, but really just kind of focus on whether this makes sense as a possible policy recommendation. Thanks.

DAVID MCAULEY:

Thank you, Griffin. Susan Payne is next in the queue. Go ahead, Susan.

SUSAN PAYNE:

Hi. Yes. I agree with Griffin. I think this is a possible option. I think what we experienced in the 2012 round was that some registries were very willing to have a kind of dialogue, so that if a registrar came to them and said, "My client is trying to register, I don't know, a three-letter brand in your TLD," and there's no dictionary meaning for [inaudible] that TLD, it's a premium name, have you realized it's a trademark? Some registry operators were actually very willing to go, "Oh, you make a very good point. We haven't appreciated that in this context that's a problem. You're absolutely right. We'll change the pricing."

So, something that kind of formalized that and made it – gives the path for that on a formal basis in all registries would I think be really beneficial because otherwise it was very much on a case by case.

I think, on the one hand, it would be great to have something that was an independent process that was adjudicated by an independent third party. But on the other, as I say, it's potentially something that even having a formal process within the registry itself may be adequate. We already have this notion of the sunrise dispute resolution procedure for a different process at the moment. But we're expecting registries in some context to be making an assessment to whether they should have allocated a name in a sunrise or not and I don't see this as being [wholly] dissimilar to that.

So, as I say, whilst on the one hand it would be great if it was independent process. Maybe that's creating something that's too complex. But a process whereby registries are required to offer at least a sort of [sense] check when there's a path to come and ask for a [sense] check would be really beneficial and I think could help solve quite a few of the problems that we see.

DAVID MCAULEY:

Thank you, Susan. Griffin, I think that's probably an old hand, so I'm going to move on to Jason. Go ahead, please.

JASON SCHAEFER:

Thank you. At the outset, as council, I would say, hey, this is a great idea. I'll have much more work to do representing one party or another. But I'm very concerned about this as being overly complicated and having very little return on investment for everyone involved, both brand side, registry operator side. If a registry wants to commit suicide by having insane pricing, that's the free market at work and that's in

their discretion. Obviously, they can't violate certain rules, but right now we have an example coming live. Dot-inc is going live with \$2000 pricing for their names. They made a decision that that's in their best interest as a registry operator. I'm not about to step in and say that I'm going to regulate you and provide a process to second guess you. The registry business is already a very strained and difficult business with the exception of a few very successful operators.

I would just caution everyone here. A, what's the ROI on this? And B, I think Susan brought up – I know for a fact it happens quite often. If there is some sort of issue or problem, most operators are rationale, are interested in making good business decision. If something is brought to their attention, they tend to address it.

One thing I can say for our program here is we know who the bad and poor operators are and we know who the good operators here. So, before jump ahead, I'm just very concerned on how this would even work in terms of a process that micro-managing a premium naming list or reserved list and how we would even go about doing that. That's my take at the moment.

DAVID MCAULEY:

Thank you, Jason. Before I go to Phil, we have four people in the queue. I'll draw a line under Susan. That will be the last person in the queue and I'll ask you each to be concise as we're coming up to the top of the hour. Go ahead, Phil. You're next.

PHILIP CORWIN:

Yeah. Addressing a general issue. Again, I'm speaking in a personal capacity. I don't have a strong personal view right now on question three. I wouldn't be opposed to something reasonable when a registry operator is being unduly ... Using a pricing that unduly conflicts with the ability to take advantage of sunrise, although as Jason pointed out, at a certain point that's self-defeating for the registry operator. They're going to [inaudible] [zero] for a name.

But on a general question of what's our job and what's the job of an implementation review team for anything that we recommend by consensus that gets through the whole approval process, with council on the board. I think we have some obligation to put some meat on the bones. If we were going to forward question three and propose it as a policy that should be adopted, I don't think we have to work out every implementation detail, but I don't think we should kick all the tough decisions to implementation.

Now, I don't recall the basic distinction between UDRP and URS on burden of proof is that UDRP is preponderant [for the] evidence to prove what you have to prove URS [inaudible] clear and convincing evidence. It's a higher burden. I forget where that came in the process. That was fairly early on. It was before the rules for URS were created. So, I think we just need to be responsible and not duck all the tough decisions. We have to give enough guidance to an IRT so that if something makes it through the process, they have some idea of what the standard should be, even if it's a general policy standard. So, I just wanted to speak to that point, not just for recommendation three or question three, but as a general matter as we move forward to put

together proposed recommendations for the initial report. Thank you very much.

DAVID MCAULEY: Thank you, Phil. Maxim, you're next in the queue. Please, go ahead.

MAXIM ALZOPA: I added the text [inaudible] Julie confirmed that it's captured. [inaudible] shouldn't forget that [inaudible] something which prevents registries and registrars from conducting online business and [inaudible] platforms being able to register domain [your] company or trademark owner needs [inaudible] empowers [inaudible] something which might affect all industry and all customers. Thanks.

DAVID MCAULEY: Thank you. Greg, you are the last on this topic, so why don't you go ahead.

GREG SHATAN: Thanks. Just briefly. I'm speaking without my co-chair hat on, although hopefully not terribly controversial. First, I agree wholeheartedly with Phil that policy needs to give enough guidance so that implementation is as predictable and dull as possible. I was involved in the discussions of clear and convincing [as a URS basis] and that definitely was a policy discussion. Ultimately, we shouldn't leave any really tough decisions to implementation, although implementation can be tough in a nuts-and-bolts sort of fashion.

Also, with regard to suicide, Jason brings up some good points. At least it's self-defeating business practices. I think that inc is a good example where a company decides across the board to charge \$2000 for a registration. That's not what we're getting at here at all. It's really abusive and discriminatory, not to pick up the language that I was looking at earlier in the RA.

So, for instance, one where they're charging a trademark owner more for the same domain name than they would charge any other buyer or where they are charging – where they seem to be basing things on essentially how much they can get out of trademark owners or even, worse yet, in the sense – and I don't know where the line gets drawn – pricing things so high that it's functionally not ever going to be used via a trademark owner. Some [lattices] in pricing is clearly appropriate, so it's really the abusive and discriminatory standard that, for better or worse, at least we have that somewhat embedded in the ICANN DNA and we could use that if we move forward there. But I think we also have to distinguish what we're not looking at. So, one of the things we're not looking at is just high-priced TLDs. Thanks.

DAVID MCAULEY:

Thank you, Greg. I think we'll, in a minute, ask Julie if she has any final comments administratively that she wants to make but next week Greg will be leading. I will miss my first sunrise meeting next week so I send my apologies. We'll finish up question three if necessary and move to question four. Then, of course, which is a little bit related and then we get to 5A and 5B which are on a different specific question, so that will

be good. So, Julie, do you have anything you would like to say administratively at the end of the call?

JULIE HEDLUND:

Thank you, David. And, no, other than that the next call is at the same time next week on Wednesday, the 3rd of April. And just thank you, all, for joining, and thank you very much for chairing this week, David. We appreciate it and I hope everybody has a good morning, afternoon, or evening.

DAVID MCAULEY:

Thank you. Thanks, all.

JULIE HEDLUND:

Thank you. The meeting has been adjourned.

[END OF TRANSCRIPTION]