
ICANN Transcription

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

Wednesday, 17 April 2019 at 1800 UTC

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<https://gns0.icann.org/sites/default/files/policy/2019/audio/gns0-rpm-sunrise-17apr19-en.mp3>

Zoom Recording: https://icann.zoom.us/recording/play/Wj9-hqmSS9eg9tPcLI9VRT-ZI1oQdDByYS-yp-3q7M21u-jYMdOn7_6s8p8eSQO?startTime=1555524322000

Attendance is on the wiki page: <https://community.icann.org/x/PQB1Bg>

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MICHELLE DESMYTER: I'd like to welcome everyone. Good morning, good afternoon, good evening. Welcome to the RPM Subteam for Sunrise Data Review call on Wednesday the 17th of April 2019.

In the interest of time, there will be no roll call. Attendance will be taken via the Zoom room. I would like to also remind all participants if you would please state your name before speaking for transcription purposes, and if you would please keep your phones and microphones on mute when not speaking to avoid any background noise. With this, I will turn the meeting over to Julie Hedlund. Please begin.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

JULIE HEDLUND: Thank you, Michelle. I'll just quickly go through the agenda. First item is the updates to statements of interest, then I'll turn over to Michelle for a very brief introduction to Zoom, then we'll go on to agenda item three, the development of preliminary recommendations where we will continue the discussions on question three and related proposals, and also on question four and related proposal 11, and then move to question one in conjunction with individual proposal nine and, time permitting, to question 5A.

And let me ask if there is anyone who has Any Other Business. Noting that Ariel has just put the summary table into the chat as well. And I'm not seeing any hands, so let me go back to item one and ask if there are any changes or updates to statements or interest.

Also not seeing any hands, let me go to Michelle for the Zoom introduction.

MICHELLE DESMYTER: Alright. Thanks, Julie. For the Zoom features, I'm sure a handful of you have become familiar already with it, but if you hover your mouse over to the bottom of your screen, you will see a list of options. So in order to raise your hand throughout today's call, you want to click on the participants, and that will pop up all the participants on the right-hand side who's logged in. You will see the option to raise your hand right below all of the names. You can lower your hand, raise your hand.

And again, I'll go over at the very top of your screen to toggle between different screens if need be. Go to the top of your screen, it says "view options" with the little dropdown arrow. It's located in black, and you'll see Ariel's name checkmarked at this time as well as Julie has the agenda, so you can flip between screens.

And then also, to activate the chat feature, click on the chat button and you can chat privately to one on one to someone, or to everyone. Back to you, Julie, and please chat me with any questions as well.

JULIE HEDLUND:

Thanks, Michelle. And I'll just note that several people have your phones unmuted, and so we do suggest that you mute your phone when not speaking, because I think I was catching a little bit of background noise. To do that, if you look at the participants list, you'll see your name, and to the right of that, or you can either mouse over your name and you can click on mute, or you can go other bottom of the screen, I think as Michelle mentioned, as well.

So with this, I believe I'm turning over to David McAuley who's going to give a quick recap of last week's meeting.

DAVID MCAULEY:

Thanks, Julie, and Michelle. Thanks very much. Greg and I were going to try doing something a little different, and that is that last week's co-chair who led the discussion might do a brief recap. It's not meant to be exhaustive, it's meant to hit the high points and just set the table to refresh memories.

What I'll say about last week's call is we discussed charter question three, including individual proposal number ten from Susan Payne in which she suggested a procedure for trademark owners to challenge designation of a domain name as premium, and she explained it well.

Then some conversation took place in which among other things, Jason expressed concern that the mechanism would be addressing outlier situations might be a bit formal, and that maybe an informal approach that would allow the trademark holder and the registry operator to find ways to stop specific cybersquatting would be preferred.

Greg spoke in his personal capacity and expressing concern over that kind of a soft solution. Phil weighed in in his personal capacity noting that pricing is at the heart of the issue we're discussing in that context, and we have to exercise care in how far we go in such a discussion before lobbing the issue over to the SubPro PDP. He also mentioned that a proposal like this would need more detailed meat on the bones prior to being able to apply.

Maxim mentioned that equal sunrise pricing might be a solution. This was mentioned in the context of best practice rather than a regulation. Claudio suggested getting input from ICANN Compliance on this, and then we moved to question four and Susan also had presented an individual proposal number 11 to implement an obligatory PIC, public interest commitment, or a contract provision that the registry wouldn't act to circumvent the RPMs, especially compared to general availability pricing, and not do anything to undermine brand owner access to sunrise.

She explained the approach, and Maxim expressed some concern about would it be an issue with the picket fence, noted the contracted parties house would probably not favor this.

Jason asked what standard would apply, would it be too subjective?

Susan noted that it could be a little subjective, but mentioned that there are PICs and there are PIC DRPs, and panels sort through these things. That's their job.

Kathy then sort of set the table for this week's discussion, asking that we run down sub questions in charter question number four as they lay out a logical path, and I think Cathy was concerned that maybe the questions would give us a path that was a little bit more logical than the discussions seem to be taking at the time.

So these are illustrative of the discussion that we had, and what I'm hoping to do is add focus here, and if any of this prompts you to consider making a comment, counterproposal or a proposal, that's what the list is for, and the threads that we're putting out. Give that some thought, be concise. If you can do it in a sentence or two, or a paragraph or two, please do.

With that, I will say that is a general summary, and it's over to Greg who's going to be the leading co-chair on this call. Thanks.

GREG SHATAN:

Thank you, David. Thank you, staff, and all, for attending, and for that summary.

I think that leaves us starting with question three. Or is it four at this point? I see a lot of scrolling going on on the screen.

DAVID MCAULEY: Greg, hi. I actually think we are in question number four. Julie, you can weigh in if you wish, but it was my recollection that we had gotten into four and Kathy had suggested we go through the subquestions in four. I think she was referring to the final three-ish questions there. Thanks.

JULIE HEDLUND: Thank you, David. Yeah, while we included a continued discussion on question three, if you all feel that that conversation has been exhausted or at least could continue in the threads on the list, certainly, we should go ahead to question four. Thank you for that, and just to remind you all that staff captured where we stand so far on those discussions in the summary table that Ariel is sharing. Thanks very much, and over to you, Greg.

GREG SHATAN: Thanks. Looking back at three, I think that the recommendation there is in sufficiently good shape. Not that it's final by any stretch of the imagination within the group, but it's in sufficiently good shape that we should move on and work on question four.

And as Kathy suggested, we should work through the subquestions of question four as kind of a pathway or thought process for dealing with question four. As well, we have individual proposal

11, but we should think first about whether we have a proposal, if any, coming out of our kind of combined discussions.

So just to look at the subparts of question four begins by asking, are registry operator reserved name practices unfairly limiting participation in sunrise by trademark owners? After that, should section 1.3.3 of spec 1 of the registry agreement be modified to address these concerns? Should registry operators be required to publish their reserved names list? And what registry concerns would be raised by that publication? What problems would it solve? And lastly, should registry operators be required to write trademark owners in the TMCH notice and the opportunity to register the domain name should the registry operator release it? What registry concerns would be raised by this requirement?

So with that table setting, I think we can look at the question of whether the registry operator reserved name practices are unfairly limiting participation in sunrise by trademark owners. I do think we had some discussion on this in the past, but it behooves us to pick up on that at this point. So hopefully, I'll be able to manage the hands from the tablet, which is what I'm using now. Maxim notes in the chat we had some lengthy discussions about it in the chat.

I think that we shouldn't completely rehash those. I think a lot of it echoes what was discussed in response to question three with regard to whether there were practices with reserved names. That really ... first off are the words, are they unfair? Not all reserved names are de facto unfair, I assume. But some may be, and some games may have been played by some registries, conceivably, with regard to reserved names which were then released later as premium names or the like.

But I'd like to see what others in the group – and we have a pretty good attendance this week – have to say about this point. So I'm looking for hands. If there are any, I'm not seeing them.

DAVID MCAULEY: Greg, hand from John McElwaine.

GREG SHATAN: Thank you. I see a hand from John, and I see a hand from Maxim. Go ahead, John.

JOHN MCELWAINE: Thanks. Hi. With respect to this question – and I think I've made this point with others – maybe to parse it out a little bit – and the problem I have is with unfair, because I think everyone has their own definition of what unfair would be. I can let you know from personal experience I've got several brand owners who have trademarks registered in the clearinghouse that could not take part in sunrise because their names appeared in a reserve name list. In every case, those trademarks are unique, but they are dictionary words or they are initials.

So some folks may say that's not unfair. I think it's really going to come down to what the definition of fairness is, but I can let you know that in several instances, I personally have seen trademarks being blocked.

So I think that that's going to be having some discussion around unfairness or just at least coming to the conclusion that there are

going to be marks that are going to be swept up in a reserve names list without a doubt, and that is just by virtue of brand names being also words that have other meanings. Thank you.

GREG SHATAN: Thank you, John. Maxim.

MAXIM ALZOBA: To just remind us about the discussions of the past. First of all, there were concerns about fair. It's not one-sided games where evil registries prevent everybody from doing this and it's not fair. All kinds of participants can be bad actors.

For example, if [4D] is granted, then we will see lots of situations where a quite good name is going to be released for some reason, and then we magically see lots of new registrations in trademark clearinghouse. There will be correlations of this sort.

And about the requirement to publish reserve name list, for some registries, it will not be possible. For example, we are blocking around 9000 or 10,000 swear word combinations because we don't see it to fit mission of the [city gTLD.] And some of those words are trademarks, so guess some well-known four-letter words in English are going to be registered by this smuggling point. I'm not sure it's for benefit of the public interest. And the same is for the generic terms which are, I'd say, fit the mission of the TLD.

For [Geos, it's for example metro,] police, fire department or something like this. Lots of generic terms, because basically, cities

were invented before the trademark law. And for example for some grocery association, it could be some kind of fruits and vegetables.

So it's not that simple, and for example publishing our reserve list would cause us violation of civil court, basically don't swear in public for legal entities.

So it's not a simple thing. I would really recommend us to just take the transcripts of the previous discussions of this, because if we don't do it, it's just a loss of time. Thanks.

GREG SHATAN:

Thank you, Maxim. Kristine Dorrain, please go ahead.

KRISTINE DORRAIN:

Hi. Thanks. I just wanted to weigh in really briefly with something I said on the last call, so for those of you who were on the last call, I apologize, you'll hear it twice.

But you'll recall that when the original RPMs were created, there was a balance. I was part of the drafting team that included the word "unfairly" here. And I think, yeah, we can nitpick over what "unfairly" means, but it's here because we understand that reserve name practices might limit participation in sunrise by trademark owners. But the point we were trying to get at here is we wanted the entire working group to think about balance and to think about the fact that, yes, in a few cases, in some cases, marks by their very nature or whatever might be put on a reserve names list. As

Maxim pointed out, maybe they're profane in some jurisdictions or something.

That could happen. The question is, on a balance, is this such an overarchingly crushing problem that we should be amending the current RPMs to do something about it? And I don't think the data is clear that this is an overarchingly crushing problem that requires us to make a change. I think we look at the data and we see, yeah, looks like it's happening.

It was anticipated. We knew when it was created that some people's names might be suppressed here. So I think I just want to make sure that we don't go down the rabbit hole of finding a couple of examples that would completely tarnish the entire situation. Thanks.

GREG SHATAN:

Thank you, Kristine. Maxim, is that an old hand? Susan Payne, please go ahead.

SUSAN PAYNE:

Yeah. Thanks. I'm really reluctant just to start again a conversation, the same conversation that we had last week, but just to kind of reiterate that that some of these concerns that Maxim has been raising and Kristine has been raising was why I had suggested that maybe the path forward was a PIC, a public interest commitment, and one that then a panel could consider and could be weighing up these nuances and determining whether there was a reason why our name was on a reserve list, and that it's not an unfair practice.

That way, we're not granting some extension of the rights to trademark holders overall, but we are recognizing that there were a number of situations – and there were – where brand names were put on reserve lists or put on a list that was reserved as a premium name to be released later when there was a big sort of marketing push on premium names or whatever, and that in some cases, there was a reason why, because in some cases it was Apple in the TLD of fruit. That's a fake example. And in some cases, there were not good reasons why. There was no sort of dictionary correlation, if you like, between the meaning of the trademark and the meaning of the TLD.

And we can't fix all these problems, but we could recognize that it's possible for us or it's possible for an implementation team to build a mechanism or to build a PIC that would allow a panel to address this.

And I know that there was discussion last week about this being too vague and us requiring the panel to be making these decisions, but that is what the PICs are about. The PICs, if you look at them, require an assessment. And I think that would be a way to go on this.

But I did also just want to flag that our proposal was not just limited to reserve name practices. I did also make the point that as I was suggesting it, it could cover something like having this down to general availability pricing at \$10 and the sunrise pricing at \$3 million. That kind of complete disparity of pricing between sunrise pricing and general availability pricing, which I don't believe is going behind the picket fence.

There is a recognition that ICANN is not meant to be controlling the pricing on new gTLDs, but there is some balance, because registry operators are also supposed to be offering these rights protection mechanisms, so if methods are used to circumvent that, then that's something that should be possible to be addressed.

GREG SHATAN:

Thank you, Susan. I'd like you to think a bit about what the PIC would say a bit more specifically. Not wordsmithing, but just kind of what the sense of it would be. It could use words like "unfairly" or "abusive" or "discriminatory" or "shocking the conscience" or whatever it might be, and on the other hand, could also recognize legitimate interests in various types of reserve names, as mentioned, a geo TLD, a city TLD more specifically, could have very good use for police, fire, sanitation, whatever, mayor, etc., whether or not those are trademarks.

But it's something to think about, try to put a little bit of meat on the bone. While you're thinking about that, I'll go over to Maxim. Please go ahead.

KATHY KLEIMAN:

Can I join the queue? Sorry, I can't raise my hand.

GREG SHATAN:

Got you, Kathy.

MAXIM ALZOBA: Also, one of the ideas about balance, after all, we're not designing a system which is going to be manually regulated. After all, it's not 200 years ago when everything was processed on paper. Two points. If we touch too much manual operations to the system, it will not work properly. We will spend years trying to get a simple domain name. I'm not sure it's how it works.

And the second thing, the words about circumvention, it actually works in two directions, because situations where we're trying to regulate pricing is actually circumvention of principles. It's circumvention of picket fence. So we should be careful using this word. Thanks.

CLAUDIO LUCENA: Greg, can I get in the queue?

GREG SHATAN: Yes, I've got Kathy followed by Claudio. Kathy, please go ahead.

KATHY KLEIMAN: Thanks, Greg. Okay, so first, I just wanted to alert everyone that question three has an answer. So question three is overlapping with question four on premium names and reserve names. Question 3A is, should registry operators be required to create a mechanism that allows trademark owners to challenge the determination that a second-level name is a premium name or a reserve name? And for some reason, the recommendation says that ICANN Org shall establish a uniform mechanism that allows trademark owners to challenge a determination by a registry

operator that a second-level name is a premium name or a reserve name during the sunrise period.

What I remember is that we agreed, and I think it was Jason who talked at length about this, but we agreed that trademark owners should be able to question a determination by a registry operator. So now linking to question four, some of the examples have already come out, the apple.fruit – hypothetical, of course – police.nyc, windows.construction.

So, are these harms, or is it unfairly limiting participation in the sunrise by trademark owners who do have trademarks on those but not in the dictionary words? This has already been raised.

So first, what mechanism did we decide on? Formal or informal? Second, the murkiness and the concerns that Kristine raised in the chat I think need to be elevated. And the third is the one area I do think, unless anybody's jumping up and down, but discriminatory pricing, that it's much more during sunrise than during general availability. That's something that seems inherently unfair and something that we can address. But some of these other things, I'm not sure how formal a mechanism for challenging we created and how much cost and burden that's going to add on to the registry operators. Thanks.

GREG SHATAN:

Thanks, Kathy. I think that we will be looping back to question three where we have at least kind of a strawman recommendation, but clearly, there are things to be discussed

about it as you have raised, and the strawman might start looking very different when we revisit him.

So I've got Claudio followed by Jason and David.

CLAUDIO LUCENA:

Thanks, Greg. So yeah, just a couple of points on some of these things we have been discussing. In terms of your suggestion to Susan about adding some meat to the bone and some of the issues that we're talking about here, I think there are going to be cases, one-off type cases, and some of the examples have been mentioned, where there's going to be a legitimate reasons to reserve a name and it's going to create a clash potentially with trademark.

So I think how we might address this is if there's a pattern of doing this. And that could be something that needs to be established. So if it's a name here and a name there, it might not be enough to trigger this mechanism, but if there is an extensive pattern of this taking place – and I think there have been cases of that in certain TLDs – then we're really talking about a different situation in that context.

Another point I wanted to make just in general about the pricing concern and the picket fence is that there is a general principle in contract law that when you have two provisions in a contract and the contract is being interpreted in a way to render one of those provisions meaningless essentially, [that is generally disfavored.]

So while ICANN may have a rule about not regulating pricing, that is not necessarily a rule that would prohibit pricing from ever being

taken into consideration in the way the contract is being applied. So I see those two things as being separate, and I also wanted to mention the point that Maxim has raised, and I think this has come up several times about the fact that there might be entries in the trademark clearinghouse that are pretextual and they're not necessarily [inaudible] trademark.

I've heard that come up multiple times on some of these policy discussions that we're having, and I think something that we should do is take a look at there is an existing sunrise dispute resolution policy to address those types of issues, and that is something that we could take a look at and enhance, so if there is that type of gaming [trademark claims,] then we can enhance the policy that has been designed to address that. That's basically it. Thanks a lot, Greg.

GREG SHATAN:

Thank you, Claudio. Just one quick follow-up question. When you say that they're establishing a pattern or an extensive pattern, how would you categorize that pattern? A pattern of what? It can't just be a pattern of having reserved names. So it must be something more.

CLAUDIO LUCENA:

Yeah. In other words, if a name was reserved and it clashed with a trademark, that one example of that might not be sufficient to trigger this mechanism, and that there would need to be a pattern where you can look at names that were reserved and say, "Well, [inaudible] examples where [inaudible] reserve." I think Maxim

mentioned the police example. But there were many names that were reserved that included a wide range of marks, fanciful marks and other types of marks where it's pretty clear on its face that this is being done for ulterior reasons.

GREG SHATAN: I'll go on to Jason. Not hearing you, and your phone is muted.

KATHY KLEIMAN: Greg, if I might, if anyone's using a cell phone or regular phone, star six unmutes you generally. [inaudible].

GREG SHATAN: Okay.

JASON SCHAEFFER: Can you hear me now?

KATHY KLEIMAN: Yes, Jason, we can hear you. Great. [inaudible] new system.

JASON SCHAEFFER: Yes. Zoom is a great system, so we'll all get used to it. So thank you. I think some of what Claudio said bears consideration for further discussion, certainly.

Again, one of my concerns is that we are overengineering something that the data doesn't show or support widespread

abuse. Yes, I see and I do agree that there have been instances where there are abuses, and nobody wants that. In other scenarios, there have been situations where I can say it appears that perhaps the registry operator had justification one way or the other.

I do think that – I don't know how we're going to describe it, not predatory pricing, but discriminatory pricing. Susan, I think, gave the example, \$3 million in sunrise yet \$10 in GA, yeah, that's maybe something we can tackle. But when we get into the issue of reserves and why did a registry choose to reserve a whole swath of names, having consulted with other registries over the years, there are scenarios where a registry may actually be looking to avoid problems with cybersquatting. There's actually perhaps a justification that's actually in line with the brand in terms of trying to avoid a 99 cent or a \$10 registration for a trademark which would end up costing that brand over more to pursue in other methods.

So I just think it's worth really thinking long and hard about, is there [really a] problem here, and is this the best way to address it? It behooves us to do that, because we're going to spend a lot of time, as we've said, putting meat on the bones and trying to create a standard. Good luck trying to really articulate a standard that's not going to appear subjective, and analyzing every single action that a registry operator has taken. I think that's going to be very difficult task for us to do successfully.

So in sum, I'm not averse to tackling the issue, but I do think we have to look closely at, again, what Kristine said earlier, what I've said, what others have echoed, is there real evidence of this?

And then as a final point, not to put too fine a point on it, are we creating an mechanism that in the next round is really a moot point? That's not a reason not to do this, but how many of us really believe that generic words are going to be registered in large measure in the next round and have large open strings? All those good words have probably already been taken. So I anticipate, as most of us probably do, that the next round is going to look very different than this past round, and you're probably going to see a lot more – let's hope – corporate registrations, smaller or mid-size businesses securing their TLDs and doing good things with that, and much less of this generic open type of round that we had. As we know, DONUTS seem to have taken up everything, so go through the dictionary, I don't think there's a lot of great opportunity out there for a business case to get new TLDs.

Again, that's not a reason not to tackle this, but in my mind, it weighs against seeing a widespread problem in the future. Thank you.

GREG SHATAN:

Thanks, Jason. All good points and ones we should think about in terms of the degree of harm. I just think it's funny that in the domain name system, DONUTS eats you. In any case, maybe that's not that funny. David, please go ahead.

DAVID MCAULEY:

Thanks, Greg. And I did think it was funny. Anyway, I had put my hand up before you mentioned or spoke to Kathy's question, so since my hand is up I left it up, but I would like to talk about

question three as she asked about it, and simply note that in my opinion, personal opinion, we did not reach agreement on a formalized mechanism last week, and the discussions – that’s what these discussions are for and the focus that we’re calling for is having a chance to discuss these questions now. As you said, Greg, we’ll loop back, but there was some divergence on that. I don’t think we’ve reached agreement yet. In those instances where we can reach agreement and either make or agree that we will not make a recommendation, that’ll be outstanding. But I think folks will see mail from us in the coming weeks saying, “This is what we’re hearing around this question,” agreement, nonagreement, divergence, whatever. Anyway, I just wanted to support what you said to it, Greg. Thanks.

GREG SHATAN:

Thanks, David. And on top of that, I would expect that what we have in question three will be released as a discussion thread by staff so that we can, rather than putting this on a shelf and looping around to it at another time, discussion on that can continue as well as the discussion on four.

So [let’s see,] my list of hands disappeared. Jason, is that a new hand or an old hand? The only hand I have at the moment.

JASON SCHAEFFER:

That’s an old hand. Sorry.

GREG SHATAN: No problem. We're all getting used to Zoom and how to unhand yourself.

JASON SCHAEFFER: Yeah. And actually, I can't unhand it.

GREG SHATAN: Either you go down to the bottom or you go to the place where you raised your hand in the first place, and you can unraise it there.

JASON SCHAEFFER: That's what I'm doing, and it's telling me to raise my hand.

GREG SHATAN: Well, I'm not first level support here. I'm zero-level support. In any case, looks like we've come to a resting point here, which actually will bring me back to Susan and the question I asked her earlier about what a PIC with some meats – sorry, too many [inaudible] commercials for Arby's. Apologies for the US reference. Susan, what are you thinking a PIC might look like? And especially thinking about a PIC that won't create more problems than it solves, as we've heard a number of concerns about burden as well.

SUSAN PAYNE: I typed something in the chat and I'm now trying to scroll back to find it. Btu recognizing that this is very much drafting in the fly and

it could probably be done better, I just said something like the registry should not act in a manner calculated to circumvent the rights protection mechanisms or the sunrise. But I don't think it needs to be a specific sunrise. Including by means of discriminatory pricing. But I think it's something that obviously needs some work in terms of the language, and I'm sure people will start objecting to that.

GREG SHATAN:

Thanks, Susan. I think the PIC probably should also think in terms of meat on the bones but countervailing point which is identifying names that are reserved essentially in good faith or for legitimate interest such as ... and there was quite a bit of discussion around this before the first round of police, fire and garbage sort of things, and names of prominent streets or landmarks, etc., for geos and whether, at least from a PIC point of view, those should be – you shouldn't be able to challenge `broadway.nyc` even if Broadway is your trademark if there is a decision made to try to create a taxonomy involving major street names, just as an example. Maxim, please go ahead.

MAXIM ALZوبا:

Actually, PIC is public interest commitment, and we're talking about RPMs, so if we are talking about addendum to RPMs like addendum for [QLPs which was,] it's fine, but effectively, we're talking about trademark owners interest commitments. It's not public interest.

So I strongly object to using PICs for this if we're going to – anyway, registries have to obey rights protection mechanisms, and if we are going to make for example second amendment to rights protection mechanisms, yes, it's more or less in line with the mission of our group. But I strongly object against going to PICs which were effectively result of GAC actions if we don't want to mix GAC into this. Thanks.

GREG SHATAN: Thanks, Maxim. I see Susan's hand I believe s back up, or is up. Please go ahead.

SUSAN PAYNE: Yeah, thanks. I put my hand up to respond to you, Greg, which was just that I recognize the comments you were making, but to my mind, those kinds of scenarios that you were talking about would be ones where this challenge would be unsuccessful, and I'm not sure that it's helpful to try and think about all the scenarios, to try and set out a list of examples of cases where someone wouldn't be successful in their complaint.

I don't know. I'm sorry, it's 7:45, this is many hours of calls now and I can't draft on the hoof. But I'm not sure that the greater the specificity that you try and draft it, I'm not sure that makes it more helpful. I think it makes it less helpful.

To my mind, if we're talking about circumventing and discrimination and so on, it's in the nature of the panel assessment that they would not find for the brand owner because there is a justification.

GREG SHATAN: Thanks, Susan. I'll respond. And this feels a little bit like I don't have my chair hat on, so I'll say I don't. I was thinking more of high-level principles and not detailed lists, because I agree with you, every time you try to detail all the different ways in which something would happen, you will fail, because the universe is full of too many options.

But I'm thinking more generally about legitimate interest or tied to legitimate purposes of the TLD, I don't think you have to make a list of every public service that a city offers to come up with the idea that public services can be reserved or reserved to be used by – which may not be a reserved name per se – for the use of the municipality.

So I think there may be a path forward there. Not saying that we have to follow that path, but I think that's more what I'm thinking of there. And I think overall, I'd rather not let everybody have their day in court who's going to lose.

I realize that at some point you may cut off too many people, but these are not meant to be kind of open forums for anybody who is annoyed about not having their trademark available to them. Again, to my mind it comes down to reasoning. I see Maxim has found a cup of coffee status icon, so Maxim is having a cup of coffee.

I don't have any hands up at the moment. I think we have some idea that there might be a PIC here. We have some idea that there might not be enough of a problem to have a PIC here. We

have some idea that a PIC might cause problems. We have somewhat of an idea that maybe this isn't something to be dealt with in a PIC because it's not an issue of public interest.

So those are, I think, all open questions, so I guess in terms of coming up with a preliminary recommendation here, we could look to drafting a strawman PIC, but at the same time, I think also looking to the question of justification for dealing with this and what kind of hurdle one would have to get over to challenge hypothetically if some TLD reserved the 1000 most valuable trademarks as listed in Trademarks Magazine, even though they were dot-fruit, one might have a question at least about what's going on there and whether we should have a remedy for that. Kind of strikes me as a big part of the question here.

But I think that kind of brings us to the end of 4A and brings us to 4B, which is, should section 1.3.3 of spec 1 of the registry agreement be modified to address these concerns? And I have to admit that I did not pull up the registry agreement, though I think I have some lying around, to see what 1.3.3 is. So if staff or another participant would like to refresh our recollection, that would be helpful.

I am trying to grab it right now. You never can find a registry agreement when you want one. Okay, here we go. And Microsoft Word has stopped working. Okay, wonderful. John has put the link in the chat.

JOHN MCELWAINE: Hey, I just realized that was the amendment, so I'm getting the base registry agreement up. One sec.

GREG SHATAN: Okay. Kristine reminds us that the RA cannot be unilaterally amended. And here I have it, and I need to find spec 1. 1.3.3 is under – section 1 is consensus policies. 1.3 says such categories of issues referred to in section 1.2 of the specification shall include without limitation, and 1.2 deals with consensus policies. 1.3.3 says reservation of registered names on the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to, one, avoidance of confusion [inaudible] misleading of users, two, intellectual property, or three, the technical management of the DNS or the Internet, e.g. establishment of reservations of names from registration.

So that is 1.3.3, which I see John has also pasted into the chat. So we at least have a baseline here. Let me go back to the summary table. So the question is, should section 1.3.3 be modified to address [these] concerns? [These] concerns I guess being reserve names unfairly eliminating participation in sunrise.

So let's see, do we have any hands up on this now that we've figured out what the question is?

CLAUDIO LUCENA: Can I make a comment?

GREG SHATAN: Claudio, please go ahead.

CLAUDIO LUCENA: Yeah, so I might be misinterpreting this, but this provision is there to basically say the registry can reserve names related to its own intellectual property. Then I think that's kind of outside the scope somewhat of what we're discussing. But again, I could be misinterpreting this. But I kind of was reading this as somewhat of a [inaudible] obligation that the registries could go ahead and do that. But I'm not sure if that's correct.

GREG SHATAN: Claudio, yes, 1.3.3 certainly doesn't, without context, lend itself to an easy discussion.

CLAUDIO LUCENA: Yeah.

GREG SHATAN: But the other things under 1.3 are principles for allocations of registered names such as first come first serve, prohibitions on warehousing. So basically – also maintenance of access to accurate and up to date information concerning domain name registration. That's quite a nostalgic reference.

So basically, this goes to some standard actions of a registry operator or potential action. And it may be that rather than referencing 1.2 or 1.3 it should have been 1.2.4, or maybe 1.2.2, which are consensus policies relating to functional performance

specs [for the provision of] registry services or registry policies reasonably necessary to implement consensus policy relating to registry operations or registrars. 1.3 really seems to be kind of a callback to 1.2.4 trying to carry out a consensus policy.

So I guess the question is how would one change 1.3.3 if at all based on that context? Maxim, please go ahead.

MAXIM ALZOBA:

Actually, it's about consensus – this bit of text is about consensus policies, and what they can and cannot do, because if you go to 1.4, you will see that 1.4.1 prohibits limiting the prices of registry services for example. So I'm not sure why are we going to look into the way of how consensus policies work. It's definitely out of scope of this group. It might be relevant to GNSO council, but not today's group. Thanks.

GREG SHATAN:

Thanks, Maxim. Good question. The only answer I can give is because it's in the charter questions or in the agreed versions of what started out as the charter question. [But it may be that] your answer is essentially the answer to this, unless folks have some other ideas.

Anybody else? Susan Payne, please go ahead.

SUSAN PAYNE: Yeah. I think I'm with Maxim here. I've never understood this question. This is a list of consensus policies, and so I don't see how we could amend that list.

Now, perhaps what it's really asking us is, do we want to, within the scope of that list of consensus policies, create one, or amend one that exists? But we can't change the list of what's considered a consensus policy, I don't think, in this RPM working group. But Mary's got her hand up, so maybe she could help us.

DAVID MCAULEY: Mary, please help us, we're wandering in the desert.

MARY WONG: Hi, everyone. That's very flattering, Greg. I'm not sure I can. But to the extent that section 1.3.3 – in fact, everything in 1.3 relates, as you said, Greg, to 1.2, the particular points in 1.2 in terms of the scope of consensus policies, I believe those essentially reflect what is in the bylaws, so essentially, what you see in 1.2 of spec 1 here carries over what is defined in the bylaws as the scope of the policies. So in the sense that that's background information, that also relates to Kristine's point about amending this particular section. I think my point from the staff side is it's a broader point, and it touches actually on the scope of consensus policies which are reflected in the bylaws.

GREG SHATAN: Thank you, Mary. I think my next hand is David McAuley. David, please go ahead.

DAVID MCAULEY: Thanks, Greg. I'm speaking in my personal capacity here. I just want to say I agree with what was just recently said by all the speakers, especially Kristine in chat, Maxim and Susan.

I think it's an unfortunately charter question, 4B, but I will also say that I think one of the things that's causing us to struggle here is there's so much overlap between charter questions three and four, and we're trying to address each specifically, that I think we're getting ourselves tied in knots. Perhaps. I don't know. I think the discussion is good, the discussion around what is right here in this issue of pricing and reserve names. But I think when you and I and staff come together to sort out how we come up with summaries of these things, as you mentioned earlier in the call that we'll do in the coming weeks, we might try and draw these together and see if there's proposals that make sense in light of both of the questions. Anyway, thank you very much.

GREG SHATAN: Thanks, David. So it seems like we're coalescing here that this is probably beyond the scope of the working group to change this, especially because it ties into the bylaws and definitions of consensus policy, so if we're going to recommend changes to consensus policy, which of course, we can, it wouldn't just be making a change to spec one of the RA, we'd be doing something different. We'd be dealing with it on a whole different plain.

So I think that in and of itself, the answer is that modifying section 1.3.3 is outside the scope of the group, at least as a discrete

action that could be taken or not taken. I don't think we can just recommend a change to 1.3.3 in the abstract. If anything, it would have to change before something more fundamental had changed around consensus policy elsewhere. So I'm not sure if that's something that has broad support, but certainly don't see anybody who is supporting a change to 1.3.3 or any kind of specific change to it. So I'll take Maxim, and then – unless Maxim will just pound us into the ground with the final nail. Go ahead, Maxim.

MAXIM ALZOBA: Yes. If we scroll down a bit, I believe the prohibition is in 1.4.4.

GREG SHATAN: 1.4.4 says that in addition to the other limitations on consensus policy, they shall not modify the provisions and the registry agreement regarding fees paid by registry operator to ICANN, if I'm reading the right – I'm not sure that that's germane exactly, but I think even without that, I don't think we have the ability to change 1.3.3 as such. So I don't think this is going to the issue of fees paid.

But in any case, since we have zero support for – we have no strawman for changing 1.3.3, zero support for changing it, and for whatever reason, a cluster of reasons, the view that 1.3.3 probably cannot be changed by this group as a matter of scope, I think we should bury 4B and move on to 4C, especially since we're now down to 20 minutes or so of non-AOB time.

4C is, Should registry operators be required to publish their reserve name lists? What registry concerns would be raised by that publication? What problems would it solve?

KATHY KLEIMAN: Greg, happy to go into the queue.

GREG SHATAN: You are the queue. Please go ahead.

KATHY KLEIMAN: Okay, I'm the queue. So I think we did discuss this earlier, and Maxim told a lot about reasons not to publish the reserve names list that would include illegality under local law.

Can we link, is this a legitimate link of questions three and four that we create some kind of questioning mechanism? Not necessarily challenge mechanism since that sounds more official, but questioning mechanism that would include premium names and reserve names so that a trademark owner could reach a registry at least ask about why they can't register a trademark that's in the trademark clearinghouse.

So yeah, I think we have an answer to 4C that's about why registries shouldn't be required to publish their reserve names, and if we need to amplify it or provide additional information, I'm going to volunteer Maxim, but I assume he could do that. Thank you.

GREG SHATAN: Thanks, Kathy. I've got John McElwaine.

JOHN MCELWAINE: I guess I'm going to echo what Kathy said, though I think it would be a great idea to publish the reserve name list, it caused a lot of problems for me and my clients during sunrise with not being able to obtain a domain name and not knowing why. But I would like to hear the legitimate reasons for not publicizing that, so I'll turn over the floor to Maxim.

MAXIM ALZOBA: The [inaudible] is some registries actually, they allow you to check if the name could be registered or not, basically via WHOIS, where you had answer that this domain cannot be registered. It's a good sign that it's in the reserve list. But it was not obligatory, so it varied from TLD to TLD.

And about the reasons why not publish, it also varies from TLD to TLD. [inaudible]. It's up to jurisdiction in which this legal body is established. So what might be problem for some might not be problem for others. But if we're trying to create something universally applicable, it's bad to stick to something which doesn't cause lots of issues. Thanks.

CLAUDIO LUCENA: Can I get in the queue?

GREG SHATAN: You're in the queue after David McAuley and Kristine Dorrain. Go ahead, David.

DAVID MCAULEY: Thanks, Greg. I just wanted to follow up on what Kathy said, and I think what I heard, Kathy, was that you would suggest we move from a challenge mechanism in proposal ten – I think that's what you're talking about – to an inquiry mechanism. And if that's the case, I don't think you're a fan of the threads, but if there's any chance you could sort of crystalize that suggestion if I've got it right in a sentence or two or three and send it to the list, that might be quite helpful for us to sort of coalesce all this, and if it's possible.

Maybe I didn't get it right, but I thought that's what I heard. Thank you.

GREG SHATAN: Thanks. And before I go to Kristine, just a brain drizzle on my part is whether the querying mechanism would allow a query as to whether a name was on the list. I think Maxim said that was possible in some cases, if not others. But maybe also queries about whether for instance trademarks have been chosen because they're trademarks and put on the reserved names for that purpose. We'd have to think about what kind of inquiries or queries could be made and whether – to avoid the hassles that John's clients, among others I'm sure, experienced, without kind of just [sole] publication. And maybe this could also be published

upon request or some sort of methodology that would not cause anybody to break any obscenity laws.

So we'd have to think about all those things. I've got Kristine, and then I think John and then Maxim.

KRISTINE DORRAIN:

Hi. Thanks. So a couple of, I guess, points of information about reserved name lists. Kind of, I guess I'll start with John's question in the chat about why the lists vary from TLD to TLD. And it's because they're part of the confidential business plans.

Different registry operators have different strategies for why names are reserved. Some reserved a vast number of names for various reasons, intending to maybe meter them out slowly. Others reserve very few. And people reserve names for various reasons, semantic reasons.

So if you have a TLD, we will pick on – because Amazon has dot-bot, let's pick on dot-bot. One thing we might have done – and I was not part of the person that made the list, so I can't tell you for sure how we did it, but we might have gone through and used like a word generator to figure out words that end in the characters BOT to figure out what names would have a semantic meaning, like ro.bot or something, and then put those on a reserve names list because that would maybe be super valuable and people would find that interesting and amusing.

We might have reserved profanities. We may have reserved names of specific figures. Registries may reserve names because

of their local laws, as Maxim points out, may require them to not have certain names be registered as domain names.

All of those reasons might be unique by jurisdiction, might be unique by registry operator, or might be unique by TLD. So it is a totally different list in a variety of different circumstances, which is why the list is varied.

So then once the registry operator creates that reserve names list, it is not a static list. So at any moment, 10, 100 times a day, the registry operator can add or drop names from the reserve names list. And it basically just means names that it's basically blocking from registration at this point. It's not doing anything with those names, it's just not offering those names for sale right now.

The 100 names referred to in 2.6 is names that the registry operator is reserving to itself for its own use. That's not considered a transaction for the purposes of billing. And those names, once you use up your 100, you can't add or drop. Those are gone. Once you spend them, they're gone. And they're two totally different lists.

When we talk about reserve names, we just talk about names that the registry operators choosing not to reserve at this time and may release in the future at any given point. Those names are subject to the claims period, which is a totally different conversation. But hopefully that'll help as to what sort of some of the practical problems might be with requiring those lists to be published. Where do you publish them? How do you update them? How do people access them? And most importantly for the registry operator, we can detail confidential business plans as to how you

want that TLD to be used in the future by determining which names are being withheld from registration at this point. Hope that helps. Thanks.

GREG SHATAN: Thanks, Kristine. Very helpful. John and then Maxim.

CLAUDIO LUCENA: Greg, I think I was in the queue after Kristine.

GREG SHATAN: That's right. I should have noted that. Claudio, go ahead.

CLAUDIO LUCENA: No worries. Thanks a lot. So I'm absorbing some of the things that Kristine just said, which was a very helpful intervention. But I was initially looking at it the same way John did in that there's a great deal of value in having transparency in the registration practices and of registry operators, which I think is something already embedded in the contracts, that the registration [policies] are clear and transparent, and nondiscriminatory.

So I think it's something that furthers that objective, and when I was thinking back to the way the RPMs, how this all came about, the way the RPMs were ultimately implemented was actually a very convoluted process. Maybe staff can confirm this, but to the best of my recollection, the fact that registries could reserve an unlimited number of names was not something that came out until

the final RPMs document was published, which is actually after the applications were submitted, I think a good deal afterwards.

So I don't think this was something that was taken into account when registry operators applied for their strings, but Kristine certainly and Maxim mentioned some of the claims about concerns that could arise, and I just wonder if there's ways we could address and kind of find a middle ground, and to provide an example.

If there is an issue with local law, then we certainly don't want registry operators to violate local law, and that should be – if it's not already an exception, that should be one that should be part of the process. So if it violates local law, then those names wouldn't have to be published. And maybe something similar could be introduced to address Kristine's point about confidentiality, but overall, I do see a lot of value in publishing these names, because otherwise, we just don't know what's really going on, and if there is gaming, even if it's just a small number of registry operators reserving names for illegitimate reason, it's just very hard to get a window into that. So I just wanted to mention that. Thanks.

DAVID MCAULEY: Greg, you might be on mute.

GREG SHATAN: I was unmuted by the host, thankfully. So I was just saying that before moving on, it strikes me that since we are the sunrise subteam, that really our concern as a subteam is only with the effect that reserved names have on sunrise and that some of the

discussion we've been having – interesting though it is – relates to how reserve name issues might arise or not during general availability or other parts besides sunrise.

So we might want to narrow this discussion, because I think the question might be whether reserve names are being used to thwart sunrise as an RPM or something along those lines. But I'm not sure if that's just a question, if that scratches the itch that John was mentioning or if that goes too far, but just thinking that we need to make sure to stay within the sunrise context.

So John, please go ahead.

JOHN MCELWAINE:

Thanks. I think I'm pretty much just going to echo what Claudio said [inaudible] on today's call, and as Maxim also said, it varies from registry to registry, maybe even registrar to registrar, the information that you get back when you try to register in the sunrise your client's trademark in a TLD. Oftentimes you just get a note "unavailable for registry." You don't know if that's because somebody else got in the sunrise before you or what's going on. There's no easy way to figure that out. You have to end up going to an ICANN meeting and sitting down with the particular registry and working that kind of thing out. It would just be nice maybe if there was some sort of visibility in it.

I still don't understand the confidentiality concerns, I don't think, but my main point is being able to figure out why a mark that is registered and available for sunrise registration can't be registered

in the sunrise. So I think that fits within the scope of our remit.
Thanks.

GREG SHATAN: Thanks, John. Maxim.

MAXIM ALZOBA: First of all, I would like to underline that there is an assumption that registries know the trademarks. No, they're actively prohibited from doing that. They're not allowed to – actually, it was a big deal to allow registries to contact TMCH for example string. Basically, the particular example which was artificial, because registries are prohibited from contacting trademark clearinghouse, and we do not know who are there. We cannot check. And yes, rights protection mechanisms are prohibiting us from that. So it's one of the things.

Another thing is basically reserved lists are both entries of real time databases and procedures around those databases. And the mechanisms vary a lot from registry to registry. [It's software platforms,] it's coders or developers who write code. Each one of them invent crazy things to their liking.

So I'm trying to give you the [analytic] from the real world. It's like trying to prevent persons from having certain entries in their phonebooks. Yeah, it's direct analog. So if we're trying to regulate something which actually works real time, first of all, it will considerably slow all software platforms of all registries. Second, we have to be extra careful to prevent situation where for example some bad actor registers that trademark which is equal to some

kind of technical term which allows them to have the entry point for cyber attack in all TDLs at the same time. I'm not sure we're going to construct this backdoor. Thanks.

GREG SHATAN: Thanks, Maxim. John, is that an old hand?

JOHN MCELWAINE: Sorry, old hand. I'll take it down.

GREG SHATAN: Okay, so have no hands, and I'm not sure – we have a bunch of issues. I don't know that we've coalesced. We certainly don't have broad support for anything at this time. I'm not sure if we've coalesced on – I think the inquiry method shows some promise and might be something that could be [drafted] and meet concerns about confidentiality or proprietary business practices or the like. Outright publication, obviously there's some support for it, but I'm not hearing broad support, so I'm not sure that we have a strawman on this. But I think as David invited Kathy, if we could think about the inquiry mechanism, that might meet some of the concerns here in a potentially balanced fashion.

Again, going back to the higher-level concern of just – if the concern is avoiding thwarting sunrise through targeted use of the reserve name list, there may be some way to deal with that specifically. I understand what Maxim said about not being able to look into the TMCH. I'm concurring that there may have been some actors that may have in fact looked into the TMCH, but let's

just assume obviously that the good actors did not. But there are plenty of other lists of valuable trademarks, and that could be somehow used.

But again, there's a bunch of competing concerns and issues here without necessarily a clear path forward. So hopefully we will see if we can develop something on this.

But right now, it seems like there's maybe just the one limited path forward, unless somebody wants to advance the specific mechanism and see if it gets traction. But right now, I'm not seeing it.

I suppose we should be looking at individual proposal 11 before we leave this question behind, and then perhaps we're also supposed to look at 4D, apologies about that.

4D asks, should registry operators be required to provide trademark owners and TMCH notice on the opportunity to register the domain name should the registry operator release it? What registry concerns would be raised by this requirement? So we have that question, which to some extent I would say may not be part of the sunrise period, so it could happen in sunrise or after sunrise.

But in any case, we've come to 3:26 and the AOB time, so I think we need to cut this fascinating discussion short. So I've got a staff hand up. I've got Maxim's hand up as well, I don't know if that's an old hand. But let's go to staff.

JULIE HEDLUND: Thank you very much, Greg. I thought we might take just a couple minutes to talk about the use of e-mail threads to help continue the discussion from today's call. So for this, I'll turn it over to my colleague, Ariel.

ARIEL LIANG: Thanks very much, Julie. As you can see on the screen, I'm sharing a draft message to open the discussion thread, and you can see that that will include the draft preliminary recommendations and tentative answers that we have captured up until last call, which is the text that you saw today on the screen and the one that we sent this morning. So in the interest of time, we'd distribute that language and then you can continue the discussion on the e-mail thread.

And then also, for each charter question, there'll be one thread, and then we'll include the relevant individual proposal as well. And for the individual proposal, there are specific questions we're hoping the subteam can answer, is whether the subteam would support recommending the proposals to be included in the initial report and whether there's any modification to the preliminary recommendations in light of the Individual proposal and whether there's any additional recommendations that should be made.

So we hope the subteam can engage in that discussion on the list and answer these specific questions. Another thing we want to mention is that the discussion thread will be open tentatively until mid-April, so 15 of May, and if there's a further comment input provided after that deadline or outside the discussion thread, that would not be taken into account. So we want to note that.

And in the meantime, staff will check the transcript, the chat and the recording when we compile our summary, and we will update the preliminary recommendation and tentative answers after the call. And once an updated version is available, we'll also put that in the thread as well. So these notes for now, and Julie, Mary, do you have any additional comments?

JULIE HEDLUND: I had nothing more to add. Over to you, Greg.

GREG SHATAN: Thank you, Julie. Thank you, Ariel. So in the minute we have left, I just encourage everyone to latch on to those threads so that we can kind of keep our work cycle moving, be prepared to move, hopefully finish question four, which we've more or less done, but let's see what happens on the thread. And then move on to the next question, which hopefully we can prime the pump for question five by working on it on the thread during the week.

So I see a hand from my co-chair, David. I will acknowledge your hand.

DAVID MCAULEY: Greg, thanks. Just a real quick note to the members on the call. If you have any questions about Zoom – and I do, I've had a frustrating call in that respect – if you want, you can send them to me. I plan on sending a question or two to staff to try and help get an answer, and I'll probably send it on Friday. If you want to roll

them together, just send me your questions and I'll include it in my e-mail. Thanks very much.

GREG SHATAN: Thank you, David, for volunteering to collect the list of questions. It's very helpful, and I certainly have some questions of my own.

So with that, I think we can call this meeting adjourned, stop the recording, and I'll leave the room. Thank you all and [goodbye.]

JULIE HEDLUND: Thanks, everyone. Bye.

KATHY KLEIMAN: Thanks, Greg.

MAXIM ALZOBA: Bye.

MICHELLE DESMYTER: Thank you, everyone. Once again, the meeting has been adjourned. Please remember to disconnect all remaining lines and have a wonderful rest of your day.

[END OF TRANSCRIPTION]