

**ICANN
Transcription
Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP Working
Group call
Wednesday, 28 September 2016 at 16:00 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-28sep16-en.mp3>

Attendance of the call is posted on agenda wiki page: <https://community.icann.org/x/QAu4Aw>

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page <http://gnso.icann.org/en/group-activities/calendar>

Coordinator: Recordings have started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening. Welcome to the Review of All Rights Protection Mechanisms RPM and All gTLD PDP Working Group call held on 28 September 2016. In the interest of time there will be no rollcall as we have quite a few participants. Attendance will be taken by the Adobe Connect room only. So if you're only on the audio bridge could you please let yourselves be known now?

Brian Hayes: Hi. This is Brian Hayes. I'm on the bridge.

Terri Agnew: Thank you Brian.

Sarah Deutsch: This is Sarah Deutsch. I am on the bridge as well.

Terri Agnew: Thank you Sarah.

Caroline Chicoine: Caroline Chicoine.

Kristine Dorrain: Kristine Dorrain.

Terri Agnew: Thank you Kristine. Hearing no more names I would like to remind all to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this I'll turn it back over to J. Scott Evans. Please begin.

J. Scott Evans: Good morning, good evening good afternoon everyone this is J. Scott. I'm one of the three cochairs for those of you who may not have heard me speak since I have missed the last two meetings I apologize for that. Business travel and business expectations here in Adobe have kept me busy and I apologize for having to miss but thanks to our wonderful cochairs Phil and Kathy I know that things have gone on.

We have proceeded with our work plan. And I believe we have been looking at the Trademark Clearinghouse. We looked at sort of the technical apparatus of the Trademark Clearinghouse two weeks ago and last week I think we went over the sunrise period.

And I've seen there's been some healthy discussion with regards to sunrise period and - on the email list over the last few days. So today our goal is to go in and do sort of a deep dive into the Trademark Claims service and some of the issues that surround it or have surrounded it in that either that is ICANN and the various constituencies and concerned parties. So that's what we're going to do today.

Now let me see where do I go to move my slides? I think it's here. So as you know there are two rights protection mechanisms that the information that is

verified and put into the Trademark Clearinghouse is used for. One is the sunrise period which you discussed last week. The second is the trademark claim service which was originally designed to be an alternative to the sunrise period. In fact the genesis of the Trademark Claims service was .biz. Jeff Neuman who was with Neustar at the time was sort of the creator of this model. And it was an alternative to sunrise periods by creating sort of a notice system. And I believe it was the GAC that required that ICANN make this mandatory for all new gTLDs. So it's no longer an alternative it is a service that runs in every TLD alongside the sunrise service.

So here we go. So what is the overview? Trademark Claims service as you see what it is designed to do is provide a potential domain name registrants with information they may need before they register a domain before they take that action. Specifically it tells them that the alphanumeric stream that they're wanting to register on the left side of the dot the second level domain matches a trademark that's been registered in the Trademark Clearinghouse. And that notice that goes out from the registrar whose customer is seeking to register for example Adobe.software would receive a notice that goes out that's called the claims notice. It goes from the registrar to the applicant or the potential registrant saying there's a match.

Then if the putative registrant or the applicant at this point decides they want to take the action to register the domain that has been identified as matching something in the Trademark Clearinghouse one of the trademarks then there is a Notification of Registered Names. And you see it's here the acronym NORN. And the NORN is sent by the TMCH provider. And that goes to the owner of the trademark in the clearinghouse to say someone has registered a domain that matches the trademark that you registered in the Trademark Clearinghouse.

So it's, you know, it's a way to say to a someone applying for a domain oh stop you may not know this but somebody is claiming rights in this. And then if someone takes action it's a way to allow the owner of the trademark to say

oh someone has registered this so that they can go investigate it. I think and I don't want to speak for Jeff the whole idea was to sort of push the dispute resolution or the discussion about whether this was a conflict off on to the parties that it involved that is the registrant of the individual domain name and the trademark owner.

So all registrars have to clearly and conspicuously display this claims notice and we're going to get into what exactly the claims notice says in substance in a few more slides. But they have to clearly and conspicuously present this to the potential domain name registrant and then ask whether they want to go ahead and register or whether they'd rather not. It has to be provided at the time of the potential registrant - registration at real-time. It can't be sent in an email later it has to be provided during the registration process in real-time without cost and without any cost to the domain name registrant or the prospective registrant since it's, you know, shouldn't - they shouldn't have to bear the brunt of this. It's cost of doing business.

The claims notice must be in the form specified by the claims notice form. This was something that was developed specifically by the SDI. They specifically negotiated the language that would be there. I think a lot of the information as you will see as we get into it in the slide is basically to make sure that the potential registrant has the necessary information to make an informed choice of whether to proceed or not and understands what their rights are. The claims notice has to be provided in English and preferably in the language of the registration agreement for. So if you are perhaps registering in let's say France and the registration agreement for your registrars in French you would - it would be in English and in French.

All right so you see here what the language basically is that you have. You see it's quoted here what is presented to the prospective registrant. But basically it's to tell them that, you know, there's been a match but that doesn't necessarily mean you can't register. That just means there's been a match that you need to make sure that, you know, that the trademark covers the

goods and services that might overlap with you. You need to make sure and understand whether there are – you're - if the use you want to make is a non-commercial affair use in your jurisdiction. And if it is you could still register. And it provides information on the trademark so that you can make that decision. And it tells you. You need to read this information very clearly and make sure.

And then it tells you, you know, make sure that all jurisdictions aren't the same. And so you need to understand what your rights are in those national - those jurisdictions. And you need to understand what's going on. Just because it's identical doesn't mean - necessarily mean that it's a problem. So it's basically trying to provide, you know, what we would say in US parlance as hornbook law or a summary sort of a high level summary of what the rights of the prospective registrant are and that just because you get a notification doesn't necessarily mean there is a problem and that you need to understand that.

And then it goes on to explain – I'm on the next slide -- that if you continue with this registration, you know, you misunderstand that you've been informed about this. And here's the information regarding the mark that's been identified. And it gives you the mark itself, the jurisdiction which it comes from, the goods and services which it covers, the international class of goods and services or equivalent.

So for those that are not operating in the trademark fora or not attorneys or don't own trademarks in the united - in the world trademark offices classify goods and services by – into certain international classes under the Nice Treaty. Not all countries use it. Some countries actually use it but then have subclasses for instance China.

But so for instance clothing is in Class 25. And so it would tell you that, you know, you might - it might say the mark is Fruit of the Loom. The goods and services are men's, women's clothing or men's women men women and

children apparel, international Class 25 who's a trademark registrant Union Underwear Company Inc. doing business as Fruit of the Loom. And who's the contact that would be Les Dooley who is Director of Trademarks at Fruit of the Loom.

So and then it would just say that, you know, if it's previously there's been a decision that shows that this has been registered by another party and there was the UDRP decision showing that, that was a violation of rights it will list that information and give that as additional information for them so that they can look at that information to determine under what facts or scenario that was found to be infringing or to be cybersquatting under the UDRP.

And again let's see it looks like is this identical to that? Okay so then it goes on and explains further what your rights are. You have received this notice of (registrant) name because your agent has requested – oh yes this is the NORN. So this is I get these every day at Adobe. And this basically says to me I'm getting this notice because you registered the following mark Adobe. Somebody registered Adobe.software and the date they registered it. And then it's my - it's the duty is now on me to investigate whether I believe that's an infringing use and take whatever action I deem as appropriate to protect my rights.

So the Slide 6 is the claims notice that sets out everything that is five and six. And Slide 7 is the NORN or the Notice of Registered Name owner. It tells them the information that they need to investigate. So what's the scope of this? As I mentioned earlier in my introductory comments this is mandatory for all new gTLDs. All that - all of the new gTLDs have to run a claims service for at least 90 days during general registration. So this is known as a claims period.

Now when I say at least it can be longer than 90 days but at a minimum it has to be 90 days okay? The sunrise period and the claims period must be two distinct phases. So as you learned last week there's a 30 day sunrise period

and then there - now you know there's going to be a 90 day claims period. And they have has to be two distinct phases. It can't overlap.

So the registry officers - the registry operators may provide additional periods to accept registrations. I think some of them have been known as Limited Registration Periods or and for those of us who have been around for many years also known as land rush. And so this is a time that can overlap with the sunrise period but the domains can't be allocated until after sunrise registration has been processed. So these are like again pre-sales that are done prior to general registration. But again they are subject to the sunrise period being completed to make sure that any sunrise registrations are given preference before these go live - are given out to the prospective purchaser.

If you offer a Limited Registration Period as a registry the Trademark Claims service must be provided during the entire Limited Registration Period on top of the 90 day period. So you can see that, you know, it depends on what you want to do but if you want to offer a Limited Registration Period you're going to be running a Trademark Claims service that is going to be longer than the standard required 90 days. You could if you chose as a registry offer the claims service for every domain ever registered in your registry if you wanted to. But you at a minimum you have to do it for 90 days and for any extended period where you have limited registrations that are accepted.

So what are some other key points? There are certain technical requirements which you're obligated to use in order to offer the services. And I think in the slide here you'll see and it will be available to you on the wiki that there's a link to those technical services. But they work with the registry operator will work for the TMCH technical functions which is IBM to coordinate how this is going to work within the registry.

All the, you know, the operators and all the registrars have to accept the terms of service applicable to the sunrise and claims service to offering any of these services. So with the Trademark Claims providers they have to agree

to those terms of services in order to provide these. So you see here also that Trademark Clearinghouse also provides an additional ongoing notification service that applies beyond the 90 days period required by ICANN. And you see here sort of the financial formula that is used by the Trademark Clearinghouse operator.

There's no additional cost for identical matches or exact matches but there is a cost of a dollar per year for variation. So this is basically known in the parlance of trademark attorneys as a watch type service or someone who's watching to make sure that anything out there doesn't possibly conflict and putting you on notice as the owner of that particular IP that you might have a potential problem that you want to investigate. So that's a service they're offering.

Some additional points and this comes out of the independent review of the Trademark Clearinghouse is it looks like or at least there's indications from some of the research that's been done that a high proportion of prospective registrants don't proceed to registration after they've received a claims notice. And you'll see down here the sub bullet points that 93% of the 8.1 .8 million registration attempts that received a claims notice did not proceed. Only 6.3 went to complete domain registration. Now that could be because the system is working correct? That could be because people see that there might be a conflict, they investigate and they decide not to move on.

I think during our meeting earlier this year we heard from registry operators who said well the claims notice actually in his anecdotal experience he had actually had a discussion with someone they were trying to give a domain away to. And the just the verbiage on the claims notice was so much it seemed so legalistic it had a chilling effect. There – we have nothing to show that other than that one anecdotal. But you see here I mean I - you can argue that, you know, 93 point and I think that was brought up at the same meeting very well could be that that's because it's working.

As of December 2015 we had 114,000 registrations that were completed following receipt of an acknowledgment of claims notice and only about 3% of those were subject to subsequent domain disputes. So that shows that it looks like, you know, if it's working correctly you wouldn't have very many disputes because people would be deterred or the parties would work it out amongst themselves. So you see here that there is a note in the analysis group report that the claims notice data shows, you know, only the number of notices issued the number of completed registrations there is no way to really make a definitive correlation that one has a deterrent effect or a chilling effect based on the analysis done to date by that group.

You should also know that beyond the mandated sunrise period in Trademark Claims service that are mandatorily required by ICANN of new registries some of this data in the database has been put to private uses. In other words they've used the information that's been put in the database to work their own private systems. One and probably the one that you've heard most about is DPMLs which is the Domains Protected Mark List.

And what that is that was offered by Donuts. And that's where they said that domain - trademarks have been verified are - have been registered in the Trademark Clearinghouse database they could buy defensive registrations that would block any use of that string from registration in any of their top level domains. And I believe they ended up with around 200.

And you can see also I think Rightside has something similar, Minds and Machines has something similar. So this data is not only being used in the mandated way that ICANN prescribed in the applicant handbook but it's also being used by entrepreneurially to offer different variance on protection to trademark owners.

So what are the general characteristics of these private practices or private purposes? You know, you can trademark owners can block a second level domain across numerous gTLDs that are operated by a single registry

operator. So in other words it's like volume pricing. You know, blocks can be term matching a TM or containing a TM. That depends on the particular registries that's not default but that means if the registry says well you can register exact matches in anything with a generic. So Adobe software.sucks for instance if you paid as a defensive block we'll not - well anything that has Adobe in it so adobe.sucks, adobesoftware.sucks adobecopyright.sucks we would block. But that's not necessarily a default that is something that can be offered by the registry operators so it chooses and the use that data to do that.

It's still blocked on the same SD - SMD files that I think were discussed on earlier calls issued by the Trademark Clearinghouse. It's not applicable to reserve names or premium domain names. So, you know, if you have a mark for instance your mark was I don't know some of the ones would be like let's say it was a particularly to it was a generic or a dictionary term as particular.store for instance like retail.store.

But for instance let's say that you had a clothing line that was retail clothing line. If it was put on the reserve name or premium list because for store.store or.stores it was seen as a premium name then it would not be - it would not - you couldn't block that. And you have to submit through your register authorized by the registry operator that sells the blocks okay? So there's a channel for purchase is defined.

So here's some of the questions from the working group charter concerning the claims service. You know, there are some - I'm not going to read these verbatim. They're here for everybody to see. You can see that there is some related to the links of the claim service whether it should be extended beyond the mandated period. Should it apply to all new gTLDs? There is a - there's a provision that allows a trademark owner to lift up to 50 derivations of it's what they call a domain name label or the string. So in other words if it was Adobe then it could be A-D-0-B-E as a very - derivation. So the question is does that want to be continued? Do we - are we comfortable with that?

Again as the study from that I referred to a couple of slides back the question I don't - the question has been asked well does this create a potential chilling effect on genuine registrations? And if it does if we should find that it does how can that be addressed? And then there's the overall question, are these RPMs sunrise period and claims service are they keeping the good domains out of the pool of available domains? For instance I think there's an example in this question that shows should Microsoft be able to remove Windows from a domain a top level domain that was like .cleaning? So you could get windows.cleaning when it's not specific to technology and/or specific to perhaps software. And then I think this question is almost duplicative but, you know, what effect does the 90 day claims period have?

So here are some additional questions and issues from the charter. You can see that there are about six here or maybe seven. And again, you know, I'll give everybody a second or two to look through these but I think they're, you know, basically their pretty general observations and questions that have been asked.

Move to the next one and its again just additional questions. And then that's it. You know, we have some questions for discussion and those are, you know, you need to look at the questions that were on the slides and - or in the charter. Are there? Are there any that we need to remove from the list? Do we find some of them to be duplicative? What might be grouped together? What might we examined first? So those of the sort of the discussion points as we look at this.

And I'm happy to jump back some slides and open up the discussion so we can, you know, talk about the charter questions and the additional questions and whether anyone on the call feels like we've left - there's something been left out, or there's things that are duplicative or do we want to group these in a certain way? And then how as we go about our work in exploring this, you know, how should we order that work?

So with that I will ask if anyone has any questions based on the presentation I've given so far that's sort of a deep dive into this with regards to claims service. So before you to the questions does anybody have any questions about how it works, anything I presented today that you didn't understand that you have additional questions about I'll ask that question first? And scroll up and down somebody needs to help me because I can't - there's so many people in the call I cannot see everybody's hand. I guess it shoots up to the top if everyone raises their hands so maybe that will help.

Next now that we have that I'll open it up to the floor with regards to the charter questions regarding the claim service. And I guess, you know, we can look at this and say okay the first thing I think would be easiest to look at this and say are there any of these questions that look like they're duplicative? Anyone have a thought? But in looking at the slide we're looking at it seems to me that the first bullet and the last bullet are the same question just asked in a different ways? Does anyone disagree with that conclusion? And I would also argue that the fourth bullet and the last bullet are susceptible and to the same exploration of issues? Okay. I hand Kristine Dorrain, you win a prize. Please.

Kristine Dorrain: Thanks. First I have to figure out how to get my phone off mute. And I apologize because I have to bail kind of immediately after I make a comment. I'm going to suggest that there may be not and Kristine from Amazon by the way. I'm going to say that I don't think that they're all exactly the same. I think their follow-on questions from one another. That's how I'm reading them. So I read them sort of in the order of question four, six, one.

So if you say does the trademark claim period create a chilling effect on genuine registrations? And then what is the effect of the 90 day claims process if it doesn't right? So if it doesn't create a chilling effect what is its effect? And then given that answer you would then ask the question possibly then should the trademark claim period be extended beyond 90 days? So I

don't view them as necessarily duplicative as much is sort of a process of questions that I think you go through if you sort of ask them in a particular order. I guess that's how I'm reading them but I'd be interested if anyone else is sort of seeing the same sequence that I'm seeing?

J. Scott Evans: Okay, thanks Kristine. I think at least we could grant – we could group them into a grouping that dealt with timing issues and then list the three questions under those as timing issues so that they're all considered together at the same time and discussed. And perhaps the – it appears to be a logical order that Kristine has suggested. And I think that, that would be - it seems like to be a good way to group them together. Does anyone object to that? Okay go to the next slide and let you look at these and see if anybody thinks there's anything. Caroline Chicoine you may be a mute?

Caroline Chicoine: Can you hear me?

J. Scott Evans: Now I can.

Caroline Chicoine: Okay sorry it takes a while for it to - I guess my question too would be and I, you know, don't know necessarily where these come from but, you know, does the trademarks claims period create a chilling effect? I don't know if there's ever been any studies to say, you know, because to me a chilling effect is you get this notice. And, you know, should we be looking into the actual notice and say is it written in a way that, you know, lets people understand that this is not saying what you're doing is infringing. And so maybe the notice itself needs to be reviewed if it's a notice that's kind of creating a problem as opposed to just this...

J. Scott Evans: Right.

Caroline Chicoine: ...generic process.

J. Scott Evans: I agree. And I think that I mean I think the conclusion from the working group that considered this said all we know is this information we don't know why that has happened. You can draw a lot of conclusions from that. I mean if it was my marketing department what they would do is they would put together several focus groups and they would run this language by them and interview them on how it made them feel and what their reaction to it was. And then take that as well this is our target audience right? We've segmented it out. Here's how they responded to it. And we either need to adjust or not adjust depending on the intake of that information.

I saw Jeff Neuman's hand come up and I see that it's gone. Oh it's back up. Okay well Kathy is now ahead of you so I'm going to Caroline if you will lower your hand and Jeff if oh well now Jeff no it's Kathy Kleiman okay Kathy.

Kathy Kleiman: I'd be happy to defer to Jeff. He was ahead in the queue J. Scott.

J. Scott Evans: No. He says he'll go after. I got a note from him in the chat.

Kathy Kleiman: Okay. Just because the analysis group did not consider it within its scope to look at why 93.7% of all registration attempts turned back at the Trademark Claims notice doesn't mean we can't. In fact I think we're being urged by the charter questions to ask just that which is why are people turning back? And so the analysis group I think we heard in the Trademark Clearinghouse subgroup from their report that the analysis group set up a number of barriers beyond which they were not going.

And again that, you know, well this I think we should take what we can from the analysis group report but not necessarily except the same barriers and hurdles that I think this is a question that we'll be forced to ask. And I can assure you that SDI did not have the time or opportunity to do focus groups. So rewriting the Trademark Claims notice certainly I would consider well falls into the purview of this working group. Thanks J. Scott.

J. Scott Evans: Yes thanks Kathy. Just to be fair I didn't mean in any way to suggest that it wasn't in our purview. What I was just saying is we can't look at the information they have provided us and draw a conclusion. We need to relook at that information and then ask the right questions if we're going to draw a conclusion. I see that Jeff...

Kathy Kleiman: Agreed.

J. Scott Evans: ...Neuman's hand. And then I saw Mary Wong's hand.

Jeff Neuman: Yes thanks. This is Jeff Neuman, just an additional question that we should think about which I had them put on the right side. Initially the policy recommendation was for a Trademark Claims or a sunrise period. That was later changed after an agreement between the GAC and ICANN staff in 2011 I want to say at their Brussels meeting. So we need to decide as a group whether to stick with our original policy recommendation which was Trademark Claims or sunrise or whether we should officially codify the new compromise into the policy as to whether it should be both. I'm not giving a judgment as to which one I think it should be but just that we need to address it.

J. Scott Evans: I think that's great. And I - would our scribe make sure that we get that additional question noted in our notes so that we'll no to add it to our questions, Mary Wong and then Phil Corwin.

Mary Wong: Thanks J. Scott. And yes we have noted Jeff's question. The comment I wanted to make from the staff side is a follow-up on Kathy's. And to clarify for the rest of the group we're not members of the sub team. In the call that the analysis group did with the data gathering sub team they felt that the reason they could not draw an inference or a deduction about either a chilling effect or the nature and type of deterrent is - was due to the nature of the data. As we noted in the slides the data shows the number of notices and then the number of actual registrations that proceeded following those notices.

So this may well be a limitation of the data rather than the admittedly limited nature of the work of the analysis group. So to the extent that the working group has some suggestions for maybe additional data or other sources that we can look to for information that might help us to draw the conclusions which as Kathy noted is something that our charter questions seem to contemplate. I think that will be very helpful both to staff as well as to the sub team thanks.

J. Scott Evans: Thank you so much Mary. Phil Corwin.

Phil Corwin: Yes. Thank you J. Scott, Phil for the record. Just a couple of thoughts I wanted to throw out here all relate to this. One is that the language of the claims notice and I'm not sure if it can be made more laymen friendly because most people in the world and most potential domain registrants thank God are not attorneys much less IP attorneys. But I think to the average registrant or potential registrant getting this notice what kind of comes through is you may get in trouble if you go through with registering a domain. And the only way to find out whether or not you will is to hire an attorney or speak to an attorney which is kind of put off a lot of people.

I do think on the language that toward the end and aside from making it just more generally less loyal like but still accurate and I don't think the ICANN can be in the business of trying to provide legal advice as to whether potential registration may or may not be abusive or infringing. But the part where it says this domain name has previously been found to be used or registered abusively I think we understand that, that only applies to trademark plus 50 domains placed in the clearinghouse. But it's not really differentiated here.

And the only way it would be different is that if it's not a TM plus 50 registration there wouldn't be a decision number in UDRP provider which is also incomplete because trademark plus 50 also relates to court cases not just UDRPs. And it now could also relate to URSs so all of that needs to be

cleaned up. But that needs to be differentiated because I think a non-sophisticated person would read this and might be confused and think oh the domain name I'm trying to register has previously found to be abusive even if it's not a TM plus 50 name.

So those are my remarks about the language here. I just had two questions I wanted to throw out there. One was to J. Scott another is receive these notices kind of what do you - the other notice is the - is it the NORN? Yes when you get a NORN if you look and see that the domain is not in use do you just put it on a watchlist and do nothing further? And then the other question which is somewhat relevant even though we're not up to URS or UDRP is whether any of the people practicing in the URS or UDRP, you know, the prosecution or defense area know of any cases in which receipt of the claims notice and continuing on to subsequent registration has been cited as evidence of bad faith registration...

J. Scott Evans: Okay.

Jeff Neuman: ...because there could be that legal implication from receipt. So those are comments on the language and the notice and two questions about the notice and its effects. Thanks.

J. Scott Evans: Okay great Phil. First of all with regards to the language of the notice I think that a lot of companies especially in the Internet space that deal with millennials struggle with that very point. And I think if you'll look at the way Facebook, and Twitter, and Facebook, Twitter, my site behance.net, and Google deal with these issues. You'll find there are much more conversational and written far more as a help guide rather than a legal notice type of thing.

And we might want to take a look at the way this information is presented on those sites to get sort of a flavor for what you're talking about. That's just a suggestion. With regards to the NORN generally because I have so many

partners, you know, we investigate to make sure whether it is a partner that is registered in violation of a contractual arrangement they have with our organization and try to contact them as quickly as possible before they make any sort of substantial investment beyond the purpose - the purchase of the domain. Sometimes depending on we may license it back to them but register in our own name it just depends on the commercial.

If there is no use and is not a partner we just keep an eye out to see if it's ever used for infringing activities. Some of our marks like Photoshop it's very difficult to use it in a way that would not be infringing other words Adobe on the other hand if it was Adobe.buildings, you know, there's a very good chance unless they were selling or giving away free malware of our Adobe reader that it might just be a fair use or another trademark use in a different field so coexistence is possible.

So that's sort of what I do with regards to those. I'm happy to hear from anyone else that wants to speak to that. I see that Beth Allegretti is on the phone. She may deal with them differently than we do but I'll turn to Kathy Kleiman. And Beth if you'd be willing to speak up and just say how you all deal with them just raise your hand and we'll put you in the queue. Kathy?

Kathy Kleiman: Sure. Thanks J. Scott. Let's see so to Mary's point on the analysis group my information does not come from the meeting with the sub group because I do miss that I was traveling. It comes from meeting with or just talking with their folks in Marrakesh where they were doing some presentations about what the scope was. And they just said they couldn't - they weren't analyzing chilling effects that this was really ours that, that would really be for the full working group to look at. But one thing that does shed some light is something really interesting. There's a table in the analysis group report of the ten most frequently downloaded trademark strings in claims service data.

And so I'm about to read a set of words and I think based on the statistics we have to envision that these are the words at which, you know, approximately

93.7% 94% of people are turning back instead of going forward and registering. And the strings are smart, FOREX for FOREX Bank, hotel, one, love, cloud, NYC, London, ABC, luxury. So Page 8 of the analysis group report and so I think there was a lot for inquiry. And I'm glad we're beginning to talk about this. Thanks.

J. Scott Evans: Paul McGrady?

Paul McGrady: Thanks, Paul McGrady for the record. So a couple of things first in the claims notice language itself when it says the domain label has previously been found to be used or registered and all that Phil indicated that some cleanup was needed there because it may not be clear what, you know, to the average registrant what that means. I think this may be a question for staff. I'm not sure.

This - does this language appear every time that claims notice is given even if there's not been a decision? It seems like there's a specific decision number and UDRP provider that would and again we may need to provide more information or better wording of that for the registrant. But it seems like if there's a specific decision and it only shows up in the event that there has been a decision then it at least limits the scope of the potential fuzziness of that language. So I guess a question for staff.

A comment for Phil. Phil said, you know, some - reading this language the, you know, the average registrant may think I could get in trouble and I'd have to ask a lawyer whether or not I should be doing this. And I think he said that and because he wanted to make sure that people weren't chilled from registering domain names that they wouldn't get in trouble for.

But some domain names people will get in trouble and they really should see a lawyer right? And so I think we need to be careful that whatever we do to the language we don't change it so much that we give the false impression to a potential registrant that everything is terrific when in fact it could end up

being not terrific. And, you know, UDRPs aren't a guaranteed outcome here, you know, a registrant could be sued in federal court and be facing down a significant judgment that they wouldn't be able to, you know, defend against if it's the wrong kind of registration.

So I mean they could mount a defense but some of these things are pretty straightforward. So I do think we need to, you know, be careful that we don't soften this to the point that it is so weak that it doesn't do what it's supposed to do which is put the potential registrant on notice that, you know, they could be walking into or they could be buying a significant piece of trouble for, you know, \$12 and that they should perhaps in some circumstances reconsider what they do.

And then lastly to answer Phil's question. Yes the claims notice has been cited. Receipt of the claims noted has been cited in supporting elements at least the URS, the footlocker.website case is a good example under the URS to take a look at to see how that panel has used that. And then lastly, you know, Kathy Kleiman and I over a very long weekend towards the tail end of the SDI process drafted this thing.

And so, you know, she and I are - have no pride of authorship. So as we go through this, you know, we, you know, I don't feel like everything has to remain static. But I do think there are some important issues of balancing, you know, notice to the potential registrants against over noticing them and scaring them. And she and I tried to reach that balance.

If we didn't and if the - we can find some data to indicate that we didn't and we need to reopen this. You know, I, you know, I'm sure Kathy can speak for herself but I'm sure that she and I share the same point of view which is the goal of the claims notice was always to get it right. And so I'm I for one am open to revisiting this if it turns out to be a problem that in fact needs to be solved. Thanks.

J. Scott Evans: Thanks so much Paul. Yes there's one thing I just want to point out with regard to Kathy's comment again with regards to the list she read. So in my mind the list Kathy read does no more than raise the fact that we need to inquire about this. It doesn't lead me to any sort of conclusion. To pick up on Paul's point and my earlier point 90 3.7%, 90% of those could have been people who were deterred because they have a reason to be deterred. We have no information to lead us to believe that in any way.

And I think that that's the conclusion that the people who put that list together came up with. So I just want to remind everyone I do believe and agree with Kathy that there is an issue that is raised here, that it is within our purview and it is something we should look at. But I don't want anyone to come in with a predisposition of where we should end up on that because there's some list of eight name and it looks like because I know people who would say hey 93% .7% shows it works. That's 93.7% people who didn't get in any problems.

They walked away unscathed without any investment. They moved on to a new name that would work for them. So we just don't have any information with regards to that. And I just would like to remind everyone of that. Beth I'd ask you about your company's procedure for handling NORNs or the Notice to the Registered Name holder. Do you want to - the mark that's in the clearinghouse do you want to speak to that quickly?

Beth Allegretti: Yes sure, this is Beth Allegretti. So we do here at Fox pretty much what Adobe does. You know, we keep an eye on the domains that are registered that we get the claims notices for. We have sort of a, you know, our mark our main house mark is Fox. And it can also be descriptive of a small furry animal. So, you know, there could be a lot of that. What I do find interesting though is that we get a lot of notices for 21 CF for 21st Century Fox. And that is I think you've got to be pretty aware to be registering that.

We also get a lot - the majority of our claims notices are from Chinese registrants so either the notices are not being translated in the local language from these registrars. And so these applicants are proceeding or, you know, they know what they're doing and they proceed anyway. But we should look at this language thing because we really get a lot of these notices in connection with Chinese registrants.

J. Scott Evans: Okay. So maybe I would pose that we should look at - because it doesn't seem to me it appears that that's mandatory. Maybe we should look at whether mandatory translation into the registry agreement language is required. And perhaps we should not be in - it should - that no requirement be in English that it just be in the language of the registry agreement? So I mean I think that's a question we could add to our list whoever is our scribe over here on the right-hand side. And (Jenna) notes if you would just put that down as a possible additional question that we could ask because I do believe that seems to indicate that there might be an issue there Beth. And thank you so very much for bringing that to the forefront.

Okay. So are there – we've looked at these questions. Are there any additional issues with regards to these? If not I'm going to move down to the next slide for us to consider.

Kathy Kleiman: J. Scott, this is Kathy. Could you tell us what slide you're looking at since we're...

J. Scott Evans: I'm looking at Slide 14. And it looks like the question I said should be additional is the first bullet point on that slide. So it looks like we're already asking our self that question. I thought I was driving the slides for everyone. I apologize.(Unintelligible) a presenter.

Kathy Kleiman: So J. Scott, its Kathy. Just a quick addition to the note Mary or (David) are typing on the right that we should investigate somewhat what languages are

being offered right now so in addition to recommendation maybe some data gathering on this. Thanks.

J. Scott Evans: So you see this list of questions here, is there anything that people think that are different, or they would add or they think is duplicative? Okay I'm moving to Slide 15? I have to admit that I have no idea how the last bullet in any way is in purview of this group? J. Scott for the record.

Don't we have another working group looking at human rights issues? And if we do wouldn't that be in their purview to decide whether there's something here rather than ourselves taking that on? It seems it's beyond this group's expertise in what we should be considering. Kathy is your hand still up because Paul McGrady's hand is it up but in my list you were ahead of him? Okay Paul and then I see you Mary too.

Paul McGrady: Thanks J. Scott. This is Paul McGrady back again. So on the human rights side yes I think this is probably - I'm not sure why this bullet point is here either. There is Work Stream 2 subcommittee or subgroup work on human rights. I would say that I would love to characterize what that work is doing. I'm part of it and emerging discourse in fact right now it just feels like chaos to me on the first several weeks of the meeting of that group. We are, you know, that work is a long way off from being able to inform anything that we're doing here.

And presumably if whatever we do here runs a fowl of whatever they do there and whatever they do there is adopted by the board as a framework of interpretation of the bylaw of the contingent new bylaws which will go into effect after the IANA transition then I guess the board will have to figure out how to change what we've done here at that time. But in terms of attempting to get guess where they're heading and having us sort of operate around it at this point that is going to be an extremely difficult and unlikely process.
Thanks.

J. Scott Evans: Great Mary?

Mary Wong: Thanks J. Scott. And maybe just a note of explanation or clarification on this point on human rights question which J. Scott I believe this is the last question on Slide 15. This actually is a question that was crafted for the sunrise discussion last week. And it's not actually in the charter itself at least not in this form.

The charter does have a general question about human rights without specifying any particular RPM. So it may be helpful if I put the language of that question from the charter into the chat so that people can see it again noting that it wasn't specific to an RPM and noting further that all of the charter questions really were pretty much verbatim taken from community suggestions that have been made over the last several years, so just to clarify. Thanks.

J. Scott Evans: Thank you very much. Kathy?

Kathy Kleiman: Yes. Actually I was going to say, this is Kathy Kleiman. I was going to say something similar to what Mary said. And I called up the charter. So the question in the charter and it may or may not be relevant as has been pointed out but the actual questions are recent and strong ICANN work – I think it may or may not be well drafted either -- a recent strong ICANN work seeking to understand and incorporate human rights into the policy considerations of ICANN relevant to the UDRP or any of the RPMs. So we had these kinds of questions at the end about human rights, about fair and their procedures things like that big broad umbrella questions that I do think are very much in our purview.

One way to interpret this question that might be and I didn't draft it so I don't know that might be interesting is not to - is to look at Article 19 of the UN Declaration of Human Rights which is on freedom of expression. And linking this other questions that we have which is, you know, are the Trademark

Claims or the sunrise are they overly broad? We're being asked about this. So are there protections that are going in beyond the scope of goods and services of the trademark or one might also add beyond the fair use protections of the trademark.

So one question that's been asked has to do with criticism, you know, you're allowed to use a trademark to criticize, or critique, or write about say Microsoft in the antitrust trial you don't need their permission to do that. So are there top level domains where the use of the trademarks actually are fair use that involves criticizing or critiquing? So this would fall this kind of interpretation might fall under a human rights or a free expression free speech type of analysis that is very much I think within our purview. So I just wanted to shed some light on why this question might in a revised way be very relevant to our work. Thanks.

J. Scott Evans: Okay thank you Kathy. Just one point, very few jurisdictions in the world have free speech one. Two, expression doesn't necessarily mean non-infringement. And so and every jurisdiction is different. Europe does not have fair use at all. There's no such concept at all. So...

Kathy Kleiman: But every jurisdiction has signed on to the United Nations declarations...

J. Scott Evans: Not every jurisdiction has signed on.

Woman: Oh wait, wait.

J. Scott Evans: Not every jurisdiction is a member of the United Nations. But we'll go ahead and let Greg finish because we are at the end of our hour. So we're going to let Greg be the last word.

Greg Shatan: Thanks, Greg Shatan for the record. First with regard to the statement that's in the charter I find it rather bizarre. I'm fairly familiar with what's going on and I'm not familiar with any recent and strong ICANN work to be characterized

this way. Only thing I'm aware of that could be characterized this way is a working party created by the NCUC or and CSG and chaired by I think Niels ten Oever of Article 19. So, you know, that is a group. It is recent. I have no idea whether, you know, the NCSG group is strong but I certainly wouldn't characterize it as ICANN work.

Second I think this is very premature at I think, you know, to the extent it's even - before you even get into the issue whether it's in our scope there is a human rights bylaw. There is a subgroup which is deciding how to deal with interpreting the human rights bylaw. The human rights bylaw has to be - the construction and application of it really needs to be figured out by the subgroup for that bylaw which is, you know, currently dormant as executed.

So going off in other directions relating to human rights that go beyond the scope of the bylaw just kind of, you know, stuffing them in here I think will, you know, will be counterproductive to this groups work and to, you know, the proper construction of the bylaw and creating a human rights regime within ICANN that, you know, fits the mandate of the bylaw.

Lastly with regard to free speech the – there's no problem with engaging in speech online, you know, regardless of what the - what string appears in the domain name. You know, that is, you know, not in my mind even speech to begin with. But, you know, putting that aside there are plenty of opportunities for people to say what they want and to engage in criticism, parity, and commentary in text regardless of what domain string is involved. And to the extent that, you know, we're now stopped talking about content I thought we don't go there. Thanks.

J. Scott Evans: Okay. Thank you very much. Just one point that I may offer as a point of compromise as chairs privilege. As Kathy read the question it - or Mary indicated the question to us I'm sorry. It appears that this was an umbrella question that applied to all the RPMs. So rather than making a decision now my suggestion would be we strike it for our current discussions. And then

when we go back and we consider these overall or overarching questions that sort of apply to all the things at the end of our work they were at the end of the charter then we can sift through those and decide whether they're still applicable, whether there are other groups doing the work because that work will be further along? And we can make that consideration now.

That doesn't need to be something we consider at this very moment while we deal with these other issues with regards to the Trademark Clearinghouse. And that would be my recommended suggestion for going forwards is it's not off the table it's just we will go back and discuss it later when we do sort of more the umbrella or chapeau issues that sort of seem to apply to all of the mechanisms that we are reviewing.

So let's - I see the Paul - I mean that Brett Fausett seems to think that will work. So Mary you had your hand up. And then we really do need to go. We're five minutes over the hour and I want to respect everyone's time.

Mary Wong: Thanks J. Scott and thanks everybody for the allowance for a few minutes. So J. Scott I think the staff we're going to make a similar suggestion that since this and a number of other questions are more general that we come back to them at the appropriate time. And in that context I placed something in the chat although the formatting is kind of messed up that these charter questions as mentioned are basically ones suggested by the community over time.

And the charter itself does ask us to look at these questions and says they should form part of the PDP discussions. And the working group may decide to address all, some or even additional issues to these. So hopefully this will be helpful as we go and look at all the charter questions both specific and general. Thanks.

J. Scott Evans: Fantastic. So if someone with staff will just briefly tell us the timing of our next call for next Wednesday which I believe is 5 October I hope I've got the

correct. But if someone would tell us the date and time just so that everyone can make sure it's on the calendars correct. Oh I see (Terri) she put it in here, October 5 at 1700 UTC for 60 minutes. So thank you so much (Terri) for that. Thank you for staff for the slides that you prepared for us. They were excellent. Thank you for everyone's participation today and your time. And we look forward to picking up our discussion next Wednesday at 1700. Thank you all.

Man: Thank you J. Scott.

J. Scott Evans: Cha-cha.

Man: Thanks.

Terri Agnew: Once again the meeting has been adjourned. Thank you very much for joining. (Marie) the operator, if you could please disconnect all recordings for everyone else please remember to disconnect your lines. Have a wonderful rest of your day.

END