ICANN Transcription

Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP WG

Tuesday, 06 October 2020 at 13:00 UTC

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TERRI AGNEW: Good morning, good afternoon, and good evening. Welcome to the Review of All Rights Protection Mechanisms, RPMs, in All GTLDS PDP Working Group call taking place on Tuesday the 6th of October, 2020, at 13:00 UTC. In the interest of time, there will be no rollcall. Attendance will be taken by the Zoom room. If you're only on the audio, could you please identify yourselves now?

Hearing no one, I would like to remind all to please state your name before speaking for recording and transcription purposes, 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'll turn it back over to our co-chair, Kathy Kleiman. Please begin.

KATHY KLEIMAN: Terri, thanks so much. Welcome, everybody. Thanks for joining and thanks for spending so much time on the list on Friday and over the weekend. That's really how we move things forward, so thanks so much for all those postings. Quick overview that we are in the final lap. This is our final week of discussion, review, and editing. By next week, we head into, according to our schedule, our review of the final report. So, congratulations, and let's begin our final week of detailed work.

First thing, we will have statements of interest. Does anyone have a revision or update to their statement of interest? If I miss a hand, just let me know. Okay. Seeing none, I do believe there is an update to the agenda, so let me pause for staff to talk about that. If anybody is speaking, I'm not hearing it. Okay. No revisions to the agenda. Okay. Anything for AOB, any other business? If anyone else is speaking, I can't hear them. Okay. Then let's go ahead—

BRIAN BECKHAM: Kathy?

KATHY KLEIMAN: Yes, Brian?

BRIAN BECKHAM:	Yeah, I'm sorry to jump in. I don't know. I think it's individual proposal number 28. I had asked … And I apologize. I replied to the e-mail from Julie Bisland and apparently it didn't go through to the list. I haven't had a chance … This was raised on Thursday and I have been trying to catch up with some WIPO colleagues.
	I have a call scheduled for this evening at 5 PM our time. But if it's at all possible, if we could jump over that and move to some of the last TMCH items, that would be very much appreciated so I'll have a chance to do some more consultations internally. Hopefully, that could provide some useful feedback to the working group.
KATHY KLEIMAN:	Brian, that sounds reasonable. Let me just refresh everyone's recollection, since I have individual proposal number 28 in front of me. This is the one where we were talking about—a question mark for you—effective, and enforceable, and published conflict of interest policies for the URS, and kind of what our wording would be on that. Is that right?
BRIAN BECKHAM:	Correct.
KATHY KLEIMAN:	Okay. Terrific. So, just letting everybody know that we are … And people should check. There is some revised language that received support that's now in the box, again, on individual URS proposal number 28. But we are going to skip over that for Thursday. Great.

Thanks, Brian. I knew there was a change, I just wasn't quite sure what it was, so thanks.

Okay. Then let's start with Sunrise recommendation number two. I'll wait for … And if anyone did have anything for AOB, any other business, go ahead and put it in the chat, but I don't think there is anything for that. Okay. So, Sunrise recommendation number two has—

PAUL MCGRADY: Kathy?

KATHY KLEIMAN: Yes? Who is this, please?

PAUL MCGRADY: Hi. This is [inaudible] interrupt you. I'm on phone bridge only. I'm up a mountain today.

KATHY KLEIMAN: Okay.

PAUL MCGRADY: I [travelled] [inaudible], so I missed the [inaudible]. I just wanted to point out I just [inaudible] policy. It's a volunteer role but it is [inaudible]. I also did some other [inaudible] I was [merely] on the GNSO Council, I think. So, nothing exciting but I just [inaudible]. Thank you.

KATHY KLEIMAN: I'm so sorry. We got noise and cut-out on what you said your new roles are, or revised roles are. Could you repeat that again?

PAUL MCGRADY: Sorry. Sure. Sure. A policy coordinator for the IPC. It's a volunteer role, but it was a change to the statement of interest.

KATHY KLEIMAN: Policy coordinator for the IPC? Okay.

PAUL MCGRADY: Yes.

KATHY KLEIMAN: Great.

PAUL MCGRADY: I apologize for the bad connection. I'll do my best to be silent … Today's call … Now on.

KATHY KLEIMAN: Well I don't know … You know, we're coming into Sunrise recommendation number two, so we will do our best to understand what you're saying. I also think, if you want to share a picture with us at a later time of what you're looking down on, that would be amazing so that we can be with you on the mountain top.

PAUL MCGRADY: Will do.

KATHY KLEIMAN: Okay. So, Sunrise recommendation number two. I was looking at it. We have a good amount of change. Because this was a really good and well-developed discussion, we have changes to the final recommendation language in the box. We have changes to the context and we have changes to the Public Comment Review.

So, I'm going to go ahead and read the changes. Let's go through the recommendation language so that everyone can hear it, so that Paul can hear it, and then I'll hand it over to staff to highlight and perhaps read the changes to context and Public Comment Review. Because if all goes well, this is the last time we see this material for Sunrise final recommendation number two after extensive discussion before it goes into the final report and we review the final report. Okay.

So, Sunrise final recommendation number two: "The working group recommends that the Registry Agreement for future new gTLDs include a provision stating that a registry operator shall not operate its TLD in such a way as to have the effect of," and we added the word "intentionally," "circumventing the mandatory RPMs imposed by ICANN or restricting brand owners' reasonable use of the Sunrise RPM."

Implementation guidance. "The working group agrees that this recommendation and its implementation are not intended to preclude or restrict a registry operator's legitimate business

practices that are compliant with ICANN policies and procedures, and added, such as the approved launch program, ALP, as well as the reservation of domain names as required in Specification 5 of the base Registry Agreement applicable to the 2012 New GTLD Program Round."

Alternative option. So, it looks like we can stop there or, alternative option, "Move the amended highlighted languages suggested below into the context section." So, we're going to look at … We've got some revised language, some of which we've heard before, some of which we haven't, and there is a question: does this stay in the recommendation box that we're reading now, or move it into context?

"To assist the IRT, which will be formed to implementation recommendations adopted by the board from this PDP, the working group tried to reach agreement over some possible types of specific registry conduct that could have the effect of intentionally circumventing trademark owners' use of the Sunrise period, such as to trigger enforcement action by ICANN Org, should the Registry Agreement contain a prohibition on such conduct."

"As part of this discussion, the working group noted that several public comments to the initial report had raised the following examples as non-exhaustive illustrations of such language." First bullet point. "Withholding or self-allocating trademark-corresponding domains with the intent of circumventing the use of the Sunrise period by trademark owners."

Second bullet point. "Discriminatory pricing practices clearly designed to leverage the need for defensive Sunrise registrations

by trademark owners. In this context, 'discriminatory pricing practices' could include extremely high pricing of trademark-corresponding domains during the Sunrise period, followed by significantly lower prices for the same domain during land rush or general availability, such as to evidence an intent to target trademark owners, either specifically or as a general class of registrants, for Sunrise registration."

New paragraph. "However, other working group members express concerns about, or objected to listing, these examples, cautioning that premium pricing level in and of itself may not indicate the kind of conduct that this recommendation is meant to address."

"Several working group members noted that highlighting registry pricing practices could put the working group at risk of violating the 'picket fence,'" with a footnote to the "picket fence." "Other resources have now been moved down into the context section."

So, that is recommendation language and/or context language. Julie, Ariel, do you want to take us into the context changes, or recommended changes, or proposed changes?

ARIEL LIANG: Kathy, I'm happy to do an overview of the change to the contextual language. The first change you see is we added "land rush, together with a general availability pricing" in the first paragraph, as working group members noted this is also a phase, and that we should note in the context just for the completeness of the cycle of the … Basically, after Sunrise, could happen.

So, we added to "land rush," here. And then, following that, we added a paragraph here regarding the working group discussion of generic dictionary words that may have inherent value that can also be used by potential registrants in a non-infringing manner. So, we recorded this paragraph, here. I think that point was raised by David in his e-mail to the list.

Following that, it's a section of the non-exhaustive list of resources that may provide examples of intentionally circumventing trademark owner's use after Sunrise periods. So, that's the crossed bullet points that you saw in the box, and then we moved them under here in this context, as we understand this is not a list the working group agreed to but, of course, this was raised by public comment, so worth mentioning here.

And then, following these bullet points, I think this paragraph is about capturing the discussion of the small team proposal regarding additional enforcement mechanism to address such conduct by a registry operator. So, just to summarize that, the working group did discuss the small team proposal. However, the proposal didn't receive wide support and received significant opposition. That's why the working group did not reach agreement on the question of additional enforcement mechanism. So, this is just to capture that particular discussion.

In the Public Comment Review paragraph, we made a few edits. The first sentence, we changed from "the working group agree to develop additional implementation guidance" to "the working group agreed that it should develop additional implementation guidance," just to reflect the point that the working group did have debate

regarding this implementation guidance but didn't really reach agreement on all of the points, there.

And then added "intentionally" before "circumventing," just to be consistent with the recommendation language. And then, another paragraph is, basically, recapping what's in the context regarding the working group's debate or discussion about this specific form of implementation guidance were examples for inclusion, but the working group did not agree on all of them.

But then, despite the divergence of opinions on the implementation guidance, the working group did provide support to the recommendation language itself and agreed to leave to IRT to determine the form of registry operator conduct that could constitute a violation of this recommendation.

So, it's basically a recap of the contextual language. Then I think we also have a footnote added here. It's related to that generic dictionary words paragraph. It's to provide some additional data, provided by Rebecca, I believe, regarding the use of generic terms in trademarks in the U.S. and Europe. So, she provided those context or data in discussion, so we capture it here. And that's the extent of the change to this contextual language.

KATHY KLEIMAN: Terrific. Thank you, Ariel. So, I really appreciate there is a lot of work that went into this section: a lot of work from the small group, a lot of work back from the working group, a lot of work back from the small group, and now the working group and staff. I see David's hand is raised. Let me just highlight several things as we go

DAVID MCAULEY:	Thank you, Kathy. Hello, everybody. I want to comment about what we just went through in light of my e-mail of Friday. Some of what I'm going to say is … First of all, I give great praise to staff. I always do. I think they do an outstanding job. But I have to say, I find the Google Docs platform very confusing. And so, I want to reiterate some of the things I said in my e-mail, just to make sure that … Because I'm not sure I understand exactly what's there in the Google Doc.

through. One is we have to finalize the language of the recommendation, and then any edits to context and Public Comment Review. David, go ahead, please.

DAVID MCAULEY: Thank you, Kathy. Hello, everybody. I want to comment about what we just went through in light of my e-mail of Friday. Some of what I'm going to say is … First of all, I give great praise to staff. I always do. I think they do an outstanding job. But I have to say, I find the Google Docs platform very confusing. And so, I want to reiterate some of the things I said in my e-mail, just to make sure that … Because I'm not sure I understand exactly what's there in the Google Doc.

Anyway, having said that, I certainly support putting the word "intentionally" in the actual recommendation, and thank you for that. I believe that's there. In the implementation guidance, I thought that we … And I do continue to strongly believe that we should end the implementation guidance sentence after the words "with ICANN policies and procedures."

And that language that's highlighted in what looks to me like pink should not be included. That's the language that gives some examples, such as ALP, etc. When you give examples, especially of conduct that's permissible, there is a legal principle that "expressio unius est exclusio alterius."

I recognize we're not talking to a court, we're talking to an implementation team, but I still think it's important. I think the examples could be taken out of context, and I think it's not good

practice to give examples. I would end that sentence there. I would move all of the rest to "context." All of it.

In that, I did recommend in my e-mail, Friday, and I would commend that e-mail for folks that may not have seen it yet, I did offer some tweaks to the language in what I think should be context, such as no longer using the term "trademark corresponding."

I think we need to make it specifically language that says we're talking about marks that are recorded in the Trademark Clearinghouse when we're talking about Sunrise. Excuse me. I saw that "land rush" was capitalized. Things like that, I think, are important.

And so, I would stand by what I said in the e-mail, and it's just because I'm not exactly sure what this Google Doc is presenting that I'm making this statement. I feel quite strongly about it, and that's it for now. Thank you.

KATHY KLEIMAN: David, don't get off. Don't get off.

DAVID MCAULEY: Okay.

KATHY KLEIMAN: If that's okay. So, let me double-check what you're recommending that we move to context starts as the end of the period of ICANN Compliance … So, what you have … Let me just double-check. For implementation guidance for Sunrise recommendation number two,

you have recommended—and I'm going to read the whole sentence, just so everyone has it—

DAVID MCAULEY: Sure. Could we go up?

KATHY KLEIMAN: Staff, can we go up? Yes. "The working group agrees that this recommendation and its implementation are not intended to preclude or restrict a registry operator's legitimate business practices that are compliant with ICANN policies and procedures." And per your e-mail and today's call, you're recommending we put a period right there.

DAVID MCAULEY: That's exactly right, Kathy, and that that language that is highlighted that contains some examples just be discarded. I don't like the—

KATHY KLEIMAN: Okay. That was my question. Do you want that language … Are you recommending or asking us to move that language to "context," or just drop the rest of the sentence?

DAVID MCAULEY: I would drop it because it's examples of conduct that is permitted, and I think that's bad practice. Thank you.

KATHY KLEIMAN: Okay. And we do talk about ALP other places. I'm not supporting or … Just mentioning it. So now, when we get to the next line immediately underneath what we were just reading, "Alternative option: move the amended highlighted language, as suggested below, into the context section," you are indeed recommending we move it into the context section.

DAVID MCAULEY: Well, I am. And in fact, the language supports it because there are instances in the language where it says, "Some believe this, some believe that, some suggested this, some suggested that." That's not implementation guidance. I think this is all context.

I have no problem with it. It's factual context. We did have these discussions. And so, I would … Yeah, to me, it's a very short recommendation, it's a very short implementation guidance, one sentence, and then the rest of context. That's my suggestion from my e-mail. Thanks.

KATHY KLEIMAN: Okay. Great. Great. And that was my understanding from last week, too, but perhaps staff left it here so that we could see it because we're familiar with this language in this place. So, perhaps they wanted to show us the edits as they suggested moving it to context.

So, the suggestion is on the table to, again, take that prior sentence and put the period earlier, delete the rest of it, and take what we're looking at under alternative option, move it to context. Sorry about the raspiness. David, I understand there is one more. Both bullet points talk about trademark-corresponding domains, if I have this

correctly. And what you're saying is you want to modify that term to TMCH-corresponding domains?

DAVID MCAULEY: Well, I thought it would be clearer if we talked about marks that are registered in the Trademark Clearinghouse.

KATHY KLEIMAN: Okay. And, I think, consistent with what you're saying, Ariel put in chat, "Alternative sentence suggestion: 'extremely high pricing during the Sunrise period of the domains that correspond to trademarks recorded …'" Okay, we're losing it. "In the Trademark Clearinghouse," because stuff is coming through.

Ariel, I'm not sure where … There are two bullet points that talk about trademark-corresponding domains, so I'm not sure where your edit goes. But the concept is that we replace, wherever it comes up, "trademark-corresponding domains" with "domains in the Trademark Clearinghouse." So, David, are those the three proposals that are on the table for people to consider?

DAVID MCAULEY: Well, yes. I didn't repeat everything I put in the e-mail. I did have some comments and contexts that were sort of editorial, like capitalize "Land Rush." Let me just go quiet for a minute and then, if I think something important has been missed, I'll come back and raise my hand.

KATHY KLEIMAN: Okay. And I hate to say it, but I think we're going to have to see this again on Thursday because, as Susan is saying, it's hard to—and Susan, forgive me if I am not paraphrasing correctly—to deal with oral language without seeing the actual edits. So, moving a number of paragraphs into context is something we would want to see.

DAVID MCAULEY: Kathy, could I make one other point?

KATHY KLEIMAN: Sure, and then we'll go onto Maxim.

DAVID MCAULEY: One of the things I did say in the e-mail is that, in the context, I think it would be wise to say that, when we talk about the group discussed adding an enforcement mechanism, etc., etc., we talk about it in the context of being additional. In other words, I wanted to make the point that, whether we like it or not, ICANN Compliance does offer enforcement of these kinds of mechanisms. Thank you.

KATHY KLEIMAN: Okay. Thanks, David. If there is language associated with that, you may want to put it in chat. I'm sorry not all your edits were picked up from e-mail. Maxim, go ahead, please.

MAXIM ALZOBA: Do you hear me?

KATHY KLEIMAN: Absolutely.

MAXIM ALZOBA: Could you please scroll up a bit? Stop. Yeah, thanks. This text which was suggested by David to be removed effectively limits what registries can do with reservation. Basically, it leaves this mechanism, which currently is the only mechanism for a registry to do something with a TLD, as non-working. So, I suggest also that this language is to be removed, or "not limited to" should be added to the end, so it's not just direct guidance saying, "Oh, please leave only this instance of words reserved and remove everything else." Yeah? Thanks.

KATHY KLEIMAN: Maxim, before you go, you're supporting the idea that we put a period after "registry operators' legitimate business practices that are compliant with ICANN policies and procedures," period?

MAXIM ALZOBA: Yes.

KATHY KLEIMAN: But you'd like to take the rest of the sentence and move it down lower into the context, basically?

MAXIM ALZOBA: Mm …

KATHY KLEIMAN: No?

MAXIM ALZOBA: I'm not sure we need it because it's only two cases out of many cases where reservation is used, so it will be extremely limiting the ability of registries to conduct business.

KATHY KLEIMAN: Okay. So, two proposals to strike out the end of this. Perhaps staff could just capture that with brackets, or something like that, or highlight just some note there. Mary, go ahead, please.

MARY WONG: Thanks, Kathy. I actually stuck my hand up for staff but, to this point that Maxim just made, as Julie said in chat, our understanding is that the proposals from David, Maxim, and potentially it might have been from Alan and others, as well, is to simply delete the language that's now highlighted in what seems to be a mustard-orange. So, that's what staff will be planning to do, unless there is disagreement with deleting this text. But we also had other points that we wanted to raise, and I'm going to turn it over to Ariel or Julie.

ARIEL LIANG: Thanks, Mary. Just in response to the comments from working group members, from staff's point of view, we think it's definitely

feasible to close out this recommendation today, as what David has suggested is not really controversial and easy to do.

So basically, move the highlighted text in yellow down to context, and then clarify some of the terms, such as changing "trademark-corresponding domains" into something like, "Domains that correspond to trademarks registered in the TMCH," so we can certainly implement those changes, and then some other editorial changes, such as using the capital L for "Land Rush," and those things can be done pretty easily.

If the working group can agree on these points, staff are happy to provide another version of this recommendation for review and approval, and we just need to hear whether the working group agrees with David's suggestions. That's pretty much it from me.

KATHY KLEIMAN: Great. Thanks, Ariel. Griffin, go ahead, please.

GRIFFIN BARNETT: Yeah. Thanks, Kathy. I don't oppose the suggestion to strike that orange highlighted text. I do tend to agree that it makes sense not to try and get into trying to list out examples. The only suggestion … And I put this in chat, but I just wanted to make sure that it gets captured when staff are updating this, potentially is to insert the word "otherwise" before the word "compliant" in the preceding part of the sentence.

So, "Registry operators' legitimate business practices that are otherwise compliant with ICANN policy and procedure." That makes

it clear that, obviously, if we have these new provisions, it wouldn't … Complying with that provision would be sort of the exemption. So, I just wanted to point that out. Thank you, staff.

KATHY KLEIMAN: I'm going to wait. I think Julie is striking that section. Julie, can we keep it there but show the strike-out? I think that may have been what you intended.

ARIEL LIANG: Sorry, we can't, because this is a redline to begin with. So, if we strike it, it just removes it, unless I accept this redline and strike it. We already put a comment to highlight this sentence and note this can be removed.

KATHY KLEIMAN: Okay. So, can you go back up to the top of this recommendation? So here, what we're looking at now is Sunrise recommendation number two, with two paragraphs, and everything else being moved down to context, with anything about trademark-corresponding domains being changed to "domains in the TMCH," with Griffins' edits/with David's edits.

Mary, I'm assuming that's an old hand but if it's not, please let me know. Does anyone have any edits/changes to the context language, the public review language—anything that strikes them as not representing what staff tried to do with fairly carefully balanced language reflecting our discussion? Maxim, final comment to you.

MAXIM ALZOBA: Just a note. Please be aware that registries do not know what's in the TMCH. They are actively prohibited from checking out what's inside. So I wonder how … Yeah, this recommendation that registries shouldn't do something with TMCH records when they are not allowed to know what's in TMCH, how it could be implemented. Thanks.

KATHY KLEIMAN: That's a good question. David, I hope you don't mind. I'm going to toss that in your direction. Brian, I saw that your hand was raised. I didn't want to close off the conversation early. Go ahead, please.

BRIAN BECKHAM: Yeah. Thanks, Kathy. I was just going to say I'm mindful of our recent request for additional time to the council, and I think we're all kind of saying similar things, here, and there seems to be a pretty clear agreement on all of the nuts and bolts, here.

And if there are any last suggestions for changing a word here or there in the context, perhaps we could do that over the list. But I think we have had a pretty good conversation, here, and it feels like we're drawing this to a close. Just an observation. Thanks.

KATHY KLEIMAN: Terrific, Brian. Thanks for encouraging us to move forward. David and Maxim, maybe you can take that off-list with any … Or put it on the list, really, offline. Let's talk about it. Maxim raises a good

question and we probably won't come up with the answer immediately. Okay.

Any other thoughts on Sunrise recommendation number two, or can we close the discussion? It's my understanding staff will circulate this separately, not just wait for us to see it in the final report, but circulate it separately after this meeting so everybody can kind of review the text as it's rearranged. Is that right, Julie, Ariel, Mary?

ARIEL LIANG: That's correct.

KATHY KLEIMAN: Perfect. Thanks so much. Let's go on. Next item on the agenda is interesting. This is our revised URS recommendation number nine in converted individual proposal number 34. I was hoping staff could show us both what the original recommendation number nine was … Because this was an agreed recommendation of the working group and we're trying to combine it with an individual proposal. It was pointed out that there might be some real overlaps, here. It's hard to find now that we have changed numbers on things. Great. Okay.

So, URS final recommendation number nine, just briefly, "The working group recommends that, as implementation guidance, the IRT consider developing guidance to assist URS providers in deciding what language to use during a URS proceeding."

So it is "guidance," I'm going to summarize here, "should take into account the fact that the domains subject to a URS complaint may

have been registered via a privacy proxy service, and the location of the service will determine the language of that service, which may be relevant."

"Furthermore, the guidance may include but is not limited to: whether it is possible to ascertain the language of the registration agreement from the registrar; two, principles articulated in section 4.5 of the WIPO overview; three, procedures followed by the UDRP; four, the language used by the registry and/or predominant language of the country of the registry; and five, the language used by the registrar and/or predominant language of the country of the registrar."

Okay. Staff, back to you. Is the primary one that we're working with now URS individual proposal number 34? So, we appear to have set aside—then this is a question—URS recommendation number nine, what I just read, in favor of this consolidated final recommendation? That's my understanding.

So, let me read this. "The working group recommends that the URS rules be amended to incorporate in full rule number 11 of the UDRP rules regarding language of proceedings."

"A: unless otherwise agreed by the parties or specified otherwise in the registration agreement, the language of the administrative proceeding shall be the language of the registration agreement, subject to the authority of the panel to determine otherwise, having regard to the circumstances of the administrative proceeding."

"B: the panel may order that any documents submitted in languages other than the language of the administrative procedure be

accompanied by a translation in whole or in part into the language of the administrative proceeding."

Implementation guidance. "As implementation guidance, the working group recommends that the IRT consider the following." First bullet point, "Preliminary submissions by either side to the panel regarding the language of the proceeding should be limited to 250 words and not be counted against the existing URS word limits."

Second bullet point, "The notice of complaint should, where applicable, contain a section explaining that the respondent may make a submission regarding the language of the proceedings."

Third bullet point, "If a translation is ordered exceeding the URS word limits, it should be permitted as long as the original submission meets the word limits in the original language."

And here, we have some alternative wording. "If a translation is ordered, as long as the original submission meets the word limits in the original language, the translation of the original submission may nominally exceed the prescribed word limit. For the avoidance of doubt, the translation may not introduce new facts or arguments which may be contained in the language of preceding submission."

And final bullet point, "Incorporate the revised URS preliminary recommendation as implementation guidance. The IRT should consider developing guidance to assist URS examiners in deciding whether to deviate from the default language in the context of a particular proceeding."

"Such guidance may take into account the language of the relevant registration agreement, irrespective of whether the domain is registered to a privacy or proxy service, or reseller, the language requested by one of the parties, principles articulated in the relevant section," presently 4.5 of the WIPO overview, "or any other matters considered relevant." Let me ask staff to summarize. There is extensive new language in the context and under the Public Comment Review.

ARIEL LIANG: So, for the green language you see in the context is not really new language. The reason we have them here is because the consolidation was the preliminary recommendation nine, and we pulled some of the contextual language from that recommendation into here because, logistically, it will make sense to provide both sides of the information. I can summarize what the new paragraphs are about.

So, the first new paragraph that you see here is regarding the working group's discussion when forum MFSD told the working group about how they communicate with the respondent, and they try their best to communicate in the language of the respondent, and these are some of the methods for them to confirm what language to use.

And the second paragraph is regarding the provider. Sometimes, they run into difficulties when a URS complaint has been registered—sorry, the domain has been registered via a privacy or proxy service. And therefore, they asked help or guidance in terms

of when this situation happens, and that was the context for URS recommendation number nine.

And then, we revised the paragraph following that to note that the working group decided to go with this particular recommendation and use the language of the registration agreement as default because it will provide a clearer method for URS examiners to decide what language to use, and that will be irrespective of whether the domain is registered through a privacy or proxy service or reseller, and such clarity will enhance the predictability for people involved in the URS proceeding while also preserving examiners' discretion to deviate from the default language where appropriate. We borrow some of the wording from Griffin in his response in the mailing list.

Then the next paragraph is about why, kind of summarizing why the working group has decided to go with this recommendation and absorb URS preliminary recommendation nine here, even though it did receive strong support from public comment. And the reason why it didn't go with the Recommendation 9 is because that recommendation did not intend to amend the current URS rules regarding the language of proceeding, but this recommendation does.

And the final new paragraph here is also from the original contextual language of Recommendation 9. It's that during the working group deliberation, we noticed that ADNDRC, which is another URS provider, only communicates with respondents in English and, therefore, it's non-compliant with a URS procedure and rules, so we also noted this paragraph here.

And then the new paragraph under Public Comment Review. This is language we used in the Public Comment Review for URS Recommendation 9. So, we moved the content over here, just to note that the working group had two schools of thought regarding the language of URS proceeding.

One is that we should provide an offer to enable respondents to be notified and have their proceeding in their own language, as identified by the provider. And the other school of thought is to use to the language of registration agreement, unless otherwise decided by the examiner.

And ultimately, the working group agreed to recommend the second approach, and this is consistent with the URS rules, but also adopted several suggestions that were raised in public comments to provide further guidance to assist URS examiners. So, that's the change.

KATHY KLEIMAN: Ariel, can you stay right there? I'm actually going to disagree. I think that's what we're talking about: it's ultimately what the working group agreed to, because we've been talking about the merger of these two recommendations.

So, did we agree to replace one with the other, or are we in a good-faith effort to try to merge both of these, one a very popular and highly agreed on, URS recommendation number nine, with an individual proposal?

I thought we were in the latter, in the merger, but let me defer to hands and the people who were very involved in working on this on

Friday/over the weekend. I'm going to add myself to the queue, as well, with a question. So, who would like to speak in support of the edits/raise questions about the edits? Griffin, go ahead, please.

GRIFFIN BARNETT: Yeah. Thanks. I was hesitant to put up my hand just because, obviously, I think that the merger approach is one that I kind of came up with, I guess, on Friday when I put this concept out on the e-mail list. So, I don't know if I'm necessarily the best person to speak to it.

But I think, again, for all the reasons that I stated in my e-mail and that were, I think, acknowledged in some other e-mails, we don't lose what, in my view, is sort of the intent of Recommendation 9, which was to give the opportunity for a URS proceeding to take place in a language other than English, which currently is, as always, the default, and in fact, I think, is the only language that it can proceed in, with the one deviation of having the notice of complaint be delivered in the predominant language of the location of the registrant.

And so, there are a lot of questions about, what does predominant language mean? I think individual proposal 34 is sort of intended to get around those questions by giving a very concrete rule about what the language of the proceeding is as a default but, of course, with built-in discretion for the examiner, given the circumstances of the case, to deviate from that default.

And I think, because URS Recommendation 9 was from the beginning couched as implementation, a proposal for

implementation guidance … Or I should put it this way: a proposal for the Implementation Review Team to develop guidance to assist examiners concerning the language of the proceedings.

I think it can be subsumed into this merged version, which provides a bright-line default rule but also allows for the discretion of the examiners to decide otherwise, and then that sort of guidance that was proposed through Recommendation 9 would sort of become guidance to examiners to help them decide whether they ought to be deviating from the default rule and, if so, which other language the proceeding could take place in in such a case.

So, to my mind, it makes a lot of sense to merge these in this way, and I appreciate the further refinements that were suggested on top of my initial proposal from Brian Beckham and, I think, some others. So, I don't know. Hopefully that intervention is helpful. Thanks.

KATHY KLEIMAN: Absolutely. Griffin, could you stay on the line? I'm waiting for other hands in the … Are you still there?

GRIFFIN BARNETT: I am still here.

KATHY KLEIMAN: Terrific. Thanks. So, let me raise … I agree the goal is this merged version. Nobody is talking about conflicts but, trying to merge, that makes sense to me. So, let me raise some questions. I can take off the co-chair's hat. This is clarification.

So, URS final recommendation number nine, which was, as was noted, immensely popular—it was highly supported—referenced in its work that we don't know the language of the registration agreement. That was part of the underlying problem all along, that in URS we deal with the registries and in UDRP we deal largely with the registrars. So, has this problem been somehow solved? And if it's solved, I'm happy to know that. And then I—

GRIFFIN BARNETT: So, I don't know that it was a problem. I understand your point that, obviously, URS takes place, if you will, at the registry level. The locking and its technical component of URS takes place at the registry level. But the language of the registration agreement is always knowable because, if you look in WHOIS, you can identify the registrar.

That is a public data element, still, in WHOIS. And then, from that, you can identify their registration agreement. So, I don't know that that was ever really a problem. The problem as I understood it was more that the language of proceedings under URS was essentially always in English.

KATHY KLEIMAN: It was, right.

GRIFFIN BARNETT: And I think that's why we tried to come up with another recommendation, to give more flexibility for the language.

KATHY KLEIMAN: I think that makes sense and I wish Renee were here to help us. Let me ask you one more question. There are two things that have been removed from recommendation number nine's guidance that don't seem, to me, to be controversial. They would go in, I think, the last bullet point, "Incorporate the revised URS preliminary recommendation number nine as implementation guidance."

But I just want to flag it and explain why I think it was there in the original recommendation number nine and see if it's controversial. One is number four, that one of the factors was the language used by the registry and/or predominant language of the country of the registry.

I think this was included for IDNs. If you're in a top-level domain that is an IDN, so it's Cyrillic, or Hindi, or Chinese, I think that's a pretty good indication, and I think we thought it was a pretty good indication, that that might be a language of choice for the registrant or the URS.

So, any objection to including that? And then there's also the language of the registrar, and/or the predominant language of the country of the registrar. So, if the registrar is only operating in Spanish or French, that is also an indication. I see Brian. Griffin, I think you're still on, so I'll give you right of response, and then over to Brian.

GRIFFIN BARNETT: Yeah. Thanks, Kathy. Yeah. My original merger actually did, I think, include some of that language, so I would kind of defer to Brian

Beckham, whose additional changes, I think, may have lost that. Personally, I don't have an objection to including some of those additional concepts in that last bullet in some way.

Particularly, I take your point about the IDN thing. I think that could potentially be a relevant factor for the examiner to consider, if it becomes an issue of them exercising their discretion to change the default language.

On your second point about the language of the registrar, I mean, if the registrar is operating in a particular language, presumably the language of the registration agreement would mirror that. So, I don't know that that's necessarily an issue. But again, I don't oppose including those as factors for the examiner to consider.

KATHY KLEIMAN: Great. Thanks. Again, I still don't know how we find out the language of the registration agreement, but maybe Brian does. Brian, over to you.

BRIAN BECKHAM: Thanks, Kathy. I'll try to, and I try to offer a little perspective/experience from our UDRP provider, experience … I appreciate we're talking about the URS, and there is a core difference in that, the UDRP, the lock and information is supplied by the registrar and the URS lock is done at the registry level.

I think that we're all … At least, I don't have any reason to think we're all not on the same page of we're trying to bring some clarity in terms of the language of the proceeding, basically for due

process purposes. We want the registrant to have information about a claim that's filed against them. We want to give them the best opportunity they can to respond to the allegations made against them.

So that is, for me, the kind of agreed starting point. And so I think, from there, "how do we achieve that" is really the question in front of us. And I think that, frankly, we're adding confusion as opposed to clarity.

Just for example, I'm an American native English speaker living here in Switzerland. If I go to godaddy.com, depending on … I don't know why sometimes this happens or doesn't. My browser will direct me to the German version of the GoDaddy website, and I can show you as an aside.

It's kind of frustrating sometimes to try to find the right language that you actually want as an end-user. But the point I'm trying to make is that the location of the registrar—and in that case, it would be Arizona in the United States—or the fact that they offer services and registration agreements in different languages, these are things that may be relevant. But again, I think we're actually introducing more confusion versus clarity.

Ultimately, look, at the end of the day, when somebody registers a domain name, they're signing an agreement. And this is part of the complication, here, that there is this chain of potential actors involved in that process. There is the registrar, who relates to the registry. The registrar might sell directly. They might have a reseller network. They might go through privacy proxy services. Those may or may not be affiliated with the registrar.

But at the end of the day, the registrant is signing an agreement, and they're doing that, presumably … I mean, I think we have to take some basic level of assumption they're doing so in a language that they can reasonably understand.

And at least in the UDRP … I don't recall the history of the URS, why it was that the complaint could be filed in English and then the response could be filed in one of these different languages, and there is reference to the predominant language of the registry, but from what I can understand, that registration agreement should really be the penultimate determining factor in the language of proceedings assessment.

And if an examiner is looking at a complaint filed in English and a proxy service in Switzerland, or a privacy service in Luxembourg, or a registrar based in Malta, or a registry based in Ireland or Russia … I can go on and on.

All of these are actually not only not assisting but they are adding confusion to the examiner's determination and they're not ultimately helping the person we want to help, which is the registrant. So, I think probably … I mean, I don't think Renee is on the call. I don't know if anyone from the registry or registrar side might be able to answer this.

If, for example, when a command comes through, if it's from the reseller proxy registrar to the registry, that command includes anything related to language that we might be able to hook into, that could be a relevant question. Another one could be whether … Through the registry or at the registrar level directly, ascertain that language.

So for me, the ultimate question is, how does a provider ascertain the language of the registration agreement? That, for me, is the simplest way to address this problem. Otherwise, I feel we're kind of … It's a laudable aim that we're after but we're not really getting across the finish line with these references to predominant languages, and jurisdictions, and so on and so forth. Thank you.

KATHY KLEIMAN: Brian, since we don't have Renee on, and per your reminder in our last recommendation, number two, when we were discussing it … Your good reminder than we're trying to get to the finish line. So, Renee was with us when we did URS final recommendation number nine and the idea that, as part of implementation guidance, we would include the language of the registry as part of the evaluation factors, as well as the language of the registrar.

Since we haven't solved the question of how the URS provider that may be dealing only with the registry knows the language of the registration agreement … That was a big one. I mean, I just remember that being a big hurdle when we got to it.

Shouldn't we include language that the working group has already agreed to as part of fleshing out … So again, that IDN in Chinese, or Cyrillic, or Hebrew? Shouldn't we include language we have already agreed on in four and five under the URS final recommendation, just to help get us to the finish line and make sure this implementation guidance is as well-rounded—

BRIAN BECKHAM: Yeah. Maybe Ariel or someone, could you scroll up? Because I think, maybe, it would be helpful to see that language on screen. Sorry, to the recommendation.

KATHY KLEIMAN: it hasn't been included. That's the problem. It wasn't copied out of URS recommendation number nine into URS individual proposal number 34, because they're not complete overlaps. One kind of dealt with language generally and one dealt more with the translation, or that request from the registrant. But go ahead, Brian.

BRIAN BECKHAM: Yeah. Thanks. I was going to suggest that, maybe, the simplest way would be to say that the recommendation is … Make the recommendation high level and say that … Just sort of to state the goal, and then leave for implementation the question of, how can a provider best ascertain that language of the registration agreement? I don't recall … Was … At some—

KATHY KLEIMAN: Brian? Staff, take us back to URS recommendation number nine, because we spent extensive—

BRIAN BECKHAM: At some point … Yeah. At some point scrolling on the screen, there were some comments about concerns raised by providers about the concern about ascertaining the language, the predominant language.

KATHY KLEIMAN: Brian, it looks like Griffin is saying, "My original proposed merger had some language that retained some more of the wording of recommendation number nine," which would include probably four and five of what we're looking at here. So, Brian, if you're okay with that, are other people okay? It just continues our merger process, here. So, I think we have Maxim, and then Zak. And of course, Brian, we can come back to you. Maxim, go ahead, please.

MAXIM ALZOBA: First of all, if we want to have an exchange of information with the registry, we do use English as a required language of all Registry Agreements, and predominant language of the country. If we want to talk to a registrar it should be English, as a required language of ICANN Registrar Agreement, and the predominant language of the country of the registrar.

But if you want to speak to a registrant, it should be the language of the Registrant Agreement, and registrants can have agreements with registrars or resellers. In TLDs—I mean in the database of the registry—not necessarily you can find information about the language of the agreement, if it wasn't in the initial design of TLD.

So far, I don't know a single TLD like that. It's not possible on a registry level to understand who is the registrant—I mean which language is understood by the registrant—because, for example, in a … Yeah. [inaudible] IDN TLD, there could be a registration done via a German registrar and via their, for example, Turkish reseller, made by some people speaking in Turkish language, and we will

never know that before the actual exchange. So, you cannot understand from the registry level what language is used by registrants. It could be understood to some degree from the Registrant Agreement with registrar or reseller. Thanks.

KATHY KLEIMAN: Thanks, Maxim. I appreciate that. I'm not sure what we're looking at here. Perhaps … Oh, this is Griffin's language. Okay. Zak, go ahead, please.

ZAK MUSCOVITCH: Thanks, Kathy. I'm getting a little bit confused about where we are, but it sounds to me like there was a concern about how the provider is supposed to ascertain the language of the registration agreement. Griffin, I think correctly, noted that that should be publicly available.

I think that's a good answer. I would probably suggest that we double-check with Renee before we finalize this because form does the vast majority of these URS cases … So, it would probably be prudent to double-check with her.

Then, in terms of the IDN situation, I think that's an important consideration that might be a good reason for an examiner to deviate from the default rule of the registration agreement. And so, if we go back and look at the fragments of Griffin's original proposal that he shared with the e-mail list, which I just put into chat, I think that's the last … It's just the very last portion of the original proposed implementation guidance.

So I think, if we were to say, "Well, listen. The default rule is the language of the registration agreement," and subject to confirmation, that's ascertainable from Renee, "the IRT should develop implementation guidance that takes into account whether, in a case of an IDN or other circumstance, the examiner should take that into account in deviating from the default rule." But I think that's where we're at. I would support that approach. Thank you.

KATHY KLEIMAN: Zak, before you go, is that the approach that you see in the highlighted text of Griffin's e-mail? I think so, but I just want to ask you. If you're talking, I can't hear you.

ZAK MUSCOVITCH: Oh! Thanks, Kathy. That has more stuff in it. I think I would focus on the last sentence, starting at "this potential guidance can also consider the relevance of other factors." I think that that's where it's at, because that gets rid of the stuff about the privacy or proxy service, or reseller, and that stuff.

KATHY KLEIMAN: Okay. So, put that back in from URS recommendation number nine, via Griffin's proposal, into this consolidated recommendation?

ZAK MUSCOVITCH: Yeah, starting with "this potential guidance can also consider."

KATHY KLEIMAN:	Can staff highlight that language, please? I think it's the next sentence, actually. Yep. Okay. So, we've got it on the screen. Zak, thanks. Thanks for trying to guide us through this.
	Does anybody object to the inclusion of that again? So, next steps on this recommendation appear to be to check in with Renee as the largest provider, as representative of the largest provider of URS services, and including this language so that we have the references to IDN and others. Zak, I'm thinking that's an old hand.
	Any disagreements? In that case, like the prior recommendation, staff, can you circulate this as revised to the working group after this meeting? Ariel says, "Sure." Okay. Great. Moving right along at 10:04, or 10:04 Eastern Time. Terrific. Thank you for the discussion and, again, thanks, everyone, for the expertise and the edits that are all aiming for the same goal, which is an understandable process for the participants.
	Okay. We are skipping number four and moving onto number five on our agenda, which is converted individual TMCH proposals number one and number six. And here, I'm going to hand it over to staff because I wasn't sure of the edits that we're looking at, or whether this is the first time we're looking at this. So, please give us some background and context on this. Thanks.
ARIEL LIANG:	This is certainly not the first time the working group has looked at this. It's because what staff did is converting the individual proposal into recommendation language, and this language is agreed by the working group. So, Kathy, you are welcome to read it, as you

usually do, just the language itself, and staff can provide additional information of the context.

And again, the context language comes from the original context or background of the individual proposal, as well as the summary of deliberation of public comments for the proposal. So, it's just to provide additional information of the background of this particular recommendation.

KATHY KLEIMAN: Okay. So, Ariel, this is the first time we're seeing this TMCH individual proposal number one that we endorsed in the box as the final recommendation language. Is that right?

ARIEL LIANG: Yes. It's just, basically, a conversion into how it looks like as a recommendation, rather than a proposal.

KATHY KLEIMAN: Great. Thank you so much for that background. So, indeed, I will read the proposed final recommendation language, and then I'll let you take us through the context in Public Comment Review sections.

So, TMCH final recommendation, formally individual proposal number one. "The working group recommends that the TMCH validation provider be primarily responsible for education rights holders, domain name registrants, and potential registrants about the services it provides."

"The working group also recommends that the IRT work with the TMCH validation provider and consider enhancing existing educational materials already made available by the TMCH validation provider with additional attention to providing information that can benefit domain name and potential registrants." Over to you, Ariel.

ARIEL LIANG: Thanks, Kathy. For the context, the first paragraph just notes this recommendation originated from the individual proposal number one for the TMCH. Second paragraph summarizes that the reason why the TMCH should be primarily responsible for education is because it is best positioned to do and best positioned to explain some services and identify the stakeholders it interacts with.

The third paragraph comments on what's provided by Deloitte in its public comment. It says that it already provides existing education on the TMCH. So, what the working group suggests is those existing materials can be enhanced, and then additional outreach efforts can be conducted to benefit current and potential domain name registrants beyond just trademark owners.

And the paragraph following that is talking about who should be responsible for developing or enhancing these educational materials, and that is the IRT's responsible. And then, it further explains that the IRT can consult with some … Will be consisting of community volunteers in consultation with ICANN staff and then bear the primary responsibility for improving these educational materials, and then be subsequently published and distributed by the TMCH validation provider.

So, the Public Comment Review section basically recaps what the context was. So, it's just recapping the suggestions come from public comments. So, that's pretty much it.

KATHY KLEIMAN: Okay. Questions, clarifying questions, and then we'll go and … I have a question. In the context paragraph starting, "The working group adopted the suggestion," first, I think this is an outstanding job. In my humble opinion, this is outstanding.

In the context … Fourth paragraph. There is an ambiguity. So it says, "The working group adopted the suggestion that the IRT would work with enhancing the educational materials." "In this regard, the IRT, consisting of community volunteers working in consultation with ICANN Org staff should bear primary responsibility for improving the educational materials."

Did we have something there about further outreach to community volunteers, kind of the larger group, academics, organizations that kind of work with these issues generally, or are we talking about the community volunteers who are already part of the IRT? I thought we had a greater outreach. Again, fourth paragraph. The working group—

ARIEL LIANG: Sorry. I can't raise my hand. So, regarding the academic reference, maybe you are referencing the Trademark Claims recommendation related to improving the claims notice? So, that does have explicit mention of academics. For this one, it wasn't explicit, but we also didn't make it very narrow who can be in the IRT, and we didn't

really define what "community volunteers" means. It didn't say it can only be ICANN members. So, it wasn't narrow, and I hope I addressed your concern, here.

KATHY KLEIMAN: Any opposition to adding the word "larger community," or "volunteers from the larger community"? The IRT does comprise community volunteers but end-users and registrants often are not representing the IRT, because it goes on for so many years.

So, were we talking about going beyond the expertise of the IRT to the larger community? That's what I thought we meant here, but I leave it to others. Otherwise, I think this is a great recommendation and would like to know what others think.

Looking for hands. If I'm missing anything, let me know. If Paul McGrady on the mountain top wants to say anything, let us know. Paul, I think you're the only one on audio right now—only. Any other edits/thoughts?

Excellent. Another individual proposal becomes final recommendation language. Terrific. We now go on to TMCH final recommendation, and this comes from our TMCH individual proposal number six. I'll just go ahead and read it, assuming the status is the same as the last one we dealt with, Ariel.

"The working group recommends that the Trademark Clearinghouse database provider be contractually bound to maintain, at minimum, industry-standard levels of redundancy and uptime."

Implementation guidance. "To assist the IRT that will be formed to implement recommendations adopted by the board from this PDP, the working group has developed the following implementation guidance."

First bullet point, "consider the advisability of requiring that more than one provider be appointed," and second bullet point, "review the work of the Implementation Advisory Group that was formed for the 2012 New GTLD program to assist ICANN Org with developing the specifications for and design of the Trademark Clearinghouse," with a footnote to the Implementation Advisory Group. Over to you, Ariel.

ARIEL LIANG: Thanks, Kathy. So, for the context, again, that's largely from the originally individual proposal, the background of that, and, as well, the deliberation of the public comment for these proposals. So, the first paragraph specifies what this is originally from. It's the individual proposal six. And then, the second paragraph talks about Deloitte as the TMCH validation provider and [IBM] operates the TMCH database, so I just want to clarify who we're concerning here in this recommendation.

And then, the third paragraph talks about the support from public comment for this original proposal and the working group's agreement that it is critical for the database to remain available for access by registries and registrars in order to provide the monetary Sunrise and claims services, and then also … Yeah.

And noted that this recommendation should be put in the final report to be considered by the IRT. And I just want to note the last sentence here. When the working group deliberated on the public comment for this proposal, some of them were unsure whether the final two bullet points are necessary, so I just want to quickly hover over here. That's the bullet point considering appointing a one-on-one provider, and then second is review the work of the Implementation Advisory Group.

So, these are the two bullet points, and some members were unsure whether it should still keep in this recommendation. And then, the public comment review paragraph basically recaps the context, just saying that public comment also confirmed support for the individual proposal, and even its anecdotal evidence, but it's still some real report of operational problems related to the TMCH database. Therefore, there needs to be a recommendation like this to address that. That's it.

KATHY KLEIMAN: Thanks. Ariel, could you stay at the very bottom? Because I'll just highlight it to refresh everyone's recollection. So, the working group agreed that there was an anecdotal but real report—and I'm in the very last sentence, here—of operational problems related to the TMCH database, and there was support that the uptime requirements and reliance of the TMCH services should be changed to industry standards.

So, obviously, if we're going to create all these rules for the TMCH, it needs to be there at the critical times of rollout/general

availability/land rush, not in that order, so that the registries, and registrars, and the whole system, can work properly. Okay.

So first, any clarifying questions, any opening questions? And then, let's go back to the sentence. So, let's go all the way back up to the top right now, Ariel, and then we'll go back to the sentence that you have raised questions on. Okay.

So, this is the recommendation, the conversion of the supported individual proposal to this new TMCH final recommendation language, and the two bullet points that go into a little more detail that may be useful to the IRT as to what we were thinking about/what has been proposed in the working group for, possibly, bringing this up to industry standards.

Ariel, you want to take us back to the highlighted language, please? So, last sentence of the context language: "However, some working group members were unsure whether the final two bullet points and the recommendation text are necessary."

Now that we have seen the recommendation, can we go back up? Now that we've seen the full recommendation, are we happy with it, the detail? It is implementation guidance that we're providing. Are we okay with the language in the box, now? Any objections to the language in the box? Any additional comments, or thoughts, or questions on this?

Terrific. Then I'm going to say, based on the resounding silence, that we're okay with this TMCH final recommendation number six, and probably delete that sentence. Let me go back to staff. I think

we have reached the end of our agenda and we don't have any other business, but perhaps you see it differently.

So, back to you for a second. Okay. Hearing nothing, I think we have reached the end of our agenda with ten minutes to spare, which is great. And for people who are on the earlier policy call, finally, time for a break after a long time online!

To everyone who was with us today, thanks so much. Staff will be circulating the slightly revised recommendations coming out for everyone's review. We'll see everybody on Thursday. Thanks so much. Take care, everyone. Bye-bye.

JULIE HEDLUND: Thanks very much for chairing, Kathy, and thank you, everyone, for joining. This meeting is now adjourned. Bye-bye.

[END OF TRANSCRIPTION]