ICANN Transcription

IGO Work Track

Monday , 15 March 2020 at 16:00 UTC

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TERRI AGNEW: Good morning, good afternoon, and good evening. And welcome to the IGO Work Track Call taking place on the 15th of March 2021 at 16:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you're only on the telephone, could you please identify yourselves now. Hearing no one, we have no listed apologies for today's meeting.

All members and alternates will be promoted to panelists for today's call. Members and alternates replacing members, when using chat, please select All Panelists and Attendees in order for everyone to see your chat. Attendees will not have chat access, only view to the chat access.

Alternates not replacing a member are required to rename their lines by adding three Z's to the beginning of your name, and at the end in parenthesis "Alternate" which means you are automatically pushed to the end of the queue. To rename in Zoom, hover over your name and click Rename.

Alternates are not allowed to engage in chat, apart from private chat, or use any other Zoom room functionalities such as raising hands, agreeing, or disagreeing.

As a reminder, the Alternate Assignment Form must be formalized by the way of the Google link. The link is available in all meeting invites towards the bottom.

Statements of Interest must be kept up to date. If anyone has any updates to share, please raise your hand or speak up now. Seeing or hearing no one, if you do need assistance, please e-mail the GNSO secretariat. All documentation and information can be found on the IGO Work Track Wiki space.

Please remember to state your name before speaking. Recordings will be posted on the public Wiki space shortly after the end of the call. As a reminder, those who take part in ICANN multistakeholder process are to comply with the accepted Standards of Behavior.

With this, I'll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you very much, indeed, Terri. And good morning, good afternoon, good evening to everybody. Thank you all for being here. And, yes, here we are again.

We are we're going to carry on our discussions. And I think everybody, hopefully, will have had a chance to look at the document that Mary and the team send out the end of last week. And there have been some specific e-mail exchanges over the last couple of days on the list.

And I had anticipated that we would move straight into discussing the options for discussion, but I think we probably have to just reassess briefly. The e-mail exchanges seemed to me to imply that we do need to revisit whether or not we are, in fact, as a group in favor of dealing with a tweak to Recommendation 2 before moving on to Recommendation 5.

Paul McGrady, I don't know put you on the spot at all, but your e-mail discussion with Brian was very interesting. And I think, unless I've misunderstood, your response to me saying, "I thought this is where we got to," is "No, I don't think we should do that. I think we should move on to talk about Recommendation 5."

So, could I ask you if you could just clarify if that's the position and that is how you feel? Would that be okay if I asked you to clarify that?

PAUL MCGRADY: That would be great, Chris. Thank you very much. So, we had an interesting and lively exchange on the list this week about the issue of standing. And it was with my friend Brian. It was all very friendly.

So basically, we have to … As we're looking at what we do next, the question is do we do we move ahead and deal with, essentially, Recommendation 5? Which I thought was the point of the work track. Or do we need to go back and try to make tweaks to the other recommendations before we deal with Recommendation 5?

I think we can deal with Recommendation 5, but to the extent that others believe we need to tweak the other recommendations which, by the way, just as a reminder, have already been adopted by the GNSO Council. And then we have to look at the text. We can't just make blind tweaks.

And the text of Recommendation 2, which is what came up, focuses on the issue of standing to bring a UDRP complaint. And what the back and forth on the e-mail revealed is that different members in this group may be dealing with two or more different thoughts about what standing means. From my point of view, standing has always meant that you have access to something: standing to file a lawsuit or standing to bring a UDRP complaint.

And when we look at the UDRP itself, there's nothing in there about standing. It talks about having sufficient trademark rights to prevail, but the standing issue itself appears to be handled by the UDRP rules which basically say anybody can file. Anybody can file based upon whatever

trademark rights they claim to have, and then it's up to the panelists to decide whether or not those trademark rights are sufficient to prevail.

And I don't want to speak for Brian. It appears that he is saying what standing really means is that you have to have sufficient trademark rights to prevail in order to have standing to bring the complaint. That, to me, sort of begs the panelists' job and puts the question up front rather than having the WIPO panelists look into it and make their own decision. But, again, I'll leave that to Brian.

All that to say this, which is if we are going to go back and tweak Recommendation 2, what I'm concerned about is taking what Recommendation 2 already says—which is, by the way, quite controversial—that if you take Brian's definition of standing, it's up to the panelists to decide whether or not an IGO has standing. Or in other words, sufficient trademark rights to prevail simply because it has complied with getting its name on the 6ter list somewhere.

And it sounded to me like Brian was advocating for, more than that, basically an automatic recognition that getting your name on this 6ter list gives you sufficient rights to prevail in a UDRP which I've been calling trademark-ish rights because simply having your name on the 6ter list doesn't convey any trademark rights.

So, we can get sort of bogged down in that if we'd like. It's an interesting discussion, and I do think if we're going to go down the path, we do need to really thoughtfully consider whether or not we're going to suggest an amendment to the UDRP which no longer requires trademark rights to prevail, or we might just say, "Well, that's over there. The Council's already passed those. Let's focus on the primary issue here which remains, in my mind, what do we do when a respondent loses a UDRP to an IGO for whatever reasons and they want to go to their home court and get some relief from a transfer."

That, to me, seems to be the big issue because IGOs, I guess, are prickly about going to court. And so, I'd much rather us focus on that. But if we need to focus on the other, terrific. But I don't

think we can do just a really superficial look at it and really change what we all believe about ICANN dispute policies which are: you have to have a trademark right.

So, anyways. That's a long-winded answer, Chris, but I hope it was helpful.

CHRIS DISSPAIN: No. Thank you, Paul. It wasn't. I'll happily take comments from others if they want to raise their hands. But while we're waiting for that, if it's alright with you, I'd just like to tease out a couple of points, Paul, for clarity.

I understand, if I could say it, your straightforward reading of the UDRP rules. And I completely get that and I don't disagree with anything that you've said. But what I'm looking at is specifically Recommendation 2 because what we talked about as part of the structure, what we might be able to do here, is not to tweak the rules but specifically tweak Recommendation 2.

And what Recommendation 2, as I understand it—again, happy to be wrong—is that Recommendation 2 introduces the option to an IGO who doesn't have a registered trademark to say, "Because I am registered in 6ter, that gets me through the door. It doesn't mean I automatically win. It doesn't mean that I am that … It just means that it gets me through the door."

I'm not sure I understand. We're going to get to the point about whether we should be discussing this or not in a second. I'm not sure that I get your … I think the point you're making is to do with what the rules say, and I think that what Recommendation 2 does is actually change the rules.

And so, therefore, what we're doing is tweaking that change to say that instead of leaving it to a panelist to decide whether or not the IGO can rely on 6ter to get them through, they would … And the specific wording is in (B) which says, "Whether or not compliance with 6ter will be considered determinants of standing is a decision to be made by the UDRP or [URS] panelists."

I think what we were saying was [that] if you change that to simply that it is determinative of standing, and standing within the context of this recommendation's suggested changes, that would solve an initial problem for the IGOs. And on the point about …

Well, let's just deal with that first.

PAUL MCGRADY: Sure.

CHRIS DISSPAIN: Do you have a response to that?

PAUL MCGRADY: Yeah, I do. And it goes to your definition of standing. If your definition of standing is my definition which is whether or not you have a right to access the UDRP mechanism, then that seems harmless enough. But if you adopt what appears to be Brian's definition of standing which, for everything I can read, that standing means you have sufficient trademark rights to prevail, then that's a real problem because what we've done there is …

The current version of Recommendation 2 at least makes it agnostic. Right? The IGO can file and say, "I am on the 6ter list." And then it's up to the panelist about whether or not that individual panelist and that individual case wants to create trademark-ish rights out of that IGO being registered for [six, too].

But if we make the proposed change, what we're saying is it's no longer agnostic. It's no longer up to the panel. What we're doing here is we are creating a trademark right even though there isn't one by making it no longer at the panelist's discretion.

So, again, I think we have to define what everybody means by the word "standing." And once we get that definition nailed down, then we'll know what we're talking about.

CHRIS DISSPAIN: Jeff, I can see your hand up. I'll come to you in one second.

So, again, just for my benefit, Paul, for clarity. What Recommendation 2 says is, "An IGO may seek to demonstrate that it has the requisite standing to file a complaint under the UDRP by showing it has complied with the requisite communication notification procedure in accordance with 6ter. An IGO may consider this to be an option where it does not have a registered trademark or service mark."

So, just to be clear, the word "standing" comes from this recommendation. It does not have a registered trademark or service mark in its name, but believes it has certain unregistered trademark or service mark rights for which it must [have used] factual evidence to show that it nevertheless has a substantive …

So, in other words, what I believe it's saying is [that] 6ter means I can come in and argue that I've got some other rights, and that 6ter gives me a right. But I completely understand what you're saying. You're saying that's a fundamental change. Aren't you?

My argument is [that] this recommendation already does the change. The only question is whether we move it from a panelist to agreed up front.

PAUL MCGRADY: Yeah. Let me just react to that very briefly because I know other people want to speak on this. The short answer is no. Right? If all the current version of Recommendation 2 does is make the IGO feel like they now have a right to file, it's interesting. It's not necessary because they already had a right to file under the UDRP rule, and that's fine. But we have to be very clear that the right to file does not equate to a trademark right that automatically gives them the ability to prevail. They still have to prove up trademark rights.

CHRIS DISSPAIN: Okay. Now wait a second. Okay. So, you're saying, no, that's not sufficient even though they've got all the other hurdles that they have to get over.

So, I think what this is saying is registration in 6ter could be treated by a panelist as being evidence of an unregistered trademark or service mark. And that's up to the panelist to decide. And what that does is get over the first hurdle. And then the IGO would then have to get over the bad faith and all the other stuff.

And you're saying that's what this recommendation says, and shifting that to not leaving it to the panelist to decide is not acceptable as far as you're concerned. Is that correct?

PAUL MCGRADY: Well, not exactly. It depends on what the definition of standing is because if you … And I'm not trying to be difficult.

CHRIS DISSPAIN: No. I know you're not.

PAUL MCGRADY: But if you read the e-mail back and forth between Brian and I, my idea of standing is the right to file. But it appears from Brian's e-mail, and therefore I'm assuming WIPO's point of view—and theirs is the point of view that matters here, right, because they're the panelists—if standing means that you have sufficient trademark rights to prevail, then that's a significant amendment of the UDRP and we shouldn't do it casually. Yeah.

CHRIS DISSPAIN: Fine. Jeff, your hand is up. Go ahead, please.

JEFF NEUMAN: Yeah. These are a lot of technical distinctions of standing in sort of a non-technical policy document. And I kind of think of this in much more simplistic terms. Right? So, Paul, whether you call it standing or whether you would call it failure to even state a claim—that's not the same as standing—but if you can't establish the first element, then you can't move forward.

So, I hear what you're saying, Paul, on the legal distinction, but I think we need to kind of look at the bigger picture. But I do agree on this discussion. The UDRP already does recognize, or at least panels have certainly recognized, unregistered rights. You don't have to have a trademark registration or a service mark registration. There are many, many, many decisions on common law rights.

I think just the recognition that being on a list … I don't see that as such a huge stretch for the UDRP because, again, you still have to prove that the registrant has no legitimate rights or—sorry—interests or rights, and you still have to prove the bad faith element. So, I'm not sure why this is such a huge issue, but I'm still listening. So, thanks.

CHRIS DISSPAIN: Thanks, Jeff. Brian.

BRIAN BECKHAM: Yeah. Hi, everyone. I do apologize if I've made a mess of this. Just to be clear, I wasn't suggesting by any stretch that merely … When I was talking about standing, I was thinking … When we've, in this working group, called "getting you into the funnel," I wasn't suggesting in any way, shape, or form that getting you in the funnel would mean that you would prevail. Not by any stretch. But that's why I suggested, and I apologize if it got a little too much into the weeds and maybe it was … It was a late Sunday night for me.

But I was suggesting [that] once you're in the funnel, then of course you have to meet that bad faith or misrepresentation test. So, just to be clear, I wasn't intending to suggest that merely having standing or being in the funnel means that you prevail. So, sorry for that.

CHRIS DISSPAIN: Okay, Brian. Thank you. I know that many people in this group are very keen to get down into discussing Recommendation 5. My point, and I'm not the only person who's made this point. But the point has been made that for our discussions on Recommendation 5 to be meaningful, there has to at least be some hint of the possibility that we're going to end up with a system where the IGOs are going to be able to actually use the UDRP. Because if we don't, then Recommendation 5 is irrelevant.

I want to put Recommendation 2 to one side for a moment and move on to talk about Recommendation 5. And the basis I'm doing that is that I think that it's clear that, I believe, we agree that it is feasible for this group to recommend some tweaking to the other recommendations—the one we're specifically talking about is Recommendation 2—some tweaking to that recommendation to make our proposed solution in respect to Recommendation 5 meaningful to the people that it's supposed to be useful to.

We're not at a point where we agree what that is yet. We have canvassed the possibility of lifting the registration of 6ter from being determinative of standing at the option of a panelist to being determinative of standing. Full stop. Meaning, to be clear, that the IGO would still need to prove the domain registration, bad faith, and all the other stuff.

But we're not there yet. It has not been agreed. [And we need to move.] We're going to need to come back to that and talk about it. But unless anybody objects, I do want to move on and talk about Recommendation 5 which is effectively encompassed in Part B of Mary's paper.

Mary, would you mind just very briefly taking us through a swift overview of what Section B on the question of jurisdictional immunity actually says? And then we can open up for discussion if that's all right with you.

MARY WONG: Hi, everyone. Sure, Chris. And thank you, Steve, for showing that part of the Google Doc.

This is essentially back to Recommendation 5, as Chris said. And as we know, the IGOs have a concern here that's been documented primarily starting with the current requirement in the UDRP and the URS of mutual jurisdiction. So, if I can summarize, and I'm sure folks will correct me if I'm missing anything.

If we start there, the concern is that when filing a UDRP or a URS complaint, by having to submit to mutual jurisdiction—which is the requirement—that amounts to an IGO essentially waiving its jurisdictional immunity in a national court. And so, Recommendation 5 does try to address that by essentially saying that if the losing registrant files and the IGO successfully shows immunity in the court, then certain things happen.

But I think that gets ahead of the fundamental issue which is that the IGOs are risking their rights and immunities in terms of jurisdiction simply by submitting to mutual jurisdiction in the first place. And so, what this table does is [try] to list out the options that have been identified, to date, for perhaps handling that very fundamental issue. Back to you, Chris.

CHRIS DISSPAIN: Thanks, Mary. So, there are two alternatives. Apart from leaving Recommendation 5 as it is, there are, in my view, two alternatives. One is to go down to Recommendation 5, have the IGO make the claim that it's not subject to the local jurisdiction, have the court agree with the IGO, and have a different result to the result which Recommendation 5 currently recommends which is to go back to the beginning again. Or introduce an alternative to relying on the individual jurisdiction.

And we've canvassed the possibilities of arbitration, and we will, very briefly, canvas the possibilities of arbitration and some kind of supreme or super panel of UDRP panelists.

So, can I ask if there's anyone currently on this call who would, just in principle, object to an alternative to relying on the individual jurisdiction? And if you would object, why? If there was an alternative. Does anyone actually object to looking at and considering a different method and relying on an individual jurisdiction?

Jay, please go ahead.

JAY CHAPMAN: Hi, Chris. Thanks. Would you mind just clarifying your question there again?

CHRIS DISSPAIN: Yeah, sure. If there was a different approach, if the jurisdictional issue of going to—just say it's you, Jay, because it's just easier—going to your jurisdiction. Right? [It] was replaced with an alternative mechanism that involved some sort of alternative panel or arbitration or something but it wasn't submitting to an individual jurisdiction, would you object to that? And why would you object, in principle?

JAY CHAPMAN: Okay, thanks. Is it okay? Can I speak? Go ahead?

CHRIS DISSPAIN: Yeah. Please go ahead, yes. Sorry. Please do, yes.

JAY CHAPMAN: So, if we're talking about doing away with the opportunity for a registrant to seek relief in a court of mutual jurisdiction, at this point I would not be in favor of doing that. I think the perspective would be, if we're going with the Recommendation 5 situation as it stands—at

least as I understand it—the registrant goes to the court of mutual jurisdiction but that court says, “We don't have jurisdiction,” or “The IGO is immune.”

And so, in that situation that's where, again—and maybe I’m just reading this to the letter of, at least the way I read, what we're supposed to be looking at. At that point, now let's talk about what some of those resolutions are.

CHRIS DISSPAIN: Okay.

JAY CHAPMAN: But the idea of just completely doing away with a situation where the registrant could not go to a court of mutual jurisdiction, at this point I’m hesitant. I’m more than willing to listen to the ideas and see where that goes. But yeah, I, in particular, am not in favor of just doing away with that at this point.

CHRIS DISSPAIN: So, I understand that. So, bear with me for a second. So, you do except, however, that if the court did say, “We agree with the IGO. We don't have jurisdiction,” that some sort of replacement for the court could be required at that point. [inaudible] to having a discussion about what that could be.

JAY CHAPMAN: Yes, of course. I do think that's one of the options. And I’ll actually … I mean, since I’m here on the spot, I’ll actually mention another one that I’ve been thinking of for a while. Again, recognizing I guess the idea that the IGOs, as Paul has put it, are not keen on going to court. Perhaps we might also consider a situation. And I haven't really talked about this with anyone else, so I’ve just been thinking about it myself. So, I’ll just go ahead and throw it out there.

But perhaps the idea of, as opposed to a situation where the appeal, so to speak … I know it's not an appeal. It's actually a de novo situation when you go to a court of mutual jurisdiction. But in lieu of actually trying to pull an IGO into that court of mutual jurisdiction and have that jurisdictional immunity type issue come up, perhaps there might be an option to consider giving the registrant the option—and, again, I'm just thinking off the cuff here—giving the registrant the option to file an in rem action against the domain itself. Because at that point, the domain is locked. I don't know. I guess it's kind of frozen in a situation where it's not transferred. And I'd appreciate other people's thoughts on that.

But just the idea that there would be some sort of a de novo action where the registrant basically makes its case as to whether or not it was something that might be considered … And especially just, in this specific situation of trying to prevent the IGO from having to go into court. If they don't want to spend their time, they don't want to go through the jurisdictional, the immunity arguments, whatever. This way, if it was an in rem type of de novo, then that might make more sense as a first route of, again, "appeal." Thanks.

CHRIS DISSPAIN: Thank you very much, indeed. Let's go to Paul.

PAUL MCGRADY: Thanks, Chris. I look at this somewhat as a simple problem to solve. And I'm going to put into the chat. It's a great big, long chunk of text, but it's the relevant section of the UDRP that we're talking about. Essentially, it's paragraph 4, sub-paragraph K. And it's everything after the first sentence. And that is the part of the UDRP that says there will be a 10-day holding period on an adverse decision.

And if the party who lost wants to go to a court, they can go to a court. And as long as a complaint is filed in the appropriate court—which in a normal case would be either the place of the registrar

or the place of the registrant, depending on what the complainant picked—that the registrar won't transfer the domain name while that court case is pending. Right?

And so, basically what this does is gives a losing respondent, in essence, a free injunction as long as they file some sort of a complaint. We throw around the word “appeal.” There's no real appeal mechanism to the UDRP, but there may be underlying law that the respondent can get help from. We happen to have that in the U.S. I don't know what's going on in the rest of the world.

But in any event, the free injunction is that the registrar won't transfer until the court action is done. Okay. Fair enough. That's how the UDRP is written, and that's how it has worked for the last 20 years. The problem when we take that and apply it to the IGO situation is that if an IGO is able to prevail on the UDRP, under the current rules it will have to have selected an appeals jurisdiction. Right? A home of the registrar, a home of the registrant. That’s IGO problem number one. They don't want to do that.

And IGO problem number two is that if they prevail and the respondent files for relief in either its home court or the home court of the registrar, under the current rules of the UDRP, that free injunction kicks in and the losing respondent gets to keep the domain name and continue to use the domain name for as long as that court case is pending. Right?

So that puts the IGO in this super weird position where they kind of have to consent to wherever the losing respondent picked because the losing responded has the domain name in their hands, and the registrar won't transfer it because of the way the UDRP is written.

And so, again, I don't mean to oversimplify this, but one thing I’d like to put on our list of things to discuss is what happens if we just delete the rest of 4K after the first sentence and let the chips fall where they may? And to be clear, delete it for the purposes of a complaint where an IGO is the complainant, and let it fall where it falls.

That way, the registrar promptly transfers the domain name to the IGO. And if the losing respondent believes that it has some right under their federal law in their particular jurisdiction, or

whatever other jurisdictions they think the court might be willing to hear the case, they can go file whatever lawsuit they can file. And if they do, then the IGO can decide at that point whether or not they want to participate in that the way they would make a choice to participate in litigation or not for any number of commercial disputes that might arise.

But the losing respondent won't have that domain name in their hand because the IGO will have it because the UDRP was already acted upon. Does that make sense?

And so, that sort of takes a bit of the drama out of it, and it doesn't put us in the weird position of either, essentially, forcing the idea onto nations that they need to amend their legislation to deal with the problem that we have because we have this language in the UDRP that's afflicting the IGOs; nor do we have to build out some really clunky appeals mechanism which, by the way, only pushes this problem down the path. Right?

Because if we have an appeals mechanism and the losing respondent still doesn't like the answer, because they probably didn't lose the UDRP for a frivolous reason, we're still back where we are. Then what do we do there? Another appeals mechanism, and another, and another? At some point, we just have to say, “You lost. If you have a right to go to a court, knock yourself out. That's not ICANN’s problem. That's not the registrar's problem.”

And if we just take our little black markers and scribble that part of a [inaudible] out for IGO, then I think we're 90% there. Thanks.

CHRIS DISSPAIN: So, Paul. Thank you, and I appreciate it. I understand what you're saying. I know Jeff’s hand is up, but he’s posted in the chat, “I don't think the registrant could have standing to file a case if the name has already been transferred.”

I’m assuming you would have to build into the redrafted bit at least a recognition that the registrant has the right to do this.

PAUL MCGRADY: Well, I think the registrant would have whatever right it has under its national law to do whatever it has. And I don't know that I agree with Jeff Neuman that in the event a domain name is taken away from you, you have no ability to go to a national court and get that domain name back. In fact, people do that all the time.

CHRIS DISSPAIN: What you're saying is that the UDRP policy itself … The fact that that's written in the UDRP policy doesn't actually give the registrant any rights. It's the fact that they're in a jurisdiction and the fact that they have got a court there that gives them the rights. That's really what you're saying. [Isn't it]?

PAUL MCGRADY: That's exactly right. ICANN is not a super national legislator, and it can't make a court take a case if the local legislation doesn't account for it. Right.

CHRIS DISSPAIN: Or vice versa.

PAUL MCGRADY: Correct.

CHRIS DISSPAIN: They can't stop it. Jeff, your hand is up. Go ahead, please.

JEFF NEUMAN: Yeah, thanks. But I think, Paul, if I'm remembering correctly—at least under the U.S.—you file an ACPA case for a declaratory judgment that you're not violating the rights of the third party despite what the UDRP is saying. But you can't file that after the fact because the name has already now been transferred. You'd have to have some kind of new cause of action like a fraudulent transfer or something, but that doesn't exist under the ACPA. So, I'm not sure that works.

I'd have to look into it more. I think we'd have to get a legal opinion on that, but the ACPA has recognized that registrants have this 10-day period to essentially seek a declaratory judgment that they're not violating the rights of a third party. And that's what registrants take advantage of.

But if the name has already been transferred, I don't see the court as having jurisdiction to hear that. It's not ripe.

PAUL MCGRADY: So, Chris, I'm happy to respond to that if you'd like.

CHRIS DISSPAIN: I'm going to let you respond, Paul, at the risk of … This is cheap legal advice from all three of us who are all lawyers, so let's just get on with that quickly. But be quick, and then we'll move on to the next point. Go ahead.

PAUL MCGRADY: Yeah. So, Jeff, I think I have a different view that the ACPA actually provides for transference during a reverse domain name hijacking situation, which is what a losing respondent would claim if they think they lost the UDRP for non-good reasons. But that having been said, that's the U.S. Right? And U.S. people with access to the U.S. courts have access to the ACPA. And that's terrific. But that's not a universal right. There's no universal law to that. Right?

And so, we may have that right in the U.S., or not, depending on your view or my view. But, again, that's not a global law. Right? And so, at the end of the day, what we would be saying is that the UDRP policy in really reflecting ICANN would quit interfering with the natural processes for IGOs in holding onto a domain name after a UDRP, after an IGO has prevailed. So, thanks, Chris.

CHRIS DISSPAIN: Thank you. For what it's worth, and this is purely just on an initial reading of it, my view is that the only difference is that, in the current case, you would go to court and say, “There is a threat that this domain name will be taken away from me as a result of this UDRP proceeding.” And in the case that you're suggesting, Paul, you would go to the court and say, “This domain name has been taken away from me in respect to this proceeding.”

And I don't know that I can see a distinction between those two things making meaning you couldn't bring a claim. There would, of course, need to be an understanding that the result of that claim would be effective under the terms of the UDRP. Because the point being that at the end of the day, under the current situation, if I go to court and I win, then the deal is that the registrar will not transfer the name.

So, there would need to be an understanding that if I did win, there would be some form of result from me winning, especially if the registrar was in a different jurisdiction. But leaving that aside for a minute, that's just my initial opinion, and I think this is certainly worth pursuing as a possible way forward. As Jeff has said, we may need to get some advice from some people other than us. Notwithstanding the fact that we probably think we know what we're talking about.

Brian, go ahead.

BRIAN BECKHAM: Hi. Just quickly on the on the whole court option question. We're aware of number of cases that are filed outside of the UDRP context, so I think I would more align myself with Paul's understanding that whatever language is in the UDRP, the 10 days is there just to

block the implementation of a UDRP decision. That doesn't prevent parties from going to court outside of the UDRP context, whether that's following a UDRP case or just in the abstract, if there's a dispute between the parties.

But I wanted to just get back to the question about Paul's suggestion of if we strike some of the language. And not to specifically react to that just yet, but … And I'd certainly invite some of my IGO colleagues to provide their expertise here because, admittedly, this is taking me a little out of my depth when we get into the notion of privileges and immunities and courts and jurisdictions.

But one of the things that I think we would have to also look at in addition to 4K is, if you actually look at the UDRP rules, one of the attestations that the complainant has to make—this in paragraph 3, Sub 12—is that the complainant "will submit." And I think it's that language—"will submit," with respect to any challenges—that there is a concern from IGO's perspective whether that could be somehow construed as a waiver.

As I say, I certainly invite my IGO colleagues to help us navigate this a little bit, but that may be one other area where we would need to look at the particular language.

CHRIS DISSPAIN: Brian, Paul said he agrees. And I can tell you that, yes, to me it's obvious. If one was to go down that path, then quite clearly it would be irrelevant and unnecessary for the [IGOs to agree] to submit a jurisdiction. And, again, assuming for the moment that it's right that the registrant would be able to bring a claim in their local jurisdiction, then the IGO refusing to submit—sorry, not being required, rather to submit up front to that jurisdiction—is perfectly fine because the registrant will bring the claim. The IGO would be the respondent to the claim. The defendant, depending on the type of claim, would be notified and could ignore it and, if they wished to do so, could turn up to court and argue that it's not subject to the jurisdiction, and so on.

My concern is more what would be the result of the judgment. And if the UDRP won in a court case, how [would you] ensure that the domain name was returned? And, presumably, there are plenty of mechanisms for enabling that to be the case.

That said, I can see that there's pushback on the list from people. Did I see Alexandra's hand pop up and then drop down again? Alexandra, do you want to say something? If not, I'll go to …

Yes, there you go. Go ahead, Alexandra.

ALEXANDRA EXCOFFIER: No, but you read my thoughts. It's what I said for the last couple of meetings. The first hurdle is this requirement to submit because, exploring all the options, if we do go to court, if we say we have immunities but the court will say, "But just by using the UDRP, you have submitted to court. So, you have waived your immunity."

So, I think that's the first challenge for us. But let's say that's gone. And then what Paul said, actually, is not so bad for us because then it brings it to the court. We're happy to, we will … Well, we're not happy to go to court because it's a long process. Nothing is resolved, generally, at the lowest level courts, so it's a whole appeals process which actually is extremely expensive. It goes through several levels of appeal because nobody's happy either way. Right?

Just, again, I'm speaking without IGO colleagues' agreement here, but if we take what Paul has said and add something, maybe for Jeff that might. If we say something like, "This is without limitation of anybody's right to go to court," without necessarily saying that there has to be an "appeal" in court. But, in that case, you preserve the rights of both parties, if they want to go to court, to do so. That might be …

We work with what Paul has suggested and add something like that so it's clear that we're not just closing anybody's rights off. Of course, if you take it further, if an IGO wins and the registrant goes to court and we plead immunities—we'll probably plead other things like inconvenient forum, etc.—and if we prevail, then is that it?

For me, I would be fine with that being it, but it would be good to hear from others on that point.

CHRIS DISSPAIN: To be fair, Alexandra, you know as well as I do that it's only ever [ready] a court says, “That’s it.” I mean, you can't prevent somebody from trying to go to a further court up the chain. That’s never going to be binding. But I take your point completely, but at the end of the day it's never over until the court says it's over.

But that said, I agree. We are at least making a little bit of progress. Thank you very much for that.

Brian, I’m assuming that hand is an old hand. Mary, you’re up. Brian, I can’t hear you. If you do want to speak, that's fine but Mary's up next and then you. Mary go ahead.

MARY WONG: Thanks, Chris. This is really just a quick follow up to my introduction and what Brian and you and Alexandra said. Right now, the document in the Google format really only speaks to the second part of the immunity issue which is challenging the decision of a panel where an IGO has already filed the complaint. And it doesn't address the initial part of the immunity question which is the submission to mutual jurisdiction. So, I just wanted to clarify that for the group, and we can develop a table accordingly.

CHRIS DISSPAIN: Sure, but the reality is that you don't need to submit to a mutual jurisdiction if there isn't going to be a reason to do so. So, it's just a no- brainer, it seems to me. There wouldn't be any point in …

If we followed this path—just assume we did, I’m not saying we will, but if we did—then you wouldn't need it because it wouldn't be relevant. Right? Do you see what I’m saying, Mary? Or does that not make any sense to you?

MARY WONG: I was just raising the point, and it's certainly for the group to see if that's a path they want to follow.

CHRIS DISSPAIN: I get you. Thank you very much. Brian.

BRIAN BECKHAM: Yeah, thanks. I was curious. So, we're talking about … I think a lot of people on this call are familiar with ACPA. Some of us are also familiar with the Nominet model where, [first, on] the ACPA, generally people will go to court. And then under the Nominet model, they have a built-in appeals system.

One of the thoughts I wanted to raise was when Alexandra mentioned, infrequently, is it the case that an initial lower court opining on the jurisdictional question is the end of the road. That, to me, raises red flags in terms of time and costs. And so, I just wonder when we're … Are we looking at this, in other words, through too much of a U.S. lens? Are their concerns about … Because I think we're here trying to solve a problem that's been raised for IGOs, but also trying to be mindful of respecting registrants' rights.

Are we actually needing that question of registrant rights if we're potentially subjecting them to all sorts of unfamiliar and time consuming and costly court processes? Or would some sort of an internal appeals process like you have in the Nominet system actually suit the interests of all the parties better?

I'd be particularly interested to hear from Jay in terms of the preference for the U.S. national court route versus … We've tried to put on the table some additional safeguards for registrants, both at the initial and appeals phase. So, I guess what I'm wondering is, are we kind of overshooting the mark a little bit by going down this whole court process question? And would it actually suit the

interests of all the parties better if there were a more streamlined process with sufficient safeguards built in? Thanks.

CHRIS DISSPAIN: Thank you, Brian. That's a good question. And we'll get to Jay in a second. Jeff was next. Jeff, go ahead.

JEFF NEUMAN: Actually, I'll defer to Jay.

CHRIS DISSPAIN: Okay. Defer to Jay. You whipped your hand down and whipped it back up again in a space of a split second.

JEFF NEUMAN: That was my [inaudible].

JAY CHAPMAN: Thanks, Brian. I appreciate the question. I think I had mentioned this in the last call, or maybe two calls ago. My concern continues to be, again, it's not that I'm not interested in hearing and having these discussions. And there might well be one. I think we just … Until there's some sort of understanding or proposal as to what "it" is, then I don't really know where to go until we've really got some firm proposals that we all can review and look at and those sorts of things.

We know the situation that we have, so we know where things stand today. That is a lot more, I wouldn't say comfortable. But at least it's a process that you know as opposed to what you don't.

So, [inaudible]. I hope that's at least somewhat helpful. I'm not trying to be intentionally just a brick wall here.

CHRIS DISSPAIN: I think what you're saying, Jay, is [that] you are prepared to look at moving away from the individual jurisdiction once you know what's on the table that would replace it and, obviously, you're comfortable.

JAY CHAPMAN: Yeah.

CHRIS DISSPAIN: In other words, you're not saying no. You're saying, "I like the way it is, but I'll certainly look at something else."

JAY CHAPMAN: Happy to consider, yeah.

CHRIS DISSPAIN: Thank you.

JAY CHAPMAN: And again, it's not just … When we're talking about registrants, we're talking about potential businesses because we're talking about … Obviously, this is about acronyms. Right?

And I want to make this clear as well. I understand the point that Brian is making, and has made several times, about this being about these extreme cases of in impersonation and just outright fraud. If we can define what that is as well. Right? I think …

Again, we just need to have some clarification about what we're really talking about here so that we can all get a get a solid look at it and then make our calls. Thanks.

CHRIS DISSPAIN: Yeah. Thank you. The irony, of course, is that in the previously mooted parallel process, it was precisely set to being a very specific and only-in- emergencies set of criteria. But we're now stuck with what we've got in the UDRP.

Mr. Neuman, you are next.

JEFF NEUMAN: Yeah. So, I would prefer not … I'm trying to think of the best way to put this. Paul's suggestion, and I know it sounded good to the IGOs. I think it fundamentally changes the nature of the burden in UDRP cases where it becomes the …

It's always been the burden of the one seeking the name to enforce its rights as opposed to someone who owns the name. And the reason I say that is that as a panelist now, and as someone who's now following all of these much more closely, there are a number of decisions that are not the easy, close-cut cases. I'm not saying they're decided wrong. I'm just saying they're not the clear-cut ones that Brian is mentioning all the time. And when you get into acronyms, it's a lot harder.

I think we should stick to the path of trying to find a way to keep the existing model as much as possible in terms of finding an arbitration panel or something where we could allow for the case to be heard again but not worry about the 10-days jurisdiction issue. I think that's changing,

fundamentally, too much, and we don't have to if we can agree on this arbitration process in the case where an IGO wins and the registrant wants some avenue to have it reheard.

I'm not saying appealed because that's not really what happens currently under the UDRP. There is no appeal, as, I think, it was Paul that said it initially. So, hopefully, that makes sense.

CHRIS DISSPAIN: I think so. I think it makes sense. And what I think you're saying is, whereas you don't think replacing the individual jurisdiction with an alternative system of rehearing or whatever you want to call it … You think that is okay. You think replacing the 10-day thing is a step too far. And I understand that situation.

Paul, I want to go to your point in the chat about narrowing down the kinds of cases that this would apply to. I'm fine with that, but here's the challenge as I see it. We've all said that we can make wholesale changes. We can make some small tweaks. But the problem, if what we want to do is to deal with this holus-bolus and effectively set up a system with a different set of criteria that apply to IGOs that they could get in because they are an IGO, that they could only bring a claim because of A and B— we'll just say that those are very specific claims of passing off or whatever it might be, emergency and so on, and then come down to some sort of separate appeals mechanism—that seems to me …

Well, it works for me, but it seems to me to be very much what amounts to, effectively, a parallel process. And the challenge there is that we've been specifically told not to do that. Have I misunderstood or taken too far the talk of doing things in a different way?

PAUL MCGRADY: Thanks, Chris. So, a couple of things. One, whenever we make any tweak that applies only to IGOs within the UDRP, we're making a parallel process. Right?

CHRIS DISSPAIN: Sure.

PAUL MCGRADY: The question is how big of a variation are we going to make? Right? So, if we have, for example, a quasi-appeals process that only respondents that lose to IGOs can access, well that's a parallel process to the other garden variety respondents that only lose to garden variety trademark owners. Right?

We can either read the instructions literally that say, “Don't make any parallel processes,” or we can read it as, “Maketh them as small as you can.” Right? And so, a lot of the ideas … We've heard lots of ideas from big changes like an appeals process to little changes like scratching out the mutual jurisdiction language to my idea of looking at the 10-day waiting period and what that means in terms of balancing the harms.

I think, at this point, we have so many good ideas from Jay, from Jeff, a couple decent ones from me and some others that have put in chat or spoken that I … This just feels like a resounding success because we're getting ideas on the wall. And so instead of saying at this point, maybe, “Oh, that's too far. Let's not even put it on the wall,” why not put it on the wall? And then if we think later it's too far, then we can pull it off the wall.

CHRIS DISSPAIN: Sure. I’m totally fine with that. That makes perfect sense to me. I like Jeff's suggestion in the chat that it's a quasi-parallel process. It's a parallel process that you set up when you're not setting up a parallel process, which is a great way of looking at it.

And I agree that if we can consider what these possibilities are, then that would be a very sensible thing to do. I’m going to come to you in a second, Alexandra.

The ones that I can think of that we've got so far as possibilities are … There is the use of 6ter, leaving aside … There were disputes about these. There's the use of 6ter as, effectively, a basis

for the IGO to come into the process and say, “It’s on the basis of 6ter that I claim to have a non-registered trademark.”

There’s narrowing the reasons for which an IGO can bring the … Effectively, it would be rewriting or adjusting the basis upon which a case can be won. There's the appeals mechanism and/or the removal of the 10-day, and so on. So, there are a number of suggestions on the table right now. Some of which are dependent on others. Some of which may was stand alone.

Alexandra, go ahead, please.

ALEXANDRA EXCOFFIER: Thank you, Chris. Not to go through your options. I’m just wanting to make a point on something that Jeff proposed which would also be fine with us. Just to mention something. And the “appeals process” is for the benefit of the losing registrant as well. We have to look at it that way. It allows them a way out, whereas if they go to court and we invoke our immunities, the court recognizes—or several courts because, generally, like I said, it's a process that may take a very long time, years even, and at great cost.

But let's say our immunities are recognized. So, the registrant will have no “appeal recourse.” Whereas what Jeff proposed, to go to … It could be arbitration. It could be another panel. It could be that … Okay, I know for somebody wants to know what “it” means. Jay, I think.

But whatever “it” is, a non-judicial process to which IGOs would agree, because we would as long as it's a non-judicial process, and it would allow the registrant to have rights which they may not otherwise have if they go to court. So, it protects. It’s not just to the benefit of the IGO for the sake of [protection of our] immunities. It should be seen, I think, as to the benefit, also, of the registrant.

CHRIS DISSPAIN: Thank you. You make an interesting point. If I can summarize it, I think what you're saying is [that] it doesn't matter whether you abandon the 10 days or you don't, for

the sake of this discussion. If you leave it as it currently is to go to court and the IGO actually argues that they are immune from the jurisdiction and they win that argument, there is really not anywhere for the registrant to go. Obviously, under the current registration, everything would go back to the beginning. But we all know that doesn't make any sense—current recommendation, sorry.

And that may build up a body of precedent over time that establishes that the IGOs are not actually subject to these individual jurisdictions and that moving outside of that and actually saying, “Let's set up a secondary hearing whether it's a challenge to the first decision, an appeal”—call it what you will—“that is acceptable to both sides and binding,” then that actually gives a more certainty to the registrant in a secondary hearing situation, as well as to the IGO.

And I had some … I can see that point, and I can understand that that makes sense from the point of view of everyone knowing where they stand. Whereas an individual jurisdictional challenge each time is not only expensive, but also risky.

David, go ahead.

DAVID SATOLA: Thanks, Chris. I just wanted to very quickly comment on the framing of how the IGO would address this issue in a situation. So, it's not really whether the court decides that the IGO has immunities or not. A treaty-based IGO—for example, the World Bank. All of the countries who are members of the World Bank, by joining the bank and signing the treaty, agree that we have privileges and immunities. It's up to the IGO to waive those, to decide for its own purposes to go to court or not.

And oftentimes we do for variety of reasons. So, if the lower court would determine wrongly that the IGO was not subject to immunity, then it would just go up the chain through the appeals to whatever Supreme Court would decide that, who would then look at the treaty obligation that the country has.

So, I think the framing of that is really important. It also goes to the question of this framing of the mutual jurisdiction thing. There is no mutual jurisdiction in that context because it's up to the IGO to waive that immunity. So, there's only mutual jurisdiction if there's a waiver made by the IGO.

So, the framing, I think, is really important to get to these other issues which we then can talk about. Over, thank you.

CHRIS DISSPAIN: Thank you. And I appreciate that clarity.

I'm conscious that we've got 20 minutes left. I want to flag, for Mary and Steve and the team. I want, at the end of this session, for you guys to pick up all of the suggestions that we've talked about. We've got a gap next week. We don't have a meeting because we've all got the joys of ICANN.

I know that discussion on the list is difficult for some and challenging what have you, but I would like to try and encourage some discussion on the list of the individual suggestions. So, I want those to be put together into a document, and then we can start to talk about them.

And maybe if we can encourage people to us the online tools that we have and the Google Documents thing. Maybe we can even use that. Vanda, I give you credit for at least having gone into that and actually made some comments in there. So, thank you for that.

So, while I've said that and giving Mary and Steve and the team a heads up, can we talk about … Does anybody want to address the concept of … There are two suggestions that have been made of an alternative mechanisms. And being conscious, as Jay has quite fairly said, I need to know what the alternative are to the individual jurisdiction. Two things that have already been suggested: 1) going to arbitration, and 2) I think it was Jeff who referred to it as a secret panel or a supreme panel of WIPOists or, rather, UDRP panelists.

Would anyone like to talk in favor of a particular one of those or specifically against a particular one of those? So, in favor of arbitration or against arbitration. Or in favor of a super panel or against a super panel.

I'm keen to see if anybody has any … Perhaps the easiest way is to ask if anyone has any real objections to either way. Brian go ahead, please.

BRIAN BECKHAM: Yeah. Thanks, Chris. Sorry to dodge your question, but I think without consulting a little bit more with my IGO colleagues, I'm not able to answer that, at least myself, on the fly.

I just wanted to mention. In one of our earlier calls, I mentioned the idea of if we did go down the, let's say, internal appeals process with known panelists, one of the things that was on the table in early discussions was somehow putting limitations on who those panelists would be. So, that could be accomplished through a pre-vetted list where registrants and IGOs have the ability to offer up a few names. Or the option for registrants to propose striking certain panelists off the list. Whatever it is, but just the idea that, in other words, to make that more of a contained and fair process. If it's useful to think about putting limitations on …

And I also mentioned things like changing the burden of proof and the applicable standard, that sort of thing. So, in other words, to put safeguards into the internal appeals process.

And for whatever it's worth in an arbitration context, that's actually one of the benefits of arbitration. Parties are free to actually create rules for the arbitration. You can select the procedural rules, the substantive rules, the jurisdiction, the arbitrators, that sort of thing. So, they're both …

In other words, what I'm trying to get at is whichever it is, if we can make these a la carte, if you will, to address some of the concerns that have been raised, that might be worth thinking about.

CHRIS DISSPAIN: Thanks, Brian. Jeff, I see your note in the chat about tweaks and wholesale changes. I acknowledge that. I would ask that when Mary and the team produce the list or the document that lists those things that we've discussed today, obviously, it would be very worthwhile for you to go through in and make your comments about what you think is a tweak and what you think is a wholesale change. And then we can test to see what your criteria are. No, and seriously, it will be really good, obviously, to do that.

And Brian, thanks. If you could do that, send the stuff out, the notes, when you have a chance, that would be great.

Does anybody else want to follow on the discussion on arbitration or super panel at this stage? Does anybody else want to cover any other points? Because I can't see the point of carrying on and the keeping the phone open if nobody has anything else to say at this point. I'll happily take any other comments from anybody.

Okay. Well, while I'm winding up, if anybody has any last-minute things to say, please put your hand up. For now, I just want to say thank you, everybody. I actually think this has been a very useful and incredibly open and collegial discussion. And as someone said, I can't remember who it was now, we managed to get quite a large number of ideas out on the table. And it will be very good for us to basically consider those on the list.

We have no meeting next week, so we do have two weeks until our next meeting. And there is an opportunity for a number of things to be clarified on the list, to be clear that a particular suggestion has significant support, a particular suggestion has no support, a particular suggestion is supported depending on another suggestion. All sorts of possibilities.

But I think that if we can be clear and simple, straightforward postings on the list to say, "I disagree with that and here's why," it would be great. And I think we can subset things off.

So, what I'm going to do is if we start to see really long and complicated e-mails addressing lots of different subjects, that's perfectly fine. But what we'll do is chunk them up and then send them

up into different threads so that we're actually having discussions on specific things just to make it easy for people to follow, rather than one long e-mail that covers 27 different points.

I think we can probably bring this meeting to a close. I wish everyone a glorious ICANN week, those of you who are going to be there. There are many meetings occurring over the next … A few meetings this week, and then many next week. So, I hope everyone has a great time.

Thank you all very much for your attendance and for your contribution which has been incredibly valuable. There is much work to do, but we are making some progress. So, on that basis, I'm going to formally close the meeting, say thanks to you all. And, Terri, you can shut down whatever you need to shut down.

TERRI AGNEW: Wonderful. Thank you. I'll stop recordings and disconnect all remaining lines.

[END OF TRANSCRIPT]