

**ICANN
Transcription
Review of All Rights Protection PDP Working Group
Thursday, 03 August 2017 at 03:00 UTC**

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at: <http://audio.icann.org/gnso/gnso-rpm-review-03aug17-en.mp3> Adobe Connect recording: <https://participate.icann.org/p1uab0xtj78/> Attendance of the call is posted on agenda wiki page: <https://community.icann.org/x/vQchB> The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page <http://gnso.icann.org/en/group-activities/calendar>

Woman: Good morning, good afternoon, and good evening to all and welcome to the Review of All Rights Protection Mechanisms and All gTLDs Working Group Call on the 3rd of August 2017.

In the interest of time there will be no roll call. We have quite a few participants online. Attendance will be taken via the Adobe Connect room, so if you are only on the audio bridge today, would you please let yourself be known now? Thank you.

And as a reminder to everyone, please state your name before speaking for transcription purposes and please keep your phones and microphones on mute when not speaking to avoid any background noise. With this, I will hand the meeting back over to J. Scott. Please begin.

J. Scott Evans: Thank you so very much. Good evening, good afternoon, good morning to everyone, depending on where you are in - on the globe this day. You see here we have our agenda in the notes section on the right-hand side of the Adobe Connect, and we are hoping that we can start discussion on the questions to the preamble. And you will see that those questions are listed in the agenda as well, and I suppose that's what is going to be coming up on the screen here in just a moment.

You see we have several preamble questions that were listed in the report out from our sub team on sunrise charter questions, and I do know that while (Lori) is not with us because she's going to have to be a little late to this call, she had a personal commitment that is going to make her late, but she does plan to join in about 30 minutes or so, she and Mary did work on this and she did review the red line comments that you see before you and approve that the wording was she felt reflective of the discussions that have taken place to this point.

So with that, I think we need to start looking at these questions. We want to have this discussion. You know, I do notice, I mean there are about 12 to 15 of us that are on the phone and that here tonight but, you know, we need to make sure that any conclusions we make are socialized without the full working group so we make sure that whatever, you know, discussions we have today and should we come to any sort of conclusions or consensus or have any broader discussions that the rest of the group at least gets presented with that information, so should they choose to weigh in, we allow that them opportunity.

So with that, I think I'll turn to the first preamble question, which you'll see in bullet point one under preamble on the bottom right-hand corner of the Adobe Connect room and I think it's also you'll see here, but it's hard for me to read so I'm just going to read off the Adobe, is this sunrise period serving its intended purpose?

So with that, I'll open it up to the group to see if we have any comments with regards to that particular question. George?

George Kirikos: George Kirikos here. I'm not sure that we're in a position to answer these without seeing all the data, but my view of what we've observed to date is that the sunrise isn't meeting its purpose, the reason being that the uptake of sunrise registration has been very low statistically and a significant percentage of those has been oriented towards gaming behavior rather than

the intended registration for trademark holders or for perhaps bonafide trademark holders. Thank you.

J. Scott Evans: Thanks. I see that Jeff Neuman asked a question in the chat box, which is he's asking the question he always asks. According to this group, what do believe is the intended purpose of sunrise? And I see that Kristine Dorrain has plus one and joined that.

So as a person who was around back in the day when we designed sunrise periods, I can tell you exactly what the purpose of them was, or the intended purpose, at least from my personal perspective as someone who worked with a group of both registries and registry operators and with trademark owners for this particular vehicle of protection, this rights protection mechanism.

And from my perspective and my understanding from the time is this was a way to allow trademark owners who had established rights in a string of letters that served as a trademark for their goods and/or services to come in and obtain a registration at a cost that would be significantly less than having to following a uniform dispute resolution policy because at 1,100, \$1,200 I think it's a little bit more expensive now, and that's filing fees, not attorney's fees.

And so that was to give them the option to do that but it would be done at a time before general availability of the names so that we would cut down on cyber squatting by bad actors. Now I believe that that is the intended purpose of the sunrise registrations and sunrise periods. Now I will open it up to others on the phone that may have other opinions, may have been around, may have different perspectives, but that's sort of my root understanding of what the purpose of a sunrise registration and a sunrise period was. So is there anyone that disagrees, has a different point of view, would like to chime in the purpose of sunrise period?

And, George, I'll take issue with the comment. George has typed in, "That assumes that the sunrise registrant is the only legitimate registrant, a false assumption for commonly used terms like hotels, the, et cetera." You know, that's a very loaded thing. You're taking the position there is a criteria. Now has that criteria possibly been gamed? I will say that. If - but that doesn't answer the question is the sunrise registration serving its purpose.

That means perhaps there needs to be some sort of safety valve so that when someone believes that an illegitimate use of a sunrise has taken place, and I thought most registries had a sunrise dispute policy, where if a sunrise registration was issued to a party that someone felt like they didn't have rights to, they could challenge that sunrise registration, or perhaps I'm mistaken.

But, you know, the fact - and many people in their sunrise registrations to avoid games, at least early on, would put a date that a registration had to be issued, usually I think in the 2004 it was something like a year before the go live date of the registry or the go live date of the sunrise period. In other words, there were certain jurisdictions at the time, and I think they still exist, where you can get a trademark registration in 48, 72 hours and they were trying to prevent people from doing that and gaming the system. So that was one safety valve that was put in.

I see that we have additional hands. I'm going to turn to Jeff and then Rebecca.

Jeff Neuman: Yes, thanks. And I'm going to try to stay fairly neutral on this, and J. Scott and I go way back and of course I was around for the first sunrises and claims and all that kind of fun stuff. But this is where it makes a huge difference of how we define what is the intended purpose. J. Scott, what I heard from you, the key word I heard from your explanation was affording them the opportunity to register names, not that they had to but that there was an opportunity.

What I heard from George though was that they actually - his definition of intended purpose was that they actually did come in, and he was defining success or whether it's achieved the intent by numbers. Again, I'm oversimplifying it, just to make a point, which is the same thing that happens in our subsequent procedures group when people are looking at the success or not success of a the new gTLDs.

If you define things in terms of numbers, it's a lot harder to say that it achieved its intended purpose or was successful. But if you define it in terms of providing choice to those that are actually looking to have that choice, then one could say it's been very successful. So I think before we go on with our opinions of whether it's been successful or met the intent, we really need to drill down and try to agree on what the intent is.

Because like you, J. Scott, I'm a little, you know, when I was on the IRT with you and with others and even the STI group, the discussions were about affording the opportunity for trademark owners to come in, not any kind of guarantee that they would register names. But obviously being afforded the opportunity it seems like you said that there is - that we've minimized gaming to the best extent possible but also affording the opportunity means did the registries stick by the rules, did they, you know - were there issues with some of the sunrises like examples that have been brought up before, .sucks, .feedback and others.

So we really need to get a clear definition of the intent and otherwise people are going to still view it from their own personal biases. And again, that's not meant to downplay anyone or put them down, it's just, you know, you're going to - if you come in with a bias, that's the way it's going to be. Thanks.

J. Scott Evans: Thanks, Jeff. Rebecca?

Rebecca Tushnet: Thanks. Rebecca Tushnet. So I want to pick up another thing that J. Scott said. I was not at the founding but the description of a process that's

supposed to allow people to avoid the expense of a UDRP seems to include the idea that they definitely or, you know, 90% maybe could have won a UDRP, and that's where I think we're getting into some problems.

Because, for example, in most cases, the trademark registrant of hotels probably couldn't have won a UDRP against a bunch of uses of hotels. And so I think that question if specified sufficiently that this was somebody who was almost certainly going to win the UDRP would imply a very different perspective than somebody who just has a registration is therefore allowed a first bite. Thank you.

J. Scott Evans: Thanks, Rebecca. You know, I - extending that logic out, just to take off my chair's hat minute and sort of argue another case, you could also say that if you use that logic that you can take the position that the domain name system itself, because it is so abused, hasn't served its intended purpose.

Now I'm not going to sit here and disagree with the fact that people have gamed the system, but that doesn't mean it didn't serve its purpose, that means there may be problems and maybe we need to look at how we build in protections so that either overreaching and/or gaming doesn't occur. But I don't think that means it didn't fulfill its purpose, I just think maybe we need to know that sometimes nefarious parties are smarter than the good people who are trying to build systems and we have to readjust when we see cracks in the dam.

Jeff, is that still a hand up or is that an old hand? Okay, it's an old hand. And I'd appreciate - I see that we've got a lot of discussion going on in the chat room but I'd appreciate if, you know, we had some more discussion on the record, the oral record that's being recorded, so we can discuss these issues broadly because I for one find it very difficult to try to pay attention to everything that's going on in the chat room and following where all the positions are and run the call. So it'd be nice if we can have some of those positions put forth and discussed in - on the telephone.

So Rebecca made a point. Is there anyone else that has some points? Jeff made some good points. I think George set out his concerns. Do we have a contracted party? I see that Phil Marano has asked if maybe we want to hear from a contracted party what they feel. And I apologize, Mary, I just saw your hand.

Mary Wong: Not at all, J. Scott. Hi everyone. This is Mary from staff. And, J. Scott, my hand really literally just went up as you were speaking. So just to try to facilitate the discussion here, a couple of points. One, I did put in the Adobe chat a definition of sunrise that as developed by an early working group. This was the Protecting the Rights of Others Working Group that was part of the original GNSO PDP for this current new gTLD program round. So that's in the chat.

And secondly, to Phil's point as to hearing from contracted parties and indeed others, one of the suggestions from the sunrise sub team for data collection -- well several of the suggestions really -- was to gather some anecdotal evidence and data from brand owners, registries and others as to the usefulness of sunrise.

And in that context, I will note that in the INTA survey that was just completed and that is part of the data that we're configuring here, there was some feedback from the respondents to that survey as to the usefulness of sunrise. Perhaps if (Lori) from INTA is joining the call later she can speak to that but, J. Scott, hopefully those inputs are helpful for the discussion. Thanks.

J. Scott Evans: Yes. Thank you very much. So Maxim has posted in the chat, and I'm going to just read one of the statements that he just made because he can't use his mic and so - and he's contracted party. He states, "I'm not sure that the cost was part of the sunrise purpose, at least it was not in the AGB. Historically sunrises were not about low price."

And I think that that's a good point. I do think that they were always sold at a slight premium. I think some of the premium pricing that we have seen come forward has not necessarily been of the level that people were used to. There's usually a slight markup and you got a longer registration and there have been some exorbitant prices just in comparison to historic prices for sunrise registrations. But that is, again, the function of the market.

I see Kristine Dorrain, who is I believe the owner of a registry. Kristine?

Kristine Dorrain: Hi. This is Kristine Dorrain. I'm on my headset. Can you hear me?

J. Scott Evans: You're a little echo-y but I can hear you.

Kristin Dorrain: Okay. I'll try to cover my mic. I just wanted to speak up as a contracted party only for the new gTLD. So I know that for Jeff Neuman and many of the other sort of 2004 round gTLDs the idea of sunrise was a way to (unintelligible) good actors and (unintelligible) in the sort of as, you know, was sort of legitimate businesses. So those are not in the gTLD round now. The sunrise was something that we didn't get a lot.

So I mean to sort of Phil's point, you know, I don't think there was a lot of decision making going on so when you're participating in sunrise well what's the benefit of it, because, you know, it's something that was kind of mandated for us. I'm sorry I'm (unintelligible) - people are having a hard time hearing me. I'll try to type something in the chat.

J. Scott Evans: Kristine, I heard you and I'll repeat what I heard just for those that may not have. It seems to me that what I heard from you was the fact that in 2004 round, there were registries that voluntarily chose to offer sunrise periods to show themselves as good actors in the marketplace and to send a message to the marketplace and to brand owners.

And then this round that wasn't a choice, it was a requirement, and that's different and that that may have some effect on whether it served its purpose. If I have misstated that in any way, I apologize and you can correct me in the chat.

I now notice that Greg Shatan has his hand up, and then Jeff Neuman. Greg?

Greg Shatan: It's Greg Shatan for the record. In answer to the question, I think that the sunrise registrations have served their purpose up to a point. However, I do disagree with Maxim. I believe there has been a fair amount of discussion of sunrise registrations and being sold, it will be a cost recovery basis. That clearly hasn't happened. I don't - certainly don't think that it was intended as a way to extract very large, relatively speaking, prices from trademark owners. It kind of turns the sunrise protection - sunrise period into a racket.

Rather than a rights protection mechanism, it becomes a profit-generation mechanism. There's nothing wrong with a fair profit but it's kind of a - taking advantage of the opportunity, you know, kind of like selling water on a train that's stalled out. You can start charging ten bucks a bottle. So I think that it has served the main purpose, which is to provide a method for trademark owners to forestall the registration of their strings by cyber squatters.

Of course there - in many cases there are multiple trademark owners that could register in sunrise and that's recognized by the fact that there are two kinds of sunrises, including you have a first-come-first-serve and end date where you could end up with a contention set since there can be more than one legitimate trademark owner participating in sunrise. And I know there are, you know, that certainly can happen. So the idea that it's only benefiting one party is kind of ridiculous. It benefits as many as wish to participate and try to protect their interests. Thanks.

J. Scott Evans: Thank you very much, Greg. Jeff, before we move to you, and I'll go to you and I'd like to have your thoughts on my next question, if you'll scroll up in the

chat where Mary put in the definition or the purpose of sunrise is stated in the applicant guidebook. She quotes, "A process in which owners of legal rights have the opportunity to register domain names before the land rush process opens to the public."

So if we take that definition and given that that's what it says its purpose was, I mean can we agree that that's the definition of what the sunrise registration's purpose was and that's what the AGB says it was? Jeff?

Jeff Neuman: Thanks. I'm trying to think about that question. Let me go to another point and I'll come back to that one while I put my thoughts together. The - I think we need to separate the cost to - into two parts. I think that it wasn't the intent of the sunrise to have a low cost, but it was an intent of having a centralized clearinghouse or one validator, if you will, of trademark rights.

The intent of doing that or having that in the middle was to hopefully reduce costs so that sunrises when they were carried out prior to there being a clearinghouse was done individually by each registry and each trademark owner had to pay for the validation of their mark regardless of whether it was previously validated by a different registry.

So if you, for example, participated in the -- let me think of one that had one -- if you participated in .co, .C-O, I know it's a ccTLD but they had a sunrise, you're validated by one validation agent. So you had to pay, you know, whatever price you did for the validation work. But, you know, later on that next year, XXX was released and you had to pay yet again to be validated.

So the intent of having a centralized clearinghouse was to reduce the costs for a sunrise registration, but the intent of sunrise is not to provide low cost. The intent of sunrise, and this is where it gets back to the definition that is in the guidebook that Mary quoted, I think is spot on from the way it was intended way back from 2000 when we drafted the very first sunrise for - that was proposed for the 2000 round and then, you know, many different models

were adopted that consistently improved on the fraud or other things, the gaming that was going on.

But I think - yes, so - my basic point is let's separate the question of fees and let's talk about sunrise for what it is and it's an opportunity for trademark owners to register prior to the names going into land rush. As Kristine said, the reason why many voluntarily did it, even though they didn't have to do it, was that they felt it was fair to get these large brand owners so they could avoid all the squatting that was going on prior to introducing any new gTLDs in the late 90s, early 2000s and mid 2000s.

So I'd be happy to answer any questions about the early sunrises that anyone has. Thanks.

J. Scott Evans: Thanks, Jeff. Steve Levy?

Steve Levy: Thank you. Steve Levy for the record. I'm going to speak a little quietly because there are people sleeping here. I want to tie together some of the concepts that I'm hearing from Rebecca, from J. Scott, from Jeff. You know, the one that we haven't mentioned, you know, outright is the difference between trademark rights and the domain name is multiple people can own the same trademark for different goods and services.

You know, we see that with Delta, which is used for airlines, it's also used for faucets and it's used for power tools. However, only one person can own let's say delta.com, and so there's that inherent question of, you know, who has the right to a generic term that's a domain name, you know. Obviously apple in relation to fruit is one thing, in relation to technology is another. And that goes to Rebecca's point about, you know, could the brand owner in fact win a UDRP against a particular domain. It really depends on how that domain is used.

So in terms of whether sunrise is performing its intended purpose, I think what really is needed here is an examination of the facts of the actual data. Is there greater abuse of sunrise by brand owners or people claiming to be brand owners and gaming versus the harms that it was intended to prevent, which would be, you know, abuses by people sort of claim jumping brands like they used to be in the old days and, you know, brand owners being put to the extra effort and expense of having to file UDRP complaints.

If you can say that the abuse by people who are - claim to be brand owners is rampant, then I would say that it's not serving its purpose, sunrise is not. But if the other side is weighs the scale down that there are more people abusing the domain system in the absence of sunrise, then I think, you know, yes it does serve its purpose. One way or the other, you know, somebody is going to be benefited and somebody is going to be left short given the nature of trademarks versus domains. And so I think this is all going to be about balancing those two.

J. Scott Evans: Thank you. For those of you that were finding Steve difficult to hear, they are summarizing his comments in the notes section of the Adobe Connect. You know, having looked at this and heard the discussion, I - my personal belief is that we should use the purpose of the sunrise as found out of the AGB. And looking at that purpose, I would have to say that the answer and the first question is yes it is.

Now when you look at the second question, is it having unintended consequences? When I hear what George has to say, I think that there is at least anecdotal evidence that there are unintended consequences that are occurring. So we've got an answer to both questions that is yes. And then that drills us down into some more questions.

I think that when you answer yes to unintended consequences, you look at the additional questions - the additional preambulatory questions we have there that need some deeper dives. And, you know, I think that something

can serve its purpose and at the same time it'd also be true that some of the unintended consequences which can be an abuse of that system means that it's not perfect and perhaps it needs some adjustment perhaps.

So that's sort of where I find myself coming out. Are there any other comments or thoughts on that point? All right? No one's raising a hand. Oh, Mary?

Mary Wong: Thanks, J. Scott. This is Mary from staff. So for purposes of the record, and as you note, you know, having to go back to the full working group, it may be helpful to have folks enumerate what the unintended effects at least specifically might be because that might help us in first looking at the data when we get it and then coming back to this overall question later on.

J. Scott Evans: Yes. I see that there's some sort of - there seems to be a little bit of agreement with what I just said, which is being summarized. I think we - I would think the next question is a resounding yes. Is it having an unintended consequence? Yes. I don't think we need to belabor it. We had a thousand discussions about it. I think it's clear from the anecdotal evidence we've heard. It's been presented again and again.

I'm a large brand owner and I think someone registering the word "the" and being able to tie it up and take over all this is ridiculous and we need to figure out how to stop it. I do believe that sunrise if used can be a value but I do think that abuses of the system need to be policed and taken care of and there need to be safety valves to make sure that that can take care of it.

So that's sort of - so I think we should answer yes. I'm going to ask for Petter to give his comments, then I'm going to take a little poll and ask for people who agree that we should go with yes on the second bullet point and we'll use our green checkmarks. But right now let's let Petter give his thoughts.

Petter Rindforth: Thanks. Petter here. I just want to instead of putting it into the chat, as you said, to say that I agree with your summarizing and conclusion, J. Scott, and I would say that the only problem that I see in that is the possibility of misuse because each system that we create will be misused by the bad guys. That's not possible to avoid.

But if we need to change anything or if we see any problems with this misuse of trademark clearinghouse and these kind of protection with a list or trademarks we – I think we mainly have to see on the regulations for how long a trademark has been registered to avoid those that in some systems just register some kind of trademark in order to misuse these kind of lists because if you have the real trademark that you actually have used, and is registered, and commercially used then I think these systems are very good workable. Thanks.

J. Scott Evans: Thank you very much Petter. Now with this I'm going to ask if we'll go with the summary that I stated and to answer a resounding yes to the second bullet point question about unintended consequences. If we're comfortable with that and again this is going to go to the full working group. So this is just a pulse to see where we are so that we can get this out in a report to them to let them know where our discussions ended up. Would you please give me a green checkmark if you're possible?

If you are merely on the phone and are not an Adobe Connect if you could do us the favor of just quickly speaking up and say agree? Now I'll go – it looks like everyone is pretty comfortable where we are. (Scott), I'm sorry did you want to speak or were you trying to agree? Okay so it looks like we're in a pretty good consensus – I'm sorry George the question is to - using the definition from the applicant guidebook that Mary posted is to answer yes does the trademark – does sunrise registration (unintelligible) in there intended purpose is articulated in that statement from the applicant guidebook but to also answer yes to the second bullet point which is that there are unintended consequences that are occurring.

And I don't think we need to go any further with unintended consequences other than saying yes and then let's drill down because I think some of those unintended consequences may be articulated in the additional questions. And if everybody would do me a favor you can clear your checkmarks so just in case we have to use them again I'd appreciate that. Thank you all very, very much for that.

So you see our next question then is, is the TMCH provider requiring appropriate forms of "use " (paren) if not how can this be corrected? So does anyone have any thoughts, comments, antidotal evidence about this particular point? Okay, I see hands are going – hands are a flying as we say. Greg?

Greg Shatan: Thanks. It's Greg Shatan for the record. I can speak, you know, mostly based on personal experience since I haven't, you know, obviously looked at the proof of use that was supplied by anyone other than my clients. And I would say that they were fairly rigorous in the situations that I was involved when. In one case they rejected the specimen of use that was accepted by the US Patent and Trademark office, and I had to go and get a better one. So that I think is a positive sign.

However it's clear that in the case of things like the and others where the trademarks are not really being used in a bona fide way to promote to sell goods but are, you know, being registered on a pretext to start glomming domains that there's also use being proven. So I would assume – I would love to know more about, you know, what they were using like there's been some reports, you know, pencils or whatever you can things you could get printed for a buck, you know, but no proof that they're actually being sold in commerce in any, you know, actual way. So - and we need to think about how the use, the proof of use can be used to avoid damning and avoiding nominal or sham use types of claims. Finally I'll note for some of the old-

timers on the list that I still have a Leo Stoller stealth pen in my collection.

Thank you.

J. Scott Evans: Okay George?

George Kirikos: George Kirikos for the transcript. Yes I would agree that with the latter half of Greg's statement that there obviously are trademarks entering into the TMCH that have a de minimis use. And so the rigor that the TMCH provider is using in order to test these trademarks is obviously open to improvement. Thank you.

Jeff Neuman: This is Jeff. Can you guys hear me? Oh okay I can be heard.

Mary Wong: This is Mary. We can hear you.

Jeff Neuman: Okay. I'll get...

Mary Wong: And apparently J. Scott's lost audio.

Jeff Neuman: Oh okay. So I will – should I go – I guess I'll go and then since I'm next in the queue I would – this is where you get into one of the most difficult issues that was incredibly difficult from a political standpoint and has been the bane of sunrise's existence since the beginning. And that was the reliance on different trademark legal systems around the world where some legal systems are built off of the, you know, the trademark has to have – go through a substantive review and in other countries and jurisdictions it doesn't.

And for political reasons actually interestingly enough initially the very – one of the first versions of the sunrise in this last round was that it would only accept marks from jurisdictions that did a substantive review. But that was quickly gotten rid of after a number of complaints from jurisdictions that didn't do the substantive review that said well wait a minute why should, you know,

the entire country or all the trademarks in Belgium for example be not allowed simply because, you know we don't do a substantive review initially?

And to be honest I don't know how to solve that problem. It is like I said been kind of one of the banes of my and sunrise's existence for 17 years now since it was initially created. I'd love to hear potential solutions to it. But until that happens you're always going to have marks like the or others that, you know, have gotten a trademark in a non-substantive review jurisdiction or even if it has substantive review jurisdiction it's going to be for a class of goods and services that are not associated with the – what people what every day think of the generic a dictionary use. And I don't know how to solve the problem either so I'd love to hear from everyone on that.

Mary Wong: Thanks very much Jeff. I believe J. Scott is dialing back in. So while he does so and before we go to Rebecca just an observation. I think as you and others on this call know if part of the history is that it was made very clear by the board and through the community input process for the various iteration of the African guidebook that indeed in terms of the RPMs and the Trademark Clearinghouse that there should not be any kind of distinction or rule about substantive review. And so that is why we have the situation that we have that as long as something is a registered trademark somewhere then it would be something that could qualify to go in the Trademark Clearinghouse. Rebecca you have your hand up?

Rebecca Tushnet: Yes, Rebecca Tushnet. Thank you. So it seems to me that we're conflating three different things that we might be able to tease out although I understand that there are going to be political difficulties. So first we have the specimen of use. That obviously does require some minimum use though not necessarily viable commercial use that would be enough to demonstrate use in the trademark sense. But you have to do something. You have to at least make the pencil in theory.

So there's that, and there are examination issues with that. Then there's substantive examination generally which I agree we probably shouldn't try to mess with. But once we have a specimen of use requirement the third issue is commercial use which seems to be where we are deeply skeptical about the and hotels and so on for pencils. So if we wanted to really solve this problem we could require the TMCH to up the use requirements, not just a specimen of use but some sort of statement of legitimate commercial use with some, you know, minimal proof requirement, some affidavit, something like that or even, you know, something that would satisfy, you know, a court or a trademark agency reviewing a nonuse talent. I understand that not all of that may be achievable but that would be one way it seems to me to deal with the objections that we've been hearing. Thank you.

J. Scott Evans: Thanks Rebecca. And I'm sorry I'm at Stanford and I'm in a dorm room and I don't know what happened. I think my phone just turned off so I'm now on my cell. This is J. Scott Evans for the record. Let's – if you'll go back up in your chat I think Kristine posted in. And it seems to me that Rebecca I like the ideas that you just talked about and I think that, that is an interesting concept. But we need to have – there needs to be some way and I haven't gone through what Kristine she put into the chat the ways that you can challenge a sunrise registration.

It certainly would mean that if you're going to have heightened requirements you also need to have a mechanism for somebody who believes that there's been bad faith behavior to be able to take action against that bad faiths behavior and release that domain if it's based on, you know, what we would call in the United States sham use, you know, used as merely sort of created in order to create a right because I thought the whole point and someone correct me if I'm wrong of requiring use for sunrise registration is because it is a block they did not want it to give to just a – someone who owned a registration but only to someone who had a registration and was making commercial use because that sort of shows where there might be harm.
Greg?

Greg Shatan: Thanks. It's Greg Shatan again for the record. I'll go for second a kumbaya moment and agree with just about everything that Rebecca said, Professor Tushnet. In any case Tushnet. In any case I think we do need to think about what else can be done to prove use. Obviously we tried going with a specimen of use concept, you know, like the US and many, many other jurisdictions. But that's proven to be insufficient or at least outsmarted by some. And, you know, we're kind of in the classic black hat situation where whatever we think of somebody is going to think of a way around it. The idea is just to make it difficult and, you know, to try to at least stay if not a step ahead not fall further behind.

So, you know, we can look at some sort of commercial use proof. We can even look at the method by which, you know, acquired distinctiveness is proved. There's, you know, a number of things but clearly we want to do something where just, you know, making a pencil or going to cafe press or wherever and getting, you know, a T-shirt printed up or even just creating a page where a T-shirt could be printed up but never actually is, you know, it – that can't be good enough for this purpose. Thanks.

J. Scott Evans: Thanks Greg. Rebecca I see a hand still up for you. I don't know if that's an old hand if you had some additional comments? I see a Petter.

Petter Rindforth: Thanks. Petter here. And I think that Greg was into that also a bit. But I see simple to not just show real use but real use that is in fact used continuously. And but I – if I refer to the domain disputes where dealt with - where the complainant has shown use so to speak with just a printout from their Web site. And that's fairly enough for that topic but still you can put out on a Web site one minute and take it down the other minute just having – just showed it for that specific limited purpose.

So it would need to - and also in – I mean in countries where you don't have to show real use in order to keep your legislation but where there could be

disputes based on non-continuous use of the trademark you actually have to show that it's not just something that you have put in the shop for a couple of hours that it's in real continuous use or at least even if you haven't sold any products it's a real advertisement with again to actually use it for real. So continuous real use that – I think that's two important words to keep on this. Thanks.

J. Scott Evans: Thank you Petter very much for those comments. Rebecca?

Rebecca Tushnet: Rebecca Tushnet, so I think – sorry it's late at night for me. What I'm trying to get at is that the TMCH has already accepted the idea of specimen abuse right which means that there are some sort of use requirement. And I think Mary posted the text in the chat. So given that it could makes sense to go further since we've already left behind at least some trademarks that can be registered in some jurisdictions that don't require use and I even ITUs in the US you wouldn't get them – you wouldn't be able to use a TMCH until you've submitted your specimen of use at least to the TMCH. So there's no I think conceptual barrier to working on the use requirement. Thank you.

J. Scott Evans: Thanks Rebecca. And I don't disagree. I would agree with you perfectly that it seems to me that their use requirement the purpose of it was to say if you're going to get the special registration that requires you front of the line status that should only be done where you have a registered rights and/or – and you can show proof of use or I think if you have a core validated right you can show use. And we're having some use problems.

And so I do think finding a way – and I don't see any disagreement but I'll ask this question now do – does everyone agree that perhaps there needs to be a re-evaluation and a strict, a strengthening or more strict requirement around proof of use in order to hopefully assist us in ferreting out and filtering out abuses of the system? So this is another where you use your green arrows.

So again and what I'm asking is do you think we need to have some additional structure around it in order to help eliminate some of the gaming that we see going on in the marketplace? And (Jonathan) I'm – I didn't know when whether you were wanting to speak. I see hand up. If you'd like to speak please do if that's – go ahead. Perhaps he's just indicating his agreement with my statement.

So it does look like where we are now with regards to that question is we believe that there needs to be some additional structure around the use requirement in order to assist with eliminating gaming. Oh (Jonathan) does not agree with that. Okay. Neither does (Phil). Okay. Well it looks like that we're at sort of a point where the majority of the group sort of there's – there are a few people who disagree but the majority in the group seems to feel like that's where we've ended up.

So now we can move on to the next question. My computer screen just went dark but here we go. Have abuses of the sunrise period been documented by trademark owners? (Jonathan) I see your hand is up again and I don't know if you're wanting to speak. If you'd like to speak please do. Mary?

Mary Wong: Thanks J. Scott. This is Mary from staff. And so two things. I guess one is we as staff can circulate the available documentation on proof of use including what the TMCH has published. The other point I wanted to make is that in previous efforts to gather community input on this point including in 2015 when staff published a paper reviewing the RPMs in preparation for this PDP there certainly was quite a bit of feedback from a large segment of the community that they thought that the application by Deloitte of the proof of use standard may not have been consistent. And we can find the comments there and circulate those too.

J. Scott Evans: Thank you Mary. And I think Greg offered some anecdotal advice to this today because it seems to me they rejected a specimen it was accepted by the trademark office yet there are people getting hotels and the through that

in and of itself in my mind after just years of experience shows that there's something going on that's not quite copacetic. Okay. So have abuses of the sunrise period been documented by trademark owners? Anyone to speak to this one? Greg?

Greg Shatan: Hi. It's Greg Shatan for the record. There may be a phrasing issue with this one and the next one. Listening to it read out I thought the question was asking whether trademark owners have documented abuses of the sunrise period. But I think what we're asking is whether abuses of the sunrise period by trademark owners have been documented? And as well have abuses of the sunrise period by registrants been documented? So I think we just need to – maybe I'm the only one who's reading it that way but I think it's ambiguous enough that we may want to make sure that we get all of our kind of subjects and objects in the right place.

As to the actual question I guess it all depends on what you call a trademark owner since in a sense the gaming is – if they get a trademark in one sense they're a trademark owner but I would not call them a brand owner, or brand user, or whatever we want to do to distinguish those whose only – only claim to being a trademark owner is that trademark being registered, you know, for the and it's based on a pencil so that they could get the in every – as many sunrises as they could possibly want. Thanks.

J. Scott Evans: Thanks Greg. Here's what I'm going to suggest. We're at the top of the hour and it looks like we've got – I'm not so sure Greg's concern is the way the questions need to be rephrased. I think they are asking have these three groups have documented evidence but that's my personal point of view. (Lori) is not on the call. Oh she is...

(Lori): I am on the call. Yes, I just joined. I apologize for being so late. But J. Scott I would agree. When we discussed this inside several meetings it was are these constituencies documenting abuses that affect them? That, you know, if you did rephrase it I think the same intention eventually you get this – you

get to the same place, you know, have there been documented abuses by registrants, things that adversely affect to them or you could say have registrants documented abuses? I mean either way you're going to get to are these three constituencies being hurt?

Man: Right.

(Lori): So I don't necessarily have a problem leaving it for that reason because I still think you get to the same end.

J. Scott Evans: Well I don't – I can't speak for trademark owners myself but I think if we jump to registrants we've got to registrants or I think they're representing registrants, George and Rebecca who've repeatedly brought up two or three prime examples of abuses. So I wouldn't say that, that question is yes that the registrants have identified abuses, have documented abuses the and I think hotel is another example. So but for trademark owners worry.

Rebecca Tushnet: But I was – yes I mean I can chime in here and speak on behalf of trademark owners of course as I represent the International Trademark Association. And yes trademark owners have been documenting abuses. We have a study that is mentioned here that we've posted to the wiki that shows much anecdotal evidence as well as data to certain abuses. So I would say yes trademark owners have documented abuses.

J. Scott Evans: Okay. And then I'll ask this question to the registries and registrars that are on the phone. And I think we have some from each group. Have you documented abuses? Have your stakeholder group or your company documented abuses? Rebecca I think we're talking about sunrise specifically because these are perambulatory questions to the sunrise charter question. So we don't have any registries or registrars that want to speak up?

Okay, well then I would suggest that Mary we – I think we can end this call now because we've gone through all that perambulatory questions. I think

that we would ask that the last two questions be posted to the list and hope that maybe we get a registry or registrar to provide us input here so that we can see. I think (Maxim) says if we define abuse as a violation of the rules, no. Okay. So I think (Maxim) if I look at some of the complaints I've heard just anecdotally it's not necessarily a violation of the rules it is stretching the rules beyond their intended purpose such as registering the word the, putting in baked up specimen abuse and then using it to obtain domains because that's not the intended purpose.

So (Maxim) then says yes he says stretching the rules he says yes he believes. So we've got one registry, one contracted party and I think (Maxim) is the registry who says yes he believes. But we'll send it around to everyone at this point and get everyone's viewpoint. Then what I'd like to do is, you know, Mary send this out to the list, ask everybody to give their comments in perhaps by next Monday so that we can sort of have a summary of where we are both from the list and from this call in these preamble questions then we could briefly - I would say our next step would be to sort of go over the (unintelligible) combined places we find ourselves at the end of this discussion combined with the end of the period on the list and sort of summarize that, spend about 30 minutes making sure where we came out on all these is where we came out.

And then we can move on to looking at perhaps the chairs perhaps hopefully will have a chance maybe to meet and discuss how we're going to go about gathering data. And can move into that at the - for the rest of that call on what is that going to be the ninth I think of August. So if I could have someone just remind everyone when the next call is going to take place and then we can I'll give everyone 30 minutes of their day back. And I want to thank everyone. I thought today's discussion...

Mary Wong: Hi J. Scott. This is...

J. Scott Evans: ...extremely useful.

Mary Wong: ...Mary from staff.

J. Scott Evans: Go ahead Mary.

Mary Wong: Thanks. No worries J. Scott. So the next call means that we're back at the new rotation which is that we will have three calls at 17:00 UTC before we have this time to call. So for next week next Wednesday it will be 17:00 UTC. Another thing I'll note here is that (Maxim) has asked that we read his suggestion about the registries and the registrars providing some feedback. And I'll note here that we do capture the Adobe chat comments, and we do post them. So I'll just ask everyone to refer to the chat for that comment as well as all the other discussions that took place in the chat today. Thanks J. Scott.

J. Scott Evans: Yes. And I will read out (Maxim)'s comment. He thinks that comments by next Monday is unrealistic given that it's summer. You know, I understand that (Maxim) but, you know, as chair of this committee one of my jobs is to keep the trains running on time. And if the registries and registrars feel like this is an important issue that they want to have a voice in then it requires that they participate. And all we're asking them to do is tell us if they have documented cases. I'm not asking for them to provide us with an illustrious list of those. I merely want a yes or no answer to that particular question. And I don't think that's over burdensome to ask.

And at the end of the day people have to participate and they have to put the time in. There are people on this phone right now who are sitting up at midnight on the East Coast and they're here and they're participating and we just can't keep delaying things because people have busy lives because we all have busy lives. I very much appreciate your comment but if we continue to do that we'll never get done and the GNSO Council's already thinking we're taking longer than we should. So I appreciate that very much.

With that I'm going to say I thought tonight's call was extremely productive. I think everyone had very good input and gave very good thoughtful ideas on ways that we could reach - identify problems that perhaps look for compromised solutions to solve those problems. I want to thank you all for your time. And for those of you on the East Coast please have – sleep tightly. For those on the West Coast enjoy the rest of your evening. And for those in our APAC region please have a wonderful day and we'll speak to you again next Wednesday which is 9 August at 1700 UTC. Ciao.

END