

GNSO
Special Trademark Issues : Trademark Clearing House
04 November 2009 at 16:00 UTC

Note: The following is the output of transcribing from an audio recording of the Special Trademark Issues meeting on Trademark Clearing House held on 04 November 2009 at 16:00 UTC . Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at:

<http://audio.icann.org/gnso/gnso-sti-20091104.mp3>

On page:

<http://gnso.icann.org/calendar/index.html#nov>

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Participants on the Call:

David Maher - Chair

Jeff Neuman

Jon Nevett- Registrar

Jeff Eckhaus – Registrar

Jean Christophe Vignes - Alternate (joined after roll call)

Mark Partridge - IPC

Paul McGrady - IPC

Zahid Jamil- CBUC

Mike Rodenbaugh - CBUC

Robin Gross- NCSG

Kathy Kleiman - NCSG

Konstantinos Komaitis - NCSG

Mary Wong - NCSG - alternate

Alan Greenberg - At Large

Olivier Crépin-Leblond - At Large alternate

ICANN Staff in attendance:

Kurt Pritz

Liz Gasster

Margie Milam

Gisella Gruber-White

Apologies:

Phil Corwin - CBUC - alternate

Marika Konings

Wendy Seltzer -NCSG

Coordinator: This is the Operator. This call is now being recorded. I'll do...

David Maher: Thank you.

Gisella Gruber-White: I'll take a quick roll call if you'd like me to.

David Maher: Yes please.

Gisella Gruber-White: Good morning. Good afternoon to everyone. On today's call we have Zahid Jamil, Jeff Eckhaus, David Maher, Mark Partridge, Paul McGrady, John Nevitt, Jeff Neuman, Alan Greenberg...

Gisella Gruber-White: Olivier Crepin-Leblond Mary Wong, Robin Gross, Konstantinos Komaitis, Mike Rodenbaugh. From staff we have Margie Milam, Liz Gasster, Kurt Pritz. And apologies we have Phil Corwin, Wendy Seltzer. And Kathy Kleinman has just joined the call.

If I could just remind everyone please to state their names when speaking, this is for transcript purposes and accuracy. Thank you.

David Maher: All right. This is David. We have one housekeeping matter to attend to before we get started.

I had a note from Chuck Gomes, chair of the GNSO Council. He needs someone to attend by teleconference the council meeting on November 23.

I'm unable to do that. And the hour as I understand it is 0800 UTC. So if we - I'll send out an email reminder of this. But we are going to need a volunteer to update the council on what's going on as of November 23.

The other issue that I'd like to - opening the discussion on - the GNSO Council was quite specific in giving us some assignments, one of them due today and the other due on Friday. There seems to be a consensus to ignore those requirements. Does anyone have any other thoughts on that? I'm...

John Nevitt: Yes. This is John. Could I speak to that, David?

David Maher: Please go ahead.

Alan Greenberg: And Alan.

John Nevitt: Yes. I want to clarify and hopefully -- my comments from the last meeting -- hopefully correct a different interpretation I have from you.

From my read of that council motion we as a group do not have any assignments related to constituency other - constituency statements or stakeholder group statements other than to read them if they come in. So I don't think we're being - we're - we as a group are doing anything against that council motion.

The constituencies and/or stakeholder groups however might have a different interpretation whether they think it's useful to provide their statements at the initial point of this process as opposed to later on where, you know, we narrow down the issues of, you know, the issues, period. So again I don't think this group is tasked with that, with creating constituency statements. And quite frankly I don't think council can order a constituency or stakeholder group statements.

David Maher: I think that is a very fine legalistic argument and I'm perfectly happy to accept it. This is David speaking. Alan, you wanted to be on the list?

Alan Greenberg: Yes. I think I was the one who suggested it, and just to clarify I interpreted it all at the very initial meeting thought it would be useful to know what positions are just to identify common ground and perhaps know who to talk to in calls between the meetings to try to come to closure on things.

That was the only rationale. And due to the timeframe they were never going to be official statements of the constituency anyway.

David Maher: Yes.

Alan Greenberg: So to the extent people can get something in by Friday since Wednesday obviously is now I think it would be useful. But I don't think it's anything stronger than that.

David Maher: Okay. Thank you. I think that at least to my mind disposes of the issue. So let's get into the substance unless anyone has a contrary idea.

Should we start with the Adobe - the list that's posted on Adobe? The first issue is the name. We've - I think there seems to be a consensus to move to trademark something instead of IP something. But the something is open to question. Anyone want to start that?

Man: My flight's at a quarter after 9:00 so I think I'm okay.

David Maher: I'm sorry. I didn't hear that.

Man: Someone was talking about a flight time. I don't know what - who it was or...

David Maher: Oh.

Man: ...what the relevance was.

David Maher: Okay. Well to get the ball rolling -- this is David -- it seems to me clearinghouse does have some implications of authoritative power beyond a mere database of data that's contributed and screened. But it's still - whatever this thing is it doesn't have governmental powers in the sense that a trademark office does.

Would it - should we call it the trademark database? Is that a forward step?

Kurt Pritz: This is Kurt. Isn't clearinghouse sort of a term of (art) that's used in many other places?

Jeff Neuman: Yes. This is Jeff. Hey David, I don't think the issue is calling it a clearinghouse. I think the issue was whether it's called IP versus trademark. I think that's the only issue on the table.

And I like the term clearinghouse. And I wish that there were some others from the - I mean Mark Partridge is on the call.

The - we did discuss this at the IRT. And for some reason we didn't want to use the word trademark. And I think it's because there were other types of things that you could have registrations for like literary works and other things that they didn't want to call trademark.

But I personally don't have a problem calling it trademark. I just want to hear from an IP person.

Paul McGrady: Yes. This is Paul McGrady. And I'll jump in here. I think that the reason why - one of the reasons why we still would like to call it the IP clearinghouse has to do with affecting smaller businesses and individual sole proprietors because often - and this also folds into the common law question which we need to address as well.

But for example in the U.K. business names do have a protectable right. It's not necessarily a common law right in the same sense that it would be in the United States or Canada. But it's an important right for - and again mostly small businesses.

We're not talking about the majority of the businesses that are represented in the INTA family of businesses, family of companies. We're talking about the small guy.

And so to the extent that the people on this call have the interest in making sure that (unintelligible) small businesses also are fairly represented in this process then I think that we should give some real thought to keeping it the IP clearinghouse.

And we should also give some real thought to keeping in these sort of more alternative forms of rights whether they be business name rights in the U.K., whether they be common law rights in other jurisdictions, keeping in mind that this is not - that the clearinghouse is not an organization that grants rights. It's purely a place where basically allegations of rights, validated allegations of rights are noted so that

registrants can make informed decisions about whether or not to register a particular domain name.

And I so I know that there are people on this call that care deeply about small businesses and for lack of a better word the little guy. And I think that the folks on this call who do care about those sorts of users should be deeply concerned about just calling this a trademark clearinghouse.

David Maher: Oh thank you Paul. And any conflicting views?

Kathy Kleinman: Kathy.

Man: Mark has his hand up and Alan does.

Kathy Kleinman: And Kathy.

Man: And Kathy just said yes so.

David Maher: Mark, go ahead.

Mark Partridge: Yes. This is Mark. I think one of the concepts to appreciate here is that - the purpose of the clearinghouse.

I had a database for the utility of the registries. If a registry for example (.kenya) wishes to have a process where they give a sunrise benefit to existing businesses in (Kenya) for example they could call upon the clearinghouse as a place where people could record their interest. And then in the future if there was need for that information it would not have to be reduplicated.

So the goal is to make this useful for the registries. And that could well be broader than simply trademark rights as Paul has explained.

David Maher: Okay. Thank you. Kathy, I think - could somebody tell me how to show the hands up on the screen? I'm sorry to...

Alan Greenberg: There's a pull-down right at the lower left-hand corner and right at the top right-hand corner of the box with the peoples' names in it. Either one will let you put a hand up or down.

Kathy Kleinman: But some of us are having trouble reaching the Web site so...

Alan Greenberg: Well...

Kathy Kleinman: We need to...

Alan Greenberg: Okay.

Kathy Kleinman: Check that.

Alan Greenberg: I think I was next in the list and then Kathy and I'm not sure who else.

David Maher: Well thank you for that help but I still don't see it.

Alan Greenberg: There should be a little downward arrow.

David Maher: Yes. It shows raise hand, agree, disagree.

Alan Greenberg: Yes.

David Maher: But it doesn't show who has raised their hand.

Alan Greenberg: But there should be a list under it. And the raised hands are always moved to the top of the list. Right now it's me and Jeff.

Man: Yes. I just raised my hand so that's an indicator.

Alan Greenberg: Do you not see that?

David Maher: No. I don't see it.

Alan Greenberg: Oh.

Kathy Kleinman: You don't see an attendee list?

David Maher: I see the attendee list.

Kathy Kleinman: Oh.

Alan Greenberg: And at the right...

David Maher: Oh.

Alan Greenberg: Of the name...

David Maher: Okay.

Alan Greenberg: There should be a hand raised.

David Maher: I'm sorry. That's where it was at the top of my...

Alan Greenberg: If you haven't scrolled down you won't see the hands up. It needs to be...

David Maher: Okay.

Alan Greenberg: ...scrolled to the top of the list.

David Maher: Yes. Thank you. I think Kathy, you were next.

Kathy Kleinman: Yes. Yes, someone who represents the little guys. There is - there's a huge issue here of how little guys should be represented and that this clearinghouse is really designed - again let's go back to the rationale which is that as I understand it trademark owners, trademark owners who hold federal marks, who hold national marks don't want 500 places to put their verified piece of paper. They want one place. That's the efficiency argument here.

If a registry of a new gTLD wants to go out and find out all the pizza restaurants in the world because they're starting a .pizza. I'm not sure that's what a TM clearinghouse is supposed to be for. In fact I'm pretty sure it's not because a lot of those names are going to be highly descriptive like (Alexandria Pizza) in Alexandria, Virginia can't get a trademark, too descriptive.

So they might want to go ahead and do their - create their own private database. But that's for something else. (Unintelligible) wants a database of all left handers for .left when he wants to register it. He

uses this example a lot in the hallways but again not something for a trademark clearinghouse.

When we're talking about little guys I've represented many, many little guys entrepreneurs, small businesses who actually use the same word, the same term, generally highly descriptive in different parts of the country or different parts of the world because there's no overlap of audiences.

Here we're talking about an ICANN-accredited clearinghouse that is going to provide whether we like it or not some kind of authenticity, some kind of global protection for these - for whatever we put into this.

And so as NCUC raised - has raised repeatedly in the process and also at the Wednesday - the big trademark panel, we think this should be for federal marks. Let's call it what it is. It's a trademark clearinghouse.

Let's go back to the rationale that we were given which is efficiency. And let's with it for the efficiency of what it was created for, federally-registered or nationally-registered marks or marks that represent multiple countries like the EU.

David Maher: Okay. Jeff.

Jeff Neuman: I believe Alan was next.

David Maher: Oh. I'm sorry. Go ahead Alan.

Alan Greenberg: Yes. I was going to make a comment which may not be relevant anymore. I thought we were talking about the name, not what was in it. And I was going to suggest at the beginning of this discussion that we deferred deciding on the name until we do have the substance discussion of what is in it whether it's business names in the U.K. or common law trademarks in jurisdictions that will - that allow those.

That's a very significant discussion. But it's not for this - it shouldn't be the discussion of the name.

So, you know, if the chair rules that we're talking about the - what the thing contains I do have some comments on that. But I'm not sure what part of the discussion we're at right now. We seem to have...

David Maher: Yes.

Alan Greenberg: Morphed into - in one of the more controversial parts when talking about its name.

David Maher: Yes. That's a very constructive suggestion. I - Jeff, before I rule would you go ahead?

Jeff Neuman: No. Mine is exactly - Alan, thank you. That was exactly the point I was going to mention. This is just the name, not the substance.

And let's just call it - can we put a hold on it, calling clearinghouse for now and then move on to the substance in the meat of the discussion? And we can always come back to the title after substance is decided?

David Maher: That - okay, I will rule as -- this is David -- I will rule as chair that we pin this and come back to it.

Jeff Neuman: Now we - I'm not sure where in the list we do have the issue of content. It may need to be added. I haven't looked through it carefully but it may not be...

David Maher: No, it - it's in there.

Jeff Neuman: Okay.

David Maher: I believe. The second item on our Adobe screen is that holders ran a license. ICANN staff proposal says that no license is necessary. Does anyone want to speak to that issue? I - it seems to me...

Kathy Kleinman: Kathy.

David Maher: To me that - go ahead.

Kathy Kleinman: It seems to me if we're using data that comes from sources like the U.S. Trademark Office where it's a publicly-searchable database that there shouldn't be an issue regarding licenses because this is information that is out there. It's published by the national authority.

David Maher: Yes. Okay. If no one objects let's move along.

Jeff Neuman: No. No. This is Jeff. I object. Sorry. This is Jeff Neuman.

David Maher: Go ahead.

Jeff Neuman: I think ICANN and I think we're all missing the purpose of what a license does - and those of us familiar with doing licensing agreements is that the clearinghouse is not just storing data. In fact it's not even getting data from the official patent and trademark office. It's getting data from the trademark owner.

It's not only going to be data that's in a patent and trademark office. But it's going to be additional data. Or it may be additional data. In any case, no matter where the source of the data is, a license must always be granted by an intellectual property owner to the thing, the clearinghouse here, using the data.

I'm not sure why this is controversial. This is actually standard that you always grant a license to use the data that you're giving into a database for use for a specific purpose.

I think it's - I'm not sure why this is even an issue. I - actually my chart that I just sent right before the call I kind of explained that, that whatever the thing is that's getting the data even if it is in the public domain, a license must still be granted to use the data for a purpose that is unrelated to which it is in the public domain which this would be, the purpose here of matching that data to data that may be from another source and using that data to either send out claim notices or using that data to publicly display in a different form. All that stuff requires from a legal perspective a license, period.

David Maher: Any other...

Jeff Neuman: Controversial.

Alan Greenberg: Yes.

David Maher: Alan.

Alan Greenberg: It's Alan. I'm not disagreeing with what Jeff says. But in this case it would not be a license to ICANN but a license to whoever operates the clearinghouse.

Jeff Neuman: Correct -- and this is Jeff Neuman, sorry -- that's exactly - that is exactly my comment in the chart that I said. It's a license to whoever operates the clearinghouse.

Alan Greenberg: Right. And there also needs to be a license to sublicense that data if there are two different entities, if there's one entity that actually holds - that actually serves as the repository versus one entity that actually does the validation there needs to be a license to one of those parties that collects the data but the right to sublicense that data to the (unintelligible).

Man: To the clearinghouse.

Alan Greenberg: Right. It's in the validation. That's just pure legal one oh...

Man: Right.

David Maher: Jeff Eckhaus.

Jeffrey Eckhaus: Okay. I guess Alan kind of scooped me again. That was one of my points. That was my point exactly.

And here's - I have a question about this - I guess this point here is - the question - I don't believe the question was: is there a license needed? I think the question was: should the license be between ICANN or whoever the entity is? And I believe we all believe there should be a contract. But it should be with the entity, not with ICANN. Is that correct? Entity or entities.

Jeff Neuman: Yes. I think ICANN was saying that no license would be needed at all, at least if you look at a chart.

And I agree with you Jeff Eckhaus -- this is Jeff Neuman, sorry -- that a license does need to be granted to the clearinghouse or to the entity that's collecting the information with a right to sublicense to the entity that's using the information to validate and publicly.

Kurt Pritz: Yes. Yes. This is Kurt. So if - I'm sorry I can't raise my hand and I'm not online. But that was - the comment was clearly pointed at ICANN having the license and the idea that ICANN could make some additional use of the data. So we were just trying to make it clear that ICANN shouldn't hold the license or nor should ICANN be able to make any additional use of the data so along the lines of Alan and Jeff were saying.

David Maher: Margie?

Kathy Kleinman: Kathy.

Margie Milam: I was...

David Maher: Oh.

Margie Milam: Just going to say the same thing that Kurt said.

David Maher: Okay. Kathy.

Kathy Kleinman: Are we talking about also the contract between ICANN and the clearinghouse? Is that a topic open also?

David Maher: I just think the contract is separate.

Kathy Kleinman: Okay. Then I'll wait till then because licenses and contracts are on the same line here. So when it comes time to comment on that I'll comment on that.

David Maher: Okay.

Kathy Kleinman: Thank you.

David Maher: Okay. Unless anyone objects we'll move along to the globally-protected market list.

Kathy Kleinman: I'm sorry David. It is part - is there a contract or accreditation between ICANN and the clearinghouse is on this set of issues.

And I'd like to recommend that there be a contract between ICANN and the clearinghouse in part to make sure that ICANN is in the position to establish the rules by which the clearinghouse operates and that those rules are then - because we're working on those rules together and that those rules should they need to be changed comes

back - they come back through ICANN and the GNSO process for any revisions. So I'd like to recommend a contractual relationship there.

David Maher: Okay. Any other comments on that? Mark?

Mark Partridge: I actually raised my hand to comment on the next topic so.

David Maher: Oh sorry. Jeff, did you want to talk about this.

Jeff Neuman: Yes. I 100% agree with Kathy. This needs to be a contractual relationship for all the reasons she stated.

Accreditation is way too loose. I - when I think of accreditation I really think of the relationship that ICANN has with WIPO and others for UDRP providers. And I think that is too loose.

I think there does need to be standards. There does need to be oversight. And unfortunately ICANN's the only one in that position. And they need to do some contract enforcement with this.

Kurt Pritz: Hey Jeff, this is Kurt. Could you flesh that out a little bit because, you know, in - if that's the way we go I think that we just need a better, clearer argument? So if you can either now or afterwards put some flesh to that, make it clear why an accreditation or, you know, the sort of association we would have with - we have with WIPO, say, would not be sufficient.

Jeff Neuman: Sure.

Kathy Kleinman: Jeff, I'd be -- this is Kathy -- I'd be happy to work with you on that.

Jeff Neuman: Great. Thanks Kathy.

Kathy Kleinman: Great.

Alan Greenberg: It's Alan. Just one quick comment. Accreditation often means there are multiple ones. In this case we have specifically said there should just be one. So that's part of the discussion also.

David Maher: Okay. Then let's move along to the Globally Protected Marks List.
Mark Partridge.

Mark Partridge: Yes. Thank you David. One of the principle concerns that was raised during this process from all of the comments was the problem of defensive registrations on the part of serial victims of cyber-squatting and the need to do something about that. In fact that's one of the - that ICANN has publicly made that it would pay attention to.

The Globally Protected Marks List as conceived by the IRT is really the only proposal put forward that directly deals with the defensive registration issue. So I think we should for that reason keep it under consideration.

It's not meant to be simply a list of famous marks. But it recognizes the reality that there are globally-protected marks, marks that are internationally registered as trademarks and are serial victims of cyber-squatting. They are faced with filing many, many actions to - against clear cyber-squatters. And I think we ought to as an organization and as a group here keep that proposal under consideration and find a way to deal with the defensive registration issue.

David Maher: John Nevitt.

John Nevitt: Sure. I think the GPML is out of scope of this discussion and could derail this group. It was obviously the most controversial part of the IRT recommendations.

And we were specifically asked to look at the URS and the clearinghouse. And I think we should not discuss the GPML.

David Maher: Alan.

Alan Greenberg: I would just like to make sure we're all talking about the same thing.

We are - I assume Mark is talking about a protective list that would be names in that list cannot be used as opposed to a flag in the clearinghouse saying this name is registered in 176 domains - 176, you know, countries around the world or something to that effect, that he's asking for real protection as opposed to simply an issue of scope in the clearinghouse.

Mark Partridge: Let me respond. I think the image that many of us had with this...

David Maher: Who is speaking?

Mark Partridge: Mark Partridge. I'm sorry.

David Maher: Oh.

Mark Partridge: Is that the Globally Protected Marks List would be a flag and it would cause a shift of burden during the application process. It would not be

an absolute block but if the string matched the globally-protected mark on the list that then there would have to be a showing that it was - that there was a legitimate right or interest in using that name.

Alan Greenberg: Would showing be enough to have you adding a justification for why you believe it is not and then it might go to court or it might not or UDRP?

Mark Partridge: I guess that's open for discussion how that evaluation would take place. But my view of it would be that it would be similar to an IP claims process where the person would have to come forward and justify how they're going to use the name, satisfy essentially the standard to show that they're not a cyber-squatter that exists under the UDRP.

But it would mean that you didn't need to do the defensive registrations in massive quantities and you would reduce the number went the UDRP process.

David Maher: Okay, Konstantinos.

Konstantinos Komaitis: Hey. Yes. I would like to agree with John on his point. I think that we are working on the - that proposal on the clearinghouse and the URS. And if we open the conversation of the GPML it will just open Pandora's box.

I think that it's very dangerous for us to start discussing about this Globally Protected Marks List. So I would agree with John on this one.

David Maher: Zahid.

Zahid Jamil: Yes. I - as a D.C. rep we have a position that says that the GPML is something that should be looked at and that there should be some solution to the defensive registration problem. But I think what we're doing right now is looking at sort of - strictly at what is being sent to us by the GNSO.

I think that it - we may derail the process of trying to find common ground if we were to focus too much on this. I'd be happy to say sidebar this issue, ride the table till the end. And let's work through the more amiable aspects and so we can maybe find common ground on those and leave this till the end.

David Maher: I'm - I think that's a constructive suggestion. It - this is obviously highly controversial. And it's controversial partly because of the question of scope.

I'm not willing to rule it out of the scope. But I am willing to accept the suggestion that it be moved to the end so that we can cover some of the other more - issues that are clearly within scope or we - where we may have disagreements but we agree that it's within the scope of our assignment.

Can I cut this off now and move on? Would anyone object to that?
Okay. I know there's some hands raised. But I'd like to move on.

Woman: David?

David Maher: Okay, number 4, the repository to interact with URS (unintelligible) marks registered in the clearinghouse are pre-vetted in the URS. This

preregistration complaint process, is this really a clearinghouse issue?
I'm looking at number 4 on our chart.

Does anyone believe that we need to talk about this today? It - Mark,
you have your hand raised.

Mark Partridge: I was just going to answer your question David, of is it a clearinghouse
issue. The idea behind it is to have some repository where you could
pre-register claims for the purpose of the URS. That would reduce cost
in the long run.

And there seem to be some efficiency in having the clearinghouse be
able to do that rather than setting up a separate system. That's really
the only question.

David Maher: Okay. Jeff Neuman.

Jeff Neuman: Yes. It does belong in the clearinghouse. I think it's - although it relates
to the URS the - as Mark said it was a point of efficiency.

It's not to register claims I don't think, Mark. It's just to really register
yourself as an entity and have your rights pre-validated so that when
you do a URS complaint all that stuff has been validated and you don't
have to go through that every single time.

So it does relate to the clearinghouse. And I think ICANN may have
separated -- and all occurred to me to this -- but my reading was that
when they say it's complexities I think they wanted to separate the
issue of the clearinghouse from the URS just for public discussion. But

I don't think they were opposed to having the clearinghouse also serve as a place for preregistration. So I do think this is - it should be there.

Again it's just a repository to collect the information and validate it or authenticate - I might be using the wrong word. It's to basically a check to make sure that the IP owner who says they've got a registration actually has that registration.

Mark Partridge: This is Mark. Jeff, I agree with how you explain it. I didn't mean to suggest that you pre-register claims against other people. I only mean you'd pre-register claims of right. So we're on the same page there.

David Maher: Okay. Kathy.

Kathy Kleinman: David, I'd like to agree with you that it's - that we table this issue. I think it's a little premature until we have a better idea what the clearinghouse looks like and what the URS looks like. Looking at the interaction of the two is kind of pushing it a bit.

So I'm not rejecting anything. I'm listening. But let's - can we table this one and come back to it?

David Maher: Alan.

Alan Greenberg: Yes. I have no problem with that. I was going to suggest that we could agree that if there is a URS that the clearinghouse be allowed to forward information to whoever handles URS's - that this be one of the valid uses of the information. And at that point it's not our problem anymore.

David Maher: Okay. Well then during my...

Alan Greenberg: Kathy's solution is wisest. And that's fine.

David Maher: Yes. This is David. I think we have a consensus to table this. Or Zahid, did you have a comment?

Zahid Jamil: Yes, a broader general comment. I think that there's a sort of a housekeeping matter I guess.

We have something called a commons ground paper that a lot of us has worked on trying to basically build common ground. And I see that we are going through the list that we discussed and so on which is fine.

The only thing is that there are a lot of issues which are not on that list, for instance the definitional change in identical match, the issue of, you know, do we accredit or do we have contracts with the regional or not regional validators. These are all things that - and everything in here is also in that commons grounds paper.

And I was just wondering at some stage maybe it may help to move along to that document because I think some of us have already worked and sort of agreed on - across constituencies some people may have agreed on issues on that one. Maybe it helps is all, so just wanted to add that as a possible option.

David Maher: Okay. I think today though I'm not sure that everyone is up to speed on the common ground paper. And since we are looking at a Adobe list I think we'd better stick to it.

Margie Milam: David, this...

David Maher: Yes?

Margie Milam: David, this is Margie. I uploaded the common grounds document as well. So it's very easy for me to pull it up if you'd like to take a look at that.

Man: Which is a super set of which?

Zahid Jamil: I think the common ground paper pretty much covers most of the things. I think it is sort of a superset and has more of - and many other issues.

For instance the one thing I think is important to many of us is the definition of identical match. What does it mean? That's not on the list that we're looking at right now for instance. So I just thought I'd, you know, just to give you an idea those are big issues which need to be discussed.

Man: I think the definition of identical match is on this actually because I know I...

Zahid Jamil: I could be wrong.

Man: I think it's...

Zahid Jamil: Okay.

Man: I...

Kathy Kleinman: This is Kathy.

Man: Yes. I think it was number 7 because you added it or...

Zahid Jamil: Oh okay. Yes.

Kathy Kleinman: David, Kathy.

David Maher: Yes. Go ahead.

Kathy Kleinman: Commenting on this, the superset I think is definitely the common grounds because it expanded. It took - there were a number of discussions that were involved in putting it together. And it took many more issues and kind of advances things to a new level. So I hope people will read it closely.

I think shifting to it now would be wise. But if people want to stick with this document then perhaps, David, at the end of this discussion there are issues we can expand because I know one of the purposes of this discussion is to make sure we've got all the issues on the table. And since the common ground presents many, many more issues and kind of a level of detail that helps advance the discussion maybe we can use that at the end of the discussion or some appropriate place to add some more issues into the discussion...

Man: How long is...

Kathy Kleinman: Like the identical match.

Man: Is this meeting one hour long?

David Maher: That's my under...

Man: So we only have 20 minutes left. We may want to just continue on this. We're not going to finish it anyway.

David Maher: Kathy, is - or I'm sorry, not Kathy, Margie, are we limited to one hour?

Margie Milam: I don't know. Gisella, do you know? I think we can go over if you'd like to.

David Maher: If the people can.

Margie Milam: Yes.

Gisella Gruber-White: If you'd like -- sorry, I was on mute -- I can extend the call with the operator so no problem.

David Maher: Okay. I can spend at least another 30 minutes beyond the scheduled end. Okay.

We're now at number 5 on the current Adobe screen: single global provider performing both validations and clearinghouse operating roles. And the staff proposal is two providers each global, one charged with database administration and one with data validation. Any - let's see. Kathy?

Kurt Pritz: This is Kurt. Can I speak to that?

David Maher: Oh go ahead.

Kurt Pritz: Unless Kathy wants to go first.

Kathy Kleinman: No, no. Kurt, please. Sorry. I think my hand was raised from earlier although I'll raise it again.

Kurt Pritz: Probably overusing the word detail but to a certain extent I think this is implementation detail. In other words when we received policy direction to create a clearinghouse that provides these functions we're going to search for the most efficient and effective, you know, value-added to procure these services.

And so a preliminary examination -- we haven't procured the services yet -- indicates that rather than have one function there might be good reasons for splitting the function. As the market evolves or the world evolves there might be better reasons for going to one function.

So what I would request is that the members here kind, you know, direct the outcomes they want. You know, we want to discourage the ability to, you know, the incentive for one entity to take in names that (unintelligible), you know, that they wouldn't ordinarily but they're incented to do because of their business. Or, you know, we want to make sure that each, you know, the entities retained have the appropriate expertise.

And then, you know, the first look indicates that, you know, per - contracting would be - with two separate entities gives the best result. But that's based on sort of a back-of-the-envelope calculation.

And what I personally would really like from you guys is the factors that should be balanced in procuring these services so that an, you know, the decision can be made, you know, the decision can be made and the most effective solution can be found without any unnecessary restraint.

David Maher: Kathy, you were speaking I believe or are you done?

Kathy Kleinman: I'm done for right now. Thank you.

David Maher: Okay. Zahid.

Zahid Jamil: Oh no, I'm sorry. I'll put my hand down.

David Maher: Jeff Neuman.

Jeff Neuman: Yes. I think we talked about this at the last meeting in Seoul. And I think the conclusion that we came to was - or at least I thought we came to was that the most important thing from a registry/registrar perspective is that we have one entity to deal with. And if that's just the - if that means splitting up into two functions, making sure that at least there's only one repository for the information that the registry has to balance up against.

If you want it to have multiple validators I guess that wouldn't impact - at least from a registry/registrar perspective you could certainly do that. But if you start getting into multiple repositories that registries and registrars have to perform checks to you're talking about possibly developing a new protocol or extending the EPP protocol which would

have to go through the IETF standards process and a whole bunch of things that I don't think any of us want to see done.

It'll just result in a delay, a huge delay which I don't want. And I don't think anybody on this call really wants that. So again I guess the point is that you can have multiple validators but only one repository the registry/registrar would check up against.

David Maher: Okay. Thank you.

Jeff Neuman: That...

David Maher: Alan.

Alan Greenberg: Yes. I - Jeff just alluded to it. The staff proposal talks about the possibility of regional clearinghouses and rejects that because handling multiple databases would be a real problem as Jeff just implied. The staff proposal doesn't talk about the in-between one of one clearinghouse and regional validators which some of us think may well have merit.

So I'm happy to leave this as an implementation detail. But I'd like to make sure that in-between option is on the books as something to consider.

David Maher: Okay. Thank you. Jeff Eckhaus.

Jeffrey Eckhaus: So yes, thanks. What my question here is, I guess more - I guess to answering the specific question here which is: I think everyone - is everyone in agreement that it could be - that it should be two separate

providers, one for data - for the database validation and one for the database administration?

I think that was the question I think that staff put forward and that I guess the discussion is around, not versus the regional or the other part which I don't think it's part of this discussion. I think it should be - that their question was that it would be two separate entities instead of one single global provider. And that's - I'd like to know if we're in agreement that it should be two separate entities which I personally am?

Kathy Kleinman: David, Kathy.

David Maher: Go ahead, Kathy.

Kathy Kleinman: Can I respond to that? Jeff, I think it's at least two if not more. And that's where - I don't - I think there's a sense that we don't want to be bound, that - I understand the one database, the one repository that the registries communicate with. That makes perfect sense.

But the regional validators I don't - I think is a very important concept that it's not just one validator. We're not locking ourselves into one structure but bringing it - regional validators bringing the issues of trademark law which are so territorial, they're so nationally based, bringing it as close as possible to those individuals, those companies, those verifiers, those validators who will understand the nuances of the national laws around the world. And so...

Man: Can you hear me?

Kathy Kleinman: I think I'm with you on the splitting of the function. And so we'll vote yes for the splitting of the function but not to tying it necessarily to two entities. I don't know if that's a nuance but definitely in favor of the staff recommendation of splitting the function.

Jeffrey Eckhaus: Yes. That was the point I was getting to because I think there was some concern about the person who's the database validator administrator somehow gaining or doing some things to earn extra revenue. And the splitting would sort of handle that.

And I think that was the point staff was bringing up. And that's what I wanted to just focus in on that.

And then about the regional and the other part I guess that's a further discussion. But I want to try - I - hopefully try and nail as many of the questions or staff responses as possible today to get, I guess, the common grounds piece.

David Maher: Who is speaking? I'm sorry.

Jeffrey Eckhaus: That was Jeff Eckhaus. I was just responding to Kathy.

David Maher: Oh I understand. Okay.

Kathy Kleinman: Thank you.

David Maher: Konstantinos

Konstantinos Komaitis: Yes. I just - I mean I just want to talk about the regional clearinghouses. But if that's not right now the time then we - I agree as well so (unintelligible).

David Maher: Okay. Jeff Neuman.

Jeff Neuman: Yes. I just - I don't necessarily agree that it has to be split into two functions. I'm not opposed to it.

I just want to note for the record though that sunrises in IP claims have been done many times before and almost always, not almost always, always with one entity responsible for it. That entity can subcontract functions out to another entity if it chooses to.

But I just hate going into the theoretical. And this is also an issue with the language and scripts issue.

Sunrises have been done before with one entity. And it's never been a problem. And there are entities that I - that are out there now that I think can do it. And I know that I've heard from a few entities that have shown me demonstrations of doing it.

I just don't want to get into more complicated discussions about trademark law because essentially all the clearinghouse or the - even the validator, all they're doing is checking it up against another database to see whether it exists in that exact form as represented to the clearinghouse. So again I'm not opposed to having two different functions. I just think we're making this a lot more complex than it has to be.

David Maher: Okay. Zahid.

Zahid Jamil: Yes. I think we - from our perspective we don't have a problem getting scripts or separations as the staff proposal suggested. There definitely should be one centralized database which is what the common grounds paper said and that a lot of people think they've agreed and that's in there.

Also we've sort of defined the (unintelligible) as a validation service provider which will be the second function. And what we - what has been recommended and a lot of people seem to agree with that is that there should be minimum standards and also a contract with ICANN possibly or an accreditation at the very least. And I think that's - that probably is the way to go.

But the number of accreditors or validators should probably depend on efficiency. And that's something that maybe I can decide - sitting here right now deciding this should be three (farasia) or maybe one (farasia) too premature.

David Maher: Thank you.

Zahid Jamil: Thank you.

David Maher: Jeff Neuman, did you...

Jeff Neuman: No. I just forgot to lower. Sorry.

David Maher: Okay. Margie, go ahead.

Margie Milam: Yes. I just wanted to comment. I mean it seems like we're getting into really deep details on implementation.

Is there a way to drive this discussion a little higher level because I think some - what Kurt indicated was that, you know, some of this he, you know, he views as implementation details that as staff we would try to come up with what works based upon, you know, the providers available. And the question is, you know, does this group really want to get into that level of detail.

David Maher: Okay. I think you're right. Paul.

Paul McGrady: Yes. I guess that the short answer is that this particular implementation detail of whether or not we have regional authenticators - and I like the word authenticate better than validate...

Man: Okay.

Paul McGrady: Regional authenticators rather than one central authenticator as opposed to whoever's running the database, you know, may not be my number 1 issue. But I know that there are other people who care deeply about the issue of whether or not one provider authenticates across all geographical territories versus breaking that up territorially.

And so what may seem like an implementation detail to staff may be something that's deeply important to other people. So I would like...

Man: (Unintelligible).

Paul McGrady: For us to talk about the regional issue.

David Maher: Thank you. Kathy?

Kathy Kleinman: Paul just said it all. That's great.

David Maher: Okay.

Kathy Kleinman: Yes. There are groups of us who care deeply. This has been an issue raised by trademark attorneys in our group who come from other regions and other trademark systems other than the European and U.S.

So I don't know how we take it offline. But I'd love to take it offline perhaps with a group of people who would like to help develop the details because it is more than an implementation detail. This is kind of a - my - NCUC has made this a principle so better know how to develop it further and would like...

David Maher: Well, can it send an email to the group and ask for volunteers is probably the easiest way?

Kathy Kleinman: Well this...

David Maher: I'll - okay. Konstantinos.

Konstantinos Komaitis: Yes. The only thing I wanted to say because I heard people saying that we are entering into complex issue, inevitably with this suggestion of a clearinghouse we will have to enter into complex issues because of the Chinese law, because of the African trademark laws. And we really need to make sure that the clearinghouse or the

regional clearinghouse -- and that's why the proposal is made -- accommodates all the variations and the tiny bit of trademark law that need to be accommodated. So I would like also to continue this discussion about regional clearinghouses.

David Maher: Okay. Alan.

Alan Greenberg: Yes. I think regardless of how we word it at this stage some of the validation work is going to be subcontracted. Not every trademark database in the world is online and globally reachable over the internet. There are going to be - there is going to have to be footwork done on the ground in some countries.

So some of it's going to be contracted regardless of how we organize it. And the only question is: where do the lines come? And I think that could be discussed later.

David Maher: Okay. Jeff Neuman.

Jeff Neuman: Yes. I just want to respond to Konstantinos. And maybe I'm the slow one here. But I don't see how it depends on any aspect of law. Either a mark is registered or not. It's a simple yes or no answer.

It doesn't matter how - like for example China. It doesn't matter how or what their process is when they register a trademark. The fact is that they have a national trademark office.

How they got to the registration is irrelevant. It's the fact that there is one. And if there is one then it's authenticated.

It's - I - we are making this way too complex. This is not an issue of law. This is an issue: does a registration exist.

If yes then there's a match. Then there's either a sunrise registration or there's a notice sent out through IP claims. That's how simple it is.

And again maybe I'm the slow one. And maybe this has to be taken offline to a separate call. But someone needs to explain to me why that's an issue of law.

Kathy Kleinman: I will. I will.

David Maher: Go ahead.

Kathy Kleinman: I'll (unintelligible).

Jeff Neuman: Thanks. Over lunch.

David Maher: Okay.

Kathy Kleinman: Fair enough.

David Maher: This - I think we can move on then to number 6. And this is a term question, contract between ICANN and provider.

It seems to me this is an implementation detail that we might again table unless somebody is very anxious to talk about it right now. Jeff Neuman.

Jeff Neuman: All right, small, small point. I think this is related to the accreditation versus contracts.

If it's a contract and there's - and Kurt wanted me to explain that further and separately. If it's a contract I think it needs to be a defined term. If it's an accreditation process then maybe it's something different. But - so I think the two are related.

David Maher: Okay. Thank you.

Kurt Pritz: This is Kurt.

David Maher: Kurt, go ahead.

Kurt Pritz: Yes. So in its writings the board voiced concern about ICANN being responsible for or contracting with or performing the clearinghouse function.

So in the report that's issued by you guys I think that - I think you should address the pro - like I suggested before and Jeff just echoed you should address the pros and cons and why, you know, if you feel it's important that - to what extent ICANN has - is able to effect some sort of control over the outcome and mechanisms for that and the pros and cons. That would be really helpful to the board in making its decision.

David Maher: Okay. Thank you. The next item on the list is one where I'm sure there is substantive discussion and controversy: the standards for acceptance into the clearinghouse, the question of common law rights, regional, state registrations and so on. Mark, go ahead.

Mark Partridge: I'm just going to echo or reiterate the point made at the start when we were discussing about aim. So I don't really want to repeat that in detail.

But again the purpose here is to provide a tool that's useful to the registries. I think it should be designed to encompass whatever types of rights are relevant for the needs of the registries. It shouldn't simply be limited but should include registered rights. Obviously those are going to matter. But it should be capable of encompassing more.

David Maher: Even including state registration registrations in the United States?

Mark Partridge: My view on that would be that if there were a registry that wanted to have that be a factor in its decision that the clearinghouse would be a place where that information could be stored and used by the registry. Again it's just a tool, a database, to make this information easily accessible to the registry.

David Maher: Okay. Jeff.

Jeff Neuman: I'd like to make a proposal that we drop the word rights from any of these discussions. And kind of in line with my comments before first of all I think we're all kind of agreed that registered trademarks -- I haven't heard anyone opposed -- that registered trademarks nationally or - nationally-registered trademarks should be in the clearinghouse. I don't think there's any opposition -- although I could be wrong on that -- to be in the clearinghouse.

We shouldn't call it trademark rights or registered rights. I think we call it registered trademarks.

And then I think - as David said I think we could also drop - once we drop the law - the term rights we could drop the term common law. Really the only reason that was put in there was as Mark said it's for data that a registry wanted to collect that was able to be authenticated by the clearinghouse.

So like in the pizza example Kathy brought up earlier for (Alexandria Pizza) if the clearing - if there was a .pizza and the registry said you know what, I don't only want registered trademarks; I want to authenticate any mom and pop shop that's got a pizzeria, you know, anywhere in the world.

And as long as that could be authenticated with some sort of directory somewhere and the clearinghouse is able to do it I think that that's something the clearinghouse should have the ability to do.

So I propose -- and I think this may cut off some other discussion on what is a common law right or, you know, who cares -- we should drop the word rights, drop the term common law. I think it was a mistake that the IRT made, in looking back that we made.

It's a mistake that's made in the ICANN because I don't think we really mean rights. And once we do away with those terms I think it's - everything becomes much more acceptable at least in my view.

David Maher: Okay. Kathy.

Kathy Kleinman: Jeff, you can call it what you want. But it will be viewed as a right once it gets into that database. There will be a regional verification of something. And that something should be a federally-registered mark or nationally-registered mark because it will be - it will sit there in that database.

And it will be viewed as a right. Again, change the name. It will be viewed as a right.

So nothing will stop a registry from going out and serving all the girls names in the world if that's what they're doing and the new gTLD or getting the name of all the people who are Baha'is to pick a religion and creating a .baha'i. But that doesn't mean that that data belongs in an ICANN-accredited, ICANN-contracted trademark clearinghouse.

What we're talking about is kind of what rises to the standard of the efficiency model for which this was sold, why people should have one place to put one piece of paper, that federal certification because there are going to be 500 new gTLDs opening up and there's an efficiency argument.

The efficiency argument falls away when you're talking about Baha'is and girls' names and common law pizza restaurant names. And so I'd like to go back to the original purpose. This will be viewed as a right.

David Maher: Thank you. Zahid.

Zahid Jamil: Yes. Thank you. One of the things in the common ground paper we've been able to achieve is saying look, at least what we do is we have the nationally-registered looks in there. The second is if there's a judgment

in respect of a mark whether it's a common law or any other right that one would have - be eligible to go into that database.

And another thing we sort of tried to work on was that - a clear statement, a clear mandate with respect to this database that says that inclusion of reviewed marks into the database is not proof of any right, nor does it confer any legal rights onto the rights owner, just sort, you know, sort of a disclaimer. I thought just that may help with some of the discussion.

One of the possible solutions could be to say okay we agree with the fact that it should be federally-registered. We agree to the fact that the judgment - if there's a judgment in favor of a mark that should be in there.

And let's agree on that for the moment. We can sidebar. I know I keep saying this but - sidebar that, put that on the pocket on the side and let's move onto the next one.

David Maher: Okay. Thank you. Jeff Neuman.

Jeff Neuman: Yes. I just wanted to respond to Kathy. I think you're only covering one side of the efficiency argument. Unfortunately your argument does not include the efficiencies that the registries and registrars wanted which is the efficiency of having one entity to connect to in order to do this.

So when you say efficiency maybe you're talking about an efficiency from the intellectual property owner. But you're not talking about efficiency from our side which must be viewed in this process. It can't just be efficiency for one side.

The other point -- I agree with Zahid -- if you put in statements that basically say this doesn't confer legal rights, you put in the language, any language you want in there, Kathy, happy to look at it and say that's great and work with that and get that in there to make sure no one can (unintelligible) legal rights.

And the third point is, you know, speaking of my - having my own company we operate multitudes of clearinghouses around the world for different purposes. And in no instance has those ever been viewed as a right.

We do authenticate a number of things. We authenticate age. We authenticate short codes, which is for mobile devices. We authenticate a whole bunch of other things. And...

Man: But it's still (unintelligible).

Jeff Neuman: I hear what you're saying. But in no instance has it ever been viewed to as a right. So I just want to, you know, talk the reality and practicality.

David Maher: Okay. Margie raised her hand.

Margie Milam: Yes. I had a question for Zahid. You mentioned judgments. I'm not really sure I understand how that would be included and whether that's an easy thing for a clearinghouse to validate or to include in its repository.

Zahid Jamil: So one of the discussions actually was that what if there is a common law right that is being (unintelligible) by a court judgment, if you go into court and actually got a judgment saying yes this - we recognize this mark.

And across the board whether with the (ALAC) or (NCSC) and even we agree that at the very least if we're not going through to the common law trademarks -- although the (unintelligible) like that -- at the very least we should have that as an identifiable type that could go into this database.

Konstantinos Komaitis: Yes. I'm sorry. This is Konstantinos. I'm sorry to be jumping in.

But this is correct here. The whole idea is to have the registered trademarks where there is documentation for everybody to know that this is a registered trademark.

And when it comes to common law trademarks, because practically anything can be a common law trademark, you have the same - well to have similar documentation that can be submitted to the clearinghouse for entry in the database.

Margie Milam: I guess my concern with that though is with registered trademarks. Essentially you go to one central location, whether it's a national, you know US PTO or something like that, but there is no central location for judgments. And so that's, I'm just looking at it from a difficulty standpoint, wondering whether, you know, that's a far more difficult standard to confirm than something that's registered through, you know, a trademark office.

Konstantinos Komaitis: Yes, because that's - this is Konstantinos again, that's Margie I think. If I understand correctly what you're asking, that's because common law trademarks can only be validated by courts.

Margie Milam: And so...

((Crosstalk))

Margie Milam: Yes, I understand that, I'm just wondering whether it's admission for a database, you know, repository to include that information. And then I guess I'm questioning how it would be validated.

David Maher: Kathy?

Kathy Kleinman: In some ways I feel like I'm playing devil's advocate here, but again, if only a court can validate and verify a common law mark, then a court order, say from a federal court, seems like a piece of paper. A decision that says, you know, this is a common like mark. It seems like that piece of paper could be appropriately submitted. It is a piece of paper, it is from a national authority and it seems like it could go to the regional verifier, much more easily than submitting a label, a bottle or...

((Crosstalk))

Margie Milam: Yes, yes, I see that. So are you talking about a federal court, a state court, an arbitration decision, I mean it opens up a lot of, you know, questions.

Kathy Kleinman: Can we take that off-line and work on it?

David Maher: Yes, Alan?

Alan Greenberg: Yes, I just want to try to bring this back into the real world. Whether we're looking at court-validated common law trademarks or even non-court-validated common law trademarks, there is going to be significant effort required to validate. A court judgment could well be a 200 page document, not a one page certificate. An unvalidated or rather a non-court-validated common law trademark may require significant documentation to be provided. We're talking about a fee based service here. The cost to validate these are going to be quite a lot bit more than for a registered trademark and the fees will likely reflect that. So no one is likely to try to put in every girl's name in the world at whatever the fee is per name, probably payable every two years renewable.

So I think whatever we decide, and I'm not advocating one or the other at large it is quite split as to whether common law trademarks should be allowed or not. But I think we need to put into perspective of how this will actually work and not carry things to the extreme.

David Maher: Thank you. Mark?

Mark Partridge: I just wanted a couple of points of clarification to make sure we're all on the same page. I think everybody understands that the clearinghouse isn't reaching out to collect this information...

((Crosstalk))

Mark Partridge: ...system where the people who want to be in the clearinghouse submit the information. Then what the validation process, whatever you want to call it, that at least we envision in the IRT, was simply that it's authenticating that the data - it's not going back to check to...

((Crosstalk))

Mark Partridge: ...establish that the right is valid, it's simply authenticating that this data exists. There is a later process where the recordation could be challenged if somebody says it's false.

David Maher: Okay, thank you. Jeff Neuman?

Jeff Neuman: Yes, I'm going to echo the comments that Alan made and implore you guys, please do not choose complexities of courts and court-validated rights. Because I've seen, at least operating the registry, I've seen five cases where courts did not have competent jurisdiction to make certain declarations. And in fact, in four of the five they were default judgments where a party didn't respond but authenticated rights, because that's what the plaintiff wrote into the default judgment order and the judge was lazy and just signed it. All right? So please, let's go try to go forward with new TLDs, let's not infuse complexity of the common law and court orders and other stuff which are impossible to centralize and authenticate, and let's please move forward, please.

David Maher: Thank you. Zahid?

Zahid Jamil: Yes, I understand the point about, you know whether we look at one judgment or the other, how do we know the judgment was correct, maybe it's a final judgment or not, and all of these arguments. They

would still be there from say a trademark registry in some countries. A lot of countries have regular registries that register certain rights. Sometimes they get charged subsequently and they get taken off the record. Because maybe the registrar was being lazy, just like a court judge, and so I think the same situation applies.

So that is precisely why you have that the staff reports, as I already said, well the person submitting the data into the database, basically makes a replication and if it's fraudulent or incorrect, etc, just take it out as the process of taken out. That would apply to court judgments. That would apply to any changes in records to the registry, as well. So I think we can equate that. Plus, I'd also sort of like to sort of make the point, this is sort of something that the NTSG and the ILAC basically gave up and said, well at least the NTSG gave up and said, "We're willing to sort of accept common law rights, at least..."

((Crosstalk))

Zahid Jamil: ...I think that's a big plus there and we shouldn't lose out on that.

David Maher: Okay, Kathy?

Kathy Kleinman: I think I left my hand raised. But I think we should take this off-line to work out the details, because I think there is really, if efficiency is the issue then I think it was Jeff who said, you know, one piece of paper, you file it, you've got it and it's verified. So beyond that, I think we should talk about it.

David Maher: Okay. The next issue on our list is really closely related. The clearinghouse will validate any registered mark issuing from a

jurisdiction and substantive review. I believe this refers in part to the problems raised by Tunisia and Benelux. Does anyone want to comment on this as a separate item? Are you - I'm sorry, Paul, go ahead.

Paul McGrady: Yes, we had a good conversation about this in Seoul, and the more that I thought about this, the more I really believe it's dangerous to start dividing roles off into groups and making a...

((Crosstalk))

Paul McGrady: ...by this group whether or not a particular national jurisdiction has, in our opinion, an also appropriate trademark examination processes. It's not just Benelux, it's the entire European community that would be excluded if we have an obligation that they in essence follow the U.S. model, and so I think that...

((Crosstalk))

Paul McGrady: ...setting aside the common law rights issue now and focusing on the registered rights issue, I think the best position for this issue is to accept registration from any national registry.

David Maher: Okay, Jeff Neuman.

Jeff Neuman: Yes, okay, so first comment is, David I think there was another issue on the last one. I'm not going to talk to them now, but I think that's where identical rights or identical match comes up. So we could say that the next topic, but that was number 7, I think, identical. But, Paul, just to respond to Paul.

I hear what you're saying, but operating a registry, I just don't think it's fair if I have to do a sunrise, but I have to recognize trademarks from the Benelux countries, because basically every generic word has been registered. And I just don't think that's going to - basically, it's not going to help me to differentiate my registry space at all. I understand that it might work in (unintelligible) brand TLD where it's probably not as important, but in generic TLD's, I just don't see it fair to have to require registry to accept registrations from jurisdictions that don't do any type of review.

Because I know that Jeff Eckhaus is on the call, and I think his company has a blog in the Benelux countries, you know. I think it's just not a wise way, and I as a registry would never want to implement that.

David Maher: All right. Kathy?

Kathy Kleinman: I wanted to note - I want to comment on something that both Paul said and that Jeff said. But first, regarding Paul, I think he's made a very important point here and it's not in the material circulated, is that we define jurisdiction. And I think we have come to common ground on defining the jurisdiction, meaning national, federal or multinational. And so jurisdiction here is vague in the document we're looking at, number 8, and I think Paul, unless anybody has any objection, I think we define common ground at least on what the jurisdiction is, and I wanted to point that out.

Regarding the issues that Jeff - I agree with many of the issues that he raised. And the language about substantive review really comes from the URS. And if we're even talking about any kind of overlap in the

future between the clearinghouse and the URS, this will be deemed a verification of rights. The acting clearinghouse will be verifying rights. I think the substantive review is probably going to be a critical part of what we're doing going forward, what we're going to need.

And for those of us who go back to the Network Solutions days and the old - not you John, never - but the old domain in dispute before the UDRP, this was a huge issue of people going out and getting any word registered in a national jurisdiction that did not do any review. It was a real problem.

David Maher: Mark?

Mark Partridge: Yes. In terms of what goes in the clearinghouse, I guess I'm echoing some comments already made. I think from the point of view of the appearance to the rest of the world, it would be a mistake to exclude registrations from some countries where they do have national effect, but we say, no, they're not good enough to be in the clearinghouse. I think that telling countries that their registered right can't be in the clearinghouse would be problematic. I suggest that issue would be dealt with at the registry stage where the registry decides and the rules will apply as to what information...

((Crosstalk))

Mark Partridge: ...and registries would not be required to consider all of this information that is in the database, only that information that they say is relevant to their plan.

David Maher: Okay. Paul?

Paul McGrady: Just to echo what Mark said, I don't think that again us making a determination about whose national laws are good enough is a wise move. I don't think that many of the members of the GAAC countries will be excluded, because we have decided that their national legislation implementing their trademark, in our opinion, isn't good enough. And to the point of as a registry we wouldn't want to paper in with some of the Benelux registrations for example, I think if there is a response there, then don't do a sunrise, do an IP claims service if you don't want the burden of those.

And then lastly, my question to the group is sort of a practical one, which is okay, assuming that our comments are ignored and we exclude Benelux, who is next? Who else on the list doesn't do a good enough review in our opinion. It's a very practical question that we have to answer if we're going to go down the path. How do we identify the countries that aren't good enough.

David Maher: Okay, thank you. I'm letting Margie come in ahead of the list. Go ahead, Margie.

Margie Milam: Oh, thank you. I'm just following upon a comment someone made. If, as Jeff explains that maybe a registry doesn't want to use the Benelux, does it have to be, I guess I should ask the question, does it have to be that every name that's in the trademark clearinghouse has to be part of the sunrise or IP claims, or is it up to the registry to say, you know, we are going to use this trademark clearinghouse, but we are not going to do sunrise, based upon, you know, all of the rights in there, because it more be more expansive than. If for example it became really broad and included business names and all this other stuff, at least my

questions agree, does that mean the registry has to grant, you know, sunrise or IP claim protection to all of the names on there?

Konstantinos Komaitis: I think that the question needs an answer, but I would like actually to agree with what Paul said, that not deciding which national laws are good enough for us to make it into the clearinghouse. And the Benelux, for example, trades within the European Union are recognized and we refer to when we want to check registrations and the European registry where they want to check that on registrations. So I really think that we should abstain from determining which marks are good enough to make it and which we think are not good enough. And that takes us back to the original clearinghouse argument.

David Maher: Okay. Thank you. John Nevitt?

John Nevitt: Thanks. I just want to follow-up with something Jeff Neuman said, and I see distinction between this clearinghouse collecting the information and whether it's required to be used by a registry or not.

So for example, if a new TLD applicant is focused on a Benelux region, then shouldn't they have the opportunity to have that data in the database. Why wouldn't they have that if it's a Luxembourg type TLD. So I guess there is flexibility on whether a registry can use it or not, and it's clearly delineated in the clearinghouse, then I guess I'm inclined why not put it in there so that a certain registry that might be looking at a certain region that might not hit certain standards, still would have the opportunity to use the clearinghouse.

David Maher: All right. Thank you. Jeff Neuman?

Jeff Neuman: And my answer to that is similar to, I guess, maybe I take in the (Kathy Kleinman) view, because once it's in the database and once it is validated, then you bet as a registry, if we choose to not recognize it, then we're going to get sued, and we're going to get sued hard. Like people who have their trademarks in the clearinghouse, but we refuse to not recognize them and not use them in a sunrise. And they will basically sue us for infringement and everything under the sun, and by ICANN collecting that data and putting it into the clearinghouse, is basically creating the assumption that it would be used in a sunrise or in every sunrise, and that's really the point.

I mean, it's one thing if you're saying, look I'm dot shoes and all I want to do is have registrations related to shoes, that's something totally different than saying, I'm doing a dot web and I'm going to open it up to every single trademark except those for the Benelux countries, even though they're in the clearinghouse.

I think putting them in the clearinghouse is a required element is a problem. If you put it in as an additional element and the registry can choose to accept, then that falls in the same line as the mom and pop pizza shop that I was taking about before. I'm fine if that's an additional element that a registry may ask for, but I'm not fine with it being required.

David Maher: Okay. Thank you. Zahid?

Zahid Jamil: Yes, I think if we're going to start saying the registry can decide which rights and choose which not to choose. For instance, they can say, well we don't accept the Benelux trademarks. So then the trademark holders will just ask a simple question and say what's the value of me

registering this, as the whole point was that I'd have a single base registered and then every utility launched. I'm also inclined to agree with Jeff's view that that is basically what the trademark holders are expecting. So I think that, you know, creating that level of flexibility would actually then enrich the value to trademark holders, and I think it should therefore, once you're in the trademark database, then it should be compulsory of registries to, you know, check off with it to sunrise against that.

David Maher: Okay, thanks. Kathy?

Kathy Kleinman: I think there is a shared sense of the impact of information going into this ICANN contracted ICANN accredited clearinghouse, which is once it's collected, once it's verified, it will have to be used. So I think we have to be very careful. Nothing stops registries again from going out and creating their list of pizza places or girls first names. But for this database, I think the discussion we're having about what goes in is extremely important, because I think the registries will get into great trouble if they differentiate once it's there.

David Maher: Okay. Thank you.

Konstantinos Komaitis: (Unintelligible).

David Maher: Oh, John Nevitt?

John Nevitt: No, that's from before sorry.

David Maher: Okay. Jeff Eckhaus?

Jeffrey Eckhaus: Yes, so I have just one quick question then. If it's not going to be - I guess if it's going to be the clearinghouse or whoever that is making the decision whether or not to accept Benelux or Tunisia or some other trademark, wouldn't they be the person then that if something goes through then they would be sued. So, I mean at the end of the day, is that still a concern. Like if somebody is going to get sued, is it going to be clearinghouse or is it going to be the registry, is that what we're concerned about here? Because somebody is going to have to make that decision on who to let in and who not too. And is that entity going to be responsible for it at the end of the day.

David Maher: It seems to me that it's highly unlikely that the clearinghouse will accept liability. They are almost bound to require indemnity. The party in interest here is the registry and possibly also the registrar. They are the ones that have to worry about the claims.

Jeffrey Eckhaus: So I guess just follow-up then, is if it's up to - if that's the case then - I'm not a lawyer so somebody hopefully can help me out here, is the registry, sorry, if the clearinghouse asks for indemnification, then who is the entity that would get sued? Would it still be the registry at the end of the day? I'm not really certain about that.

David Maher: Well...

Jeffrey Eckhaus: If the clearinghouse is the one that decides who gets in and who does not.

David Maher: Kathy?

Kathy Kleinman: That's what we want to avoid isn't it. We want ICANN to make the rules through this public process. And then Jeff, you're liable and me and ICANN, but the rules have been created together and it's a...

((Crosstalk))

Kathy Kleinman: ...to a process and then I guess governments will have the opportunity to participate through notice and comment in the recommendations that are coming from the FTI, up to the GNSO, up to the boards through staff. So I think the best way to protect everyone is to create a set of rules together, and decide what goes in to that clearinghouse. And again, the recommendation is, you know, federally registered mark from authorities that conduct a substantive examination. It's clear, it's clean and then ICANN is responsible.

Jeffrey Eckhaus: So I'm going to ask a naïve question. Do you believe then if we go through this process in the procedure with (unintelligible) other places, that nobody will get sued in quarter, do you think it will be ICANN at the day and is that really what we want here. That's what I'm just trying - I guess saying if we go through this process, I don't believe that would stop any sort of litigation, or maybe I'm wrong, maybe it would be, but I don't think so.

Kathy Kleinman: Can I respond? I think the best protection for the registry is in the neutral TLD's, is this process taking place. But I don't think the government would sue ICANN. I think they'll participate in the process and let us know if they think we're wrong. But this process again going back to the old days of the old Network Solutions domain and dispute policy, which had no public process when it was created in 1996. There has been a standard evolving. And that's why the staff I believe

put it into the URS that we use a federally registered mark from authorities that conduct a substantive review, and just don't look to see us the string registered and we'll put this one in too. But see if there are other goods and services for which that word or something very close to it is already registered. That's kind of evolved as a standard and that's what we're putting in.

But I think the governments, if they want to participate, you know, they're going to see this process going through. They're watching closely. I think there's even an observer on the (FTI). I don't know if she is on the call. So I think they'll have their chance to participate, as well, and that's why I think it's best for these decisions to be made here in this process. I think that will protect the registries and registrars.

Jeffrey Eckhaus: Sorry, I didn't mean that the government sue them, I mean it was a trademark altered in those countries that were excluded or didn't get what they wanted, not on the government's side, but on the trademark holders. It's just a question I had. I'm not advocating one way, I'm just trying to see it like are we just shifting liability or are we trying to get rid of all liability? Is that even possible? That's my question here.

David Maher: Well, it's a good question that probably doesn't have a definite answer at this time. It's almost impossible to eliminate the possibility of liability and we do our best to take whatever steps are available to limit it.

Shall we move on to the last item the Adobe list. We're coming back to the uses of the clearinghouse or IP clearinghouse or trademark clearinghouse used for IP claim service, sunrise registration, URS, GPML and trademark launch notices. Anyone want to address this

question? No? If not, we are at 90 minutes and I get the strong feeling that people are getting tired. Are we going to - oh, Kathy, go ahead.

Kathy Kleinman: Dave, we're talking about number 9, right? I think there is a lot that we can say about this. A lot about notice, a lot of hallway conversations. I think there's a lot that registrants would like to see in these notices. I think there is a lot trademark owners would like to see in these notices. And you're right. Everyone is getting tired here. This is an area that the common grounds paper have a lot of development on and a lot of ideas on, and so I would like to recommend that we continue the discussion on this, but this is going to be a very, very fruitful area, I think for everyone to get involved and come up with something that is very useful for all.

David Maher: Okay. I'd like to make a suggestion and that is that we send out another Doodle. It seems to me we've made some progress today, although it's mostly been in the area of identifying the issues and areas where there are conflicting views. I'm not sure we've arrived at any closer to a consensus. Is everyone available for a call next week, not necessarily the same time, but at least do a Doodle? Well, hearing no objection, Margie and Gisella, I think we need a Doodle. And next time I would suggest that we go to the common ground document and start with that. Any objection to that?

Jeffrey Eckhaus: This is Jeff. Can I ask one quick question on the common grounds?

David Maher: Sure.

Jeffrey Eckhaus: And Zahid, maybe you can help me. Even though they have titles like NCSG and BC, can I assume that those - that really only refers to

specific representatives from those groups? That's it's not an official position from any of those stakeholder groups, but it's only the few people from this task force that are in those groups. Is that a safe assumption?

Because I could give you my view from a registered perspective, but I can't give you - and David could, as well, but I can't give you the view of registry stakeholder group?

Zahid: Okay. Thank you, Jeff. Actually, the way it's working out basically, the rest are sort of leading a discussion, they've gone back to their constituencies or their groups and come back with it. I know that the NCSG has done that. So I want to sort of point out that a lot of the stuff that has been in a sense negotiated and discussed there, seems to have a lot of the NCSG intact, both of them are on the call right now, and even the one who is not on the call right seems to have a lot of the stakeholders in that document. So that's a good starting point for them.

((Crosstalk))

Zahid: The other is...

((Crosstalk))

Zahid: Oh, I'm so sorry, this is Zahid answering Jeff's question to me about the common ground paper.

And as far as the (BC) is concerned, we basically also have gone back and distributed to our members and they have come back and there has been approval of it from several people. So I think from our

perspective, I think that one does have the backing of our groups. That is why the registrar/registry aspects are left open, and many of them the IP aspects are left open. And there is yes as an assumption, and yes you can go back and change that and put your views in there.

Bu I just want to stress here and take this opportunity that the stuff in there may help us reach common ground on a lot of things. So I would sort of suggestion that people could sort of look at it before the next vote, as well. It may help us move things along.

David Maher: Let's wrap up pretty quickly. Alan, do you have anything?

Alan Greenberg: Yes, just a very quick thing. I think it's true for most of us that we have talked to other people within our constituencies or whatever, but none of these positions or most of these positions are not formal statements of those constituencies, but may represent more than just the one person who is talking.

David Maher: Okay, thank you, Alan. I think we will wrap it up now. I appreciate the time and effort of everyone that went into this, and we'll try to get a mutually agreeable schedule setup for next week. And we'll all be together tomorrow at the same time to talk about the URS. So thank you all and will talk to you tomorrow.

Man: Thank you.

Man: Thank you.

Woman: Thank you.

Man: Okay, bye-bye.

Man: Thank you.

Coordinator: Thank you for participating in today's conference call. You may now disconnect.

Gisella Gruber-White: Thank you, Louise, bye-bye.

Coordinator: Thank you, bye-bye.

END