

## **ICANN Transcription**

### **Review of all Rights Protection Mechanisms Sub Team for Trademark Claims**

**Friday, 12 May 2017 at 16:00 UTC**

Note: The following is the output of transcribing from an audio recording of the Review of all Rights Protection Mechanisms Sub Team for Trademark Claims on the Friday, 12 May 2017 at 16:00 UTC.

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Attendance may be found at: <https://community.icann.org/x/HgrfAw>

Audio may be found at: <https://audio.icann.org/gnso/gnso-rpm-review-trademark-claims-12may17-en.mp3>

AND

<https://participate.icann.org/p3zk6qy2rg5/>

Coordinator: Excuse me, recording has started.

Michelle DeSmyter: Great, thank you. Well good morning, good afternoon and good evening to all. Welcome to the Sub Team for Trademark Claims call on the 12th of May 2017 at 1600 UTC. In the interest of time there will be no roll call but we do have approximately nine participants in conference. Attendance will be taken via the Adobe Connect room. So if you're only on the audio bridge today would you please let yourself be known now? Great hearing no names I would also like to remind all participants to please state your name before the speaking for transcription purposes and please your phones and

microphones on mute when not speaking to avoid any background noise.  
With this I'll hand it back over to our co-chair Michael Graham.

Michael Graham: Thank you very much, Michael Graham and good morning everyone. I know several of you have been involved in other calls before this so hopefully we'll continue in a positive and productive way from how you began the morning. So we basically have three things on our agenda. The first is going over the questions in the updated table and starting to consider what data we believe would be required in order to answer those questions. And then I think following the model that I understand has been adopted with the Sunrise Sub Workgroup ask staff to help out and identifying what data has already been generated along the lines of where you identify and bring those and then secondly, you know, help us out as we start to identify data that we do not have, how we might obtain that.

I do note that we are going to now I believe I have a two-week hiatus after this meeting so that the gathering of that data, that information hopefully will be able to be conducted during that time so that when we all come back we'll have that as well. But first off before we do anything else the one change that was made in this chart that you'll all notice came from some suggestions and that was replacing the earlier draft questions that we updated in the far-right column. So the far right column updated question are the questions that we developed after the last couple of meetings. And then in the far-left column rather than have the earlier drafts we now have inserted -- and thanks Amr for doing this -- the original charter questions so that it's clear in going through these questions how they relate to each other.

So before we proceed with talking about what data we would look for to enable us to answer these questions that are being asked just want to make sure that we are fine with the updated questions. If there are any comments or questions on any of those let's entertain those now. Amr, do you want to go ahead?

Amr Elsadr: Thanks Michael, this is Amr, just a quick walk through of some of the changes and those are all in response to action items from last week's call. Question one and two have been sort of reordered and reframed. The questions are all still there from the previous iteration but the Sub Team had determined that this order might be more useful in terms of how to go about addressing them. I also wanted to point out that Question 4 in the updated question column on the right is one that's the Sub Team had asked staff to take a first stab at it in terms of coming up with it. It's a - it's sort of a newer question so I think it might be useful for folks to sort of just take a look at it and determine if it accurately reflects what the Sub Team wanted to ask and whether any edits or refinements may be required. Thank you.

And to be clear -- this is Amr again -- that this was regarding whether or not exact matches would be included in the trademark clearinghouse and if they are then whether a the standard claims notice should be sufficient in terms of addressing non-exact matches or whether a separate claims notice would be required and then if the broader working group should consider drafting a new one. And to respond to Kathy Kleiman's question in the chat this is Question 4 on Page 2 of the document in the right column, right hand column so just Question 4 and then two subsequent questions A and B under that. Thank you.

Michael Graham: Yes, thank you Amr, Michael here, Graham again. So we had ended up with Question 3 which was does the trademark claims notice to users meet its intended purpose? But then the question that was raised was well if there are other changes specifically if the review of RPMs that non-exact matches should be allowed inclusion in the trademark clearinghouse whether or not the notice should be claim - changed for that? So it's sort of a speculative question but it's one that I think in our discussion we brought up because since that claim has been made and there has been a proposal for some non-exact matches which I submitted in fact that we address this at this point rather than waiting for later. And I'm not sure if this is a question, Question 4 I'm referring to that we want to have further discussion on or review further. I

note that Kathy Kleiman had stated she might want to have a bit of additional time to take a look certainly at that one. I believe and perhaps the other questions as well. Kristine Dorrain you have your hand up?

Kristine Dorrain: Thanks Michael, Kristine Dorrain. I just wanted to comment as far as Question 4 goes in my mind, and I hope everyone is kind of the same place I am Question 4 is a speculative question from last week because (Phil) - was - this came from (Phil)'s suggestion that we think about what happens after the main working group goes a little bit different direction when talking about the trademark clearinghouse, how does that kind of trickle down to the claims work? And I think to the extent that there are changes and I think this came up a little bit in the Sunrise call I mean staff has been doing an amazing job of taking notes. And so I think to the extent that in any sort of work that happens between now and when we get to the claims questions to the extent that there are any additional questions that crop up like gosh if we change something here how will it affect something later I think we just, you know, going to make the - make a specific call out to staff to kind of put those questions -- and I don't know, here we call it a parking lot or whatever you want to call it -- but someplace where you can get to that list later and say all right well we pushed these two questions off or we decided that those questions were going to impact something else at a later date so let's make sure we get to those.

So I think in my view this Question 4 is, you know, kind of contingent upon what we decided in the main working group with some of the other topics. I think absolutely if people have like sort of tweaks to wording ongoing in the next week or so please get those in especially, you know, update the Google Doc from time to time. But I think that generally speaking our questions do, you know, capture everything that we've discussed and everything that the charter questions originally contemplated. So I think that we certainly can add it maybe by the time we get to claims we're going to have a Question 5, 6 and 7 -- who even knows right?

Michael Graham: Thanks Kristine Dorrain. It's Michael again for the record. I think that's a great point and that means that the process could demand some further questions as well as this. My understanding -- and Kristine Dorrain and I spoke earlier and I totally appreciate her history lesson since I am coming on board a bit late -- but that what we want to do from this working group is to be able to pass back not only the questions that we have formed for the larger working group to consider but then also the data that would help that larger working group in answering those questions.

Some of these and four I think is one in particular as speculative they would not have that sort of data. So I think that putting that sort of on the side that we do want to take a look at that and come back to that perhaps our next meeting to determine or in the meantime determine whether or not we want to work with that language is certainly something that we could go forward with. But that would not affect the sort of data that I think that we want to try and identify as being necessary to answer the questions that are really the fundamental ones one, two and three. So I think we can put that for something to do Kathy Kleiman. I notice your hand's up. Sorry I'm just coming back to you. Go ahead.

Kathy Kleiman: Yes Michael if you're still responsive to Kristine Dorrain I'm happy to wait because I'm going to talk a little bit more about Question 4.

Michael Graham: No, go ahead. Let's address that before we go on.

Kathy Kleiman: Okay great. And I'm just catching this on first reading because I've been on the road. And I think Question 4 would benefit from the kind of scrubbing that we've given the other questions. It's much longer, it's not as clear and frankly I think it's leading. And we tried not to do that in the other questions. But 4B is really quite a leading question. You know, if the answer is no then, you know, here's this long question of how we should change the trademark claims notice. I mean if the answer, you know, B should really have a big - the answer to 4A is no should we be making any changes to the trademark

claims notice because we have a lot of material now in Number 3 about the trademark claims notice about how to - and then the question is should it be informing but, you know, to potential registrants and how far should it go down the path of informing them about non-exact matches. But I've got to say 4B I think is a pretty leading question so I think going back scrubbing everything in the next pass would make a lot of sense here. Thanks.

Michael Graham: Yes and having the opportunity to look at that a little bit closer I would certainly totally agree. We're including in the draft, you know, some of the suggestions of direction to go and I think that's the sort of thing that we had in the original other three questions originally. So I think it's something that certainly we could go back to and look at.

And Amr is asking Kathy Kleiman you're referring to 4B correct?

Kathy Kleiman: I was going to type the answer but I'll just speak it. Yes 4B but also all of four.

Michael Graham: Okay. Yes I think that's a good point and I think we ought to go ahead. I don't know if we if you think it would be worth wordsmithing now. I sort of think it would not and this would be something that would be better leave for people to submit comments going forward. Kristine Dorrain your hand's up?

Kristine Dorrain: I was just going to offer suggested language but I'll withdraw and add it to the Google Doc later. Thank you.

Kathy Kleiman: Well no if you've got language Kristine Dorrain if you've got great language that would probably give us a goose forward. Sorry Michael...

((Crosstalk))

Kristine Dorrain All right as long as you're inviting.

Kathy Kleiman: Yes.

Kristine Dorrain: Kristine Dorrain again for the record. I would just suggest that the - that you like do what Kathy Kleiman just suggested just truncate it and stop suggesting the answer. If the answer - or just don't even say if the answer is yes or the answer is no just say what changes, you know, what if, you know, if it's inadequate what changes are necessary period that could possibly be the limitation if depending on whether or not if you find it to be an adequate are the - or what changes are necessary period.

Michael Graham: Thanks Kristine Dorrain. It's Michael again. So would that be sort of a if there are non-exact matches should the claims notice be revised yes or no? And if yes what changes would should be made?

Kristine Dorrain: The point of I don't think it has to be if yes or if no. I think it's just if - if the change is made, if the review of all RPMs and all gTDLs PLT PDP determines that non-exact matches of trademarks should be allowed inclusion in the clearinghouse. Should the trademarks claims notice be changed to address this overarching change period, get rid of everything below it and if so how?

Michael Graham: Okay got - that I think in a nutshell is what I was thinking. I don't know if you'd be able to type that into the notes Amr but I think that exact wording was excellent. There it is. So it would be the first part if answered if the review of all RPMs and all gTDLs PDP determines that non-exact matches of trademarks should be allowed inclusion in the TMCH should the trademark claims notice be changed and if so how? I think that would be the entire question wouldn't it?

Kristine Dorrain: Yes that's what I'm thinking. We can certainly still ponder it some more though.

Michael Graham: Anyone else - this is Michael anyone else have any comments on that suggested revision of Question 4? I must say the designation of the PDP Working Group as the review of all RPMs and all gTLDs PDP is a mouthful.

Kathy Kleiman: Hi Michael. This is Kathy Kleiman. I've got my hand up.

Michael Graham: Oh, I'm sorry. Go ahead Kathy Kleiman.

Kathy Kleiman: It is a mouthful. And this - it's a huge awesome responsibility. In general I like what Kristine Dorrain said. I think we should just list it on the next version and it sounds like exactly the right direction but we should probably offer to the rest of the sub teams to take a look at. Thanks.

Michael Graham: Okay thank you Kathy Kleiman. And I think I agree. We'll put that up there for further comment and consider that to be a - the working question at this point. And yes Kathy Kleiman I don't know, there's static on your line. I don't know if you're using a Skype service or something or standing under a power line as I sometimes want to do but just so you know. Great so the other thing that we want to do though with the questions as I understand it is to present the questions along with at least our initial suggestions of what data can be gathered to present with the questions for the larger working group so that the questions can be answered. And I know that some of that discussion in putting together the questions some data has been referred to, certainly the reports that have been produced for various reviews and such.

What I wanted to do and thought we might do in order to organize this is to go back to Question 1 beginning there, open it up for comment on what data we believe would be necessary to either identify or to obtain that would enable us to answer these questions. And I'm going to open up for suggestions on what data we would look at for Question 1. Kristine Dorrain?

Kristine Dorrain: Hi. This is Kristine Dorrain for the record, just to also clarify as we get started I know you and I talked about this ahead of time. But I think the idea of

maybe throwing out some suggestions of data we wish we could have without making a lot of discussion as to the merits of whether or not we could actually get that data, you know, is one way to do it. I don't know how people feel about that but, you know, we can spend a lot of time arguing over whether data is or is not available or whether that data is, you know, anecdotal or, you know, I know one of the comments that we get often is the registries don't respond to surveys so we can't survey the registries. But, you know, let's pretend we don't have those practical concerns, what data would we like to get? Does anybody object to kind of doing a brainstorming of that sort or am I too pie in the sky and we should stick only to, you know, fundamentals that we or think we're going to get?

Michael Graham: Things Kristine Dorrain. It's Michael and I would certainly agree, you know, and we discussed earlier I think the more ideas we put up now on what data would answer help us answer these questions the better. Then I think, you know, we would be able to winnow through that wish for data to identify what data already exists, what data might be obtained but would take some effort with some suggestions where that could be obtained and then also to identify data that gee it'd be wonderful to have this, you know, in our dreams but we're probably not going to obtain it and be able to classify it in those three ways so that moving forward and I believe you said our schedule at this time would have our work plan and the questions discussed in July after the Johannesburg meeting in which case between now and then we would be able to identify what data we could realistically obtain and understand if there's other coming or some we would like to have and that we probably wouldn't have. So I opened it up. Susan, do you want to go ahead?

Susan Payne: Yes thanks, Susan Payne. Yes I would support that. I think it would be a worthwhile exercise to identify what we'd like to know as long as we do all recognize that we'll then have to kind of scale back those are if you like. I would hate for us to sort of be fishing around saying we're waiting on responses from people when we in reality know we'll never get them anyway because and I think - as part of the exercise of when we're going through and

winnowing the data I think it would probably worth us checking back to see what we already asked for when we were doing the TMCH subgroup data gathering exercise because we did have a whole host of questions we sent to registries and registrars and so on. And if we basically already asked them and they said, "Sorry we're not giving it to you or no we don't have it," you know, we just have to be realistic and accept we're not going to get it. So yes I would support this provided we're all realistic and don't sit around waiting for data that's never going to come.

Michael Graham: Right thank you Susan. And I think that was one of the reasons why actually Kristine Dorrain had suggested almost a color scheme that we would have a green, yellow and red designations, green data that we can identify that we already have and here's the source and here's the data, yellow data that we need to obtain and we realistically could obtain it within the reasonable time period to be able to use in the workgroup as a whole to answer the questions. And then red would be things that we would really like to see but probably are not going to be able to get it. At this point it's putting together just a list of all the possibles and then we can figure out which of those categories the data falls in. And Kathy Kleiman you have your hand up?

Kathy Kleiman: Yes hi Michael. Is this is a better line? Is there less static on this one?

Michael Graham: Much better, thank you.

Kathy Kleiman: Fantastic thanks everybody for letting me know about the problem. So I like your phrase all the possibilities. I'm going to write that down and use it. That's a great phrase.

I know in the past we've asked for data from registries and registrars. And we asked for a lot of it. In fact we had to scale it back at one point and we didn't get a lot of response but on this we might. There are registries and registrars who have been coming forward to share anecdotal data on trademark claims.

This one, you know, kind of affects the bottom line particularly of registrars and registries in a very clear way.

So we know that some registries in kind of the anchor period where they are creating pioneer tenants -- you know, pick your favorite word for this -- had candidates they had chosen people that they had gone out to that then hit the trademark claims notice and almost turned around. And this was, you know, kind of people that they were hoping would be there anchor tenants. So we have some of that anecdotal data from, you know, registry.

The registrars are probably hearing about trademark claims. They're probably getting questions because, you know, they're sending out - a lot of them are being sent out and they're on the front lines with their customers. So I get the funny feeling we may get more answers. We have good questions and welcome those anecdotal and evidence-based data. I think we get some responses on this one. Thanks.

Michael Graham: Thanks Kathy Kleiman and I would certainly hope that would be the case. And I'll put my hand up very quickly just as we're discussing sources of data - another possible source. And I was telling Kristine Dorrain the INTA has released now to the CCG Review Team the INTA new gTLD Cost Impact Survey that does have some information that might help answer some questions. I'm not sure if there are direct answers to our questions because it was designed to respond to the Consumer Choice Trust and Competition Review Team and not to the RPM Review Team although there were some questions that came in from the Subsequent Rounds Review Team as well.

But those results are out there and hopefully will be made available, certainly they will. But there is also a possibility of follow-up service to that they were designing for trademark owners for example that we could include other questions. Whether or not we'd be able to obtain that information, you know, in a timely fashion for our purposes I'm not certain but that certainly that possibility and I put it out there. But what I think I'd like to do is, now, turn

from possible sources to actually what data we would look for to answer specific parts of these questions. So the first question is whether the trademark claims service is having its intended effect in deterring bad-faith registrations and what data would enable us in addition -- let me go back real quickly -- the anecdotal evidence I think is important as well and sometimes that may be the best that we can do. But, you know, that coupled with data I think is what we would love to be able to get through certainly the INTA survey and hopefully from the registries, registrars. Going back now what specific data could we look for to help answer this question? Kristine Dorrain?

Kristine Dorrain: Hi. I'm going to slide back to what (Rebecca Tushner) brought up last week and again when we're talking about dream data. I mean I think from a purely data-driven perspective if you want to find out if the trademark claims service is deterring bad-faith registration you need to look at the access and the use of curative rights protection mechanisms. So I think to the extent that there's any way to sort of draw analogies between cybersquatting and legacy TLDs versus cybersquatting and new gTLDs taking into account sort of different business models not all registry operators operate like VeriSign. I, you know, there are registries that are very restrictive so we have to take that into account. There are different pricing models that different registries take into. You know, VeriSign has one set of pricing and new gTLDs pay more and so their pricing models tend to be a little bit different.

So I don't think it's going to be a direct one to one. But to the extent that we can try to draw analogies and figure out, you know, what about the new gTLDs? Are they fairly - are they unreasonably high - are there an unreasonably high number of URSes or UDRPs or are brand orders simply choosing not to participate in curative rights because they don't believe new gTLDs are a threat? And I think data that ties registrations to curative rights could be useful there. I - if - I won't make any substantive comments about whether that data's accessible or quickly but I think that would be very useful.

Michael Graham: Thanks Kristine Dorrain. It's Michael for the record. And let me ask you with that information if there's some subset within that that you think would help show a specific correlation between the use of curative rights and the claims notice function?

Kristine Dorrain: Well I think you'd have to look back and determine whether or not the for instance you'd have to go back and figure out when - and I think (Rebecca) was alluded to this last week. But I think you have to go back and look at when the domain names that are the subject of your S or UDRP complaints were registered. So if they if it's stark. You know, so I think you would I think you'd see an absence pretty quickly.

So if you look at all of the UDRP or URS cases that were filed in 2016 and you could specifically focus on URS because they don't apply to legacy TLDs or to most legacy TLDs and then decide, you know, would the majority of most domain names registered during the period in which the claims notice was displayed to registrants or is there a sharp incline in the number of registrations that occurred on Day 91 of that registry operator's general availability of period and on and so in other words when the claim when the registrant would have not received the notice? You could possibly make some correlations there. I think you would at best get a negative correlation. You'd know if there was not a correlation but, you know, it might be a start.

Michael Graham: Okay. That - so to clarify my understanding the one specific part of that that I think would be really useful was the difference in behavior or numbers between those registrations applied for during the 90-day notice period and then those outside of it and whether or not there was a difference in the number of UDRP actions that were filed at that point. That's the sort of thing...

Kristine Dorrain: Yes. I mean you'd have to take a pretty big sampling swath because, you know, as a brand owner you know this. I mean you don't file your UDRP or URS the day you discover an infringement and you might not discover

infringement on the first day the domain name's registered. You usually wait around and see what the registrant is going to do with it first. So, you know, you'd have to take a pretty big swath and then you'd have to back it up and basically do a study of all of those domain names that were a part of the UDRP or URS sample that you chose and try to determine when those domain names were registered probably by looking at the Whois information to try to figure out if those domain names would have been subject to a claims notice.

Michael Graham: Okay. We'll see if we can drill that down into data definition. Kathy Kleiman, you have a - your hand up?

Kathy Kleiman: Yes. How I think the Analysis Group has actually done some of this analysis for us. I'm trying to look through the report right now. But it's my understanding that, you know, when we read it and I read it pretty closely and (Michelle) go back it's - and take a look. But that was when, you know, prepare - when I was preparing for the call when Greg was on, Greg Rafert.

The Analysis Group was looking at that question of registrations at day 91 because they been asked as one of the GAC questions what would be the impact of extending the trademark claims period? So they were looking at URS data. They were cross correlating it. I don't want to give any representations of what that data is just that I think it's there. So I think that will help us. And maybe they have additional data that they could easily provide as well something that didn't make it into the report. Just wanted to mention that, that I think they've looked at some of this for us. I'm not sure about UDRP but I know they looked at URS data. Thanks.

Michael Graham: Okay, thanks Kathy Kleiman. Kristine Dorrain?

Kristine Dorrain: Yes. So I just wanted to enter a response. So for Amr's notetaking purposes I mean my question still exists. And I think we should add to the question that Kathy Kleiman thinks some of the answers may result in or may lie in the

Analysis Group report. So that covers sort of Point 1 and Point 2 of what we're trying to do here record the questions record possible data sources.

The other possible data source which could be something as radical as an undertaking of review of UDRP or URS cases but I want to make sure that, that does not get co-mingled with Kathy Kleiman's suggestion because those are two separate data sources that we should independently look at as different ways to get information. One or the other may be more or less acceptable. I'll leave you to determine which is which.

Michael Graham: Okay, thank you. Kathy Kleiman is your hand still up or did you put it back up? Amr your hands up I see.

Amr Elsadr: Yes, thanks Michael. I raised my hand earlier and then I think Kathy Kleiman and Kristine Dorrain did cover most of what I wanted to say. I was going to make reference to the Analysis Group's revised report and point out that they did collect data from four sources one being the claims service data, the second being trademark holders database, a second UDRP and URS dispute data as well as Whois domain registration data.

And then the last two I think were specifically collected to make the sort of correlation that Kristine Dorrain was referring to. So I think what happened was they selected 25% a random selection of 25% of valid trademark strings in the TMCH. And used Whois data registered domain names that were exact matches to those strings and then came up with a number of findings. But - so for example they discovered that dispute of registrations completed following a claims notice was about 0.3% which is quite low and maybe indicated that the claims notice was effective at deterring bad faith registrations. But it could be indicative of other things as well.

And this is where additional data might be helpful. So they weren't sure for example if trademark holders weren't really concerned enough with the domain names that were registered to initiate disputes or perhaps the

disputes had been filed following the data that was already collected. So although there is data that staff could probably assist in identifying in the Analysis Group reports there are some open-ended questions in that revised report. And maybe that might help the sub team sort of pinpoint what missing data could be gathered to assist in answering the charter questions. Thank you.

Michael Graham: Thank you Amr, it's Michael Graham again. Just a question with that it seems that you were suggesting that in putting together an identification of existing sources of some of the data that we're identifying as being useful that, that listing would - could also include a notation of caveats or limitations on the data that we have so that we could use that to identify further data that we should try to obtain. Is that correct?

Amr Elsadr: That is correct Michael. And if you all agree then maybe we could take this as an action item to follow-up on.

Michael Graham: Okay yes. I think that would be very useful. Kathy Kleiman you put your hand back up I believe?

Kathy Kleiman: Yes. Actually I think it's an old hand. But let me comment because we're going back and forth. I think what Amr said in terms of listing, you know, factually what's available through the Analysis Group would be really useful. And then, you know, we can work with staff and others to find out what the question, you know, what it answered what it didn't but just in terms of factually what evidence is available so that we can figure out perhaps even by the next meeting what additional evidence we might be seeking. So let's separate the unanswered questions from what evidence was actually collected. Thanks.

Michael Graham: Okay, thank you Kathy Kleiman. Yes I think that will be important going forward. I'd like to take a stab at my pie in the sky evidence. I would like to in order to answer this question I would like to know how many of the

applications that were being filed that were subject of trademark claims notices were filed by one of a number of different groups? One of them would be trademark owners which I would imagine would be an extremely small group.

But if there were a way of identifying and it's - a way of identifying bad faith applications if I had the number of bad faith applications that were filed and then the number of those bad faith applications that were abandoned as a result of the trademark notice claims notice I think that would answer my question. I do not know where I would obtain that information. Kristine Dorrain?

Kristine Dorrain: Hi. So since you're the chair and I want to ask some clarifying questions of you because you...

Michael Graham: Okay.

Kristine Dorrain: ...have been doing such a good job of getting us to clarify. So I heard an inference that perhaps trademark owners - so you could like information about the people that registered domain names during general availability so after the claims notice is that correct?

Michael Graham: Oh I was actually going back to during the claims notice since that's the focus of our inquiry and trying to work out who I would be looking at. And actually as I said trademark I was splitting it into three groups let's say trademark owners who may be applying utilizing one of their trademarks or a compound that includes that trademark, good faith applicants who are just looking - think this would be a great domain name to have for whatever purpose either speculative or starting a Web site and then a third group which would be the bad faith applicants that are seeking to register in order to in bad faith profit from the ownership of that domain name whether it be, you know, hiking up the price and creating an infringing Web site whatever. If I could define those three groups and then find out whether or not after receiving the notice that

their applications proceeded to registration that would be information that would be useful for me. But specifically the bad faith group whether or not...

Kristine Dorrain: Okay.

Michael Graham: ...the bad faith people were prevented from going forward to registration.

Kristine Dorrain: Okay. Well under the UDRP definition right bad faith is defined as registration and use in bad faith? Although we could for the purposes of this particular chat we could extend that to people just with a bad faith and nefarious intent not your innocent infringer or not you're truly good faith like free speech person your actual like I plan to be a cyber squatter. (John)'s agreeing.

The problem is that those people don't put their name on there Whois, you know, as such. So I'm trying to figure out I'm trying to chase down with you what - and when people register a domain name and then don't use the domain name you again don't have any evidence of their intent until their using the domain name. So are you specifically talking about what the UDRP refers to as opportunistic bad faith?

So are you talking about domain names that are extremely obviously infringing, so Microsoft Windows? But Microsoft Windows wasn't in the Trademark Clearinghouse and because they don't allow a combination of term yet. And Microsoft did not register it. And so the only possible use of that would be bad faith. Is that kind of what you're looking at? I'm just trying to parse out a little bit.

Michael Graham: Very good question because I'm going with the general term bad faith registration that's in our question.

Kristine Dorrain: Okay.

Michael Graham: My presumption...

Kristine Dorrain: Yes.

Michael Graham: ...would be the applicants that have a nefarious purpose to their registration. It's not good faith use of a term that might infringe but that's not part of the intent that's totally, you know, inadvertent infringement. But have a desire to -  
- I'll use the word nefarious again sorry to be (reductivist) -- but have a nefarious purpose to registering a particular domain name.

Kristine Dorrain: Okay. So without trying to speculate as to how we would get that data let me throw this scenario out at you and see if you think this would get the data that you are looking for. So we run a report ICANN runs a report someone runs a report of all the domain names registered in January 2017 everywhere across all TLDs.

And then we sort those alphabetically. And then we literally scan them. I mean there's probably a million of them but okay let's just say it's doable because we're doing pie in the sky. And we looked on the list and we do the John Berryhill test of how many trademarks like, you know, arbitrary advance of all coined words jump out at you and then you cross reference that to the owner of the domain name. If it's not the brand owner obviously or if it's obviously not the brand owner you flag that as possible bad guy. Is that what you're thinking?

Michael Graham: Well I'm still pie in the sky. So I think that would be the place to start. But then you would have the additional question from there whether or not it was in fact a bad faith application or whether it was an inadvertent infringement. So that question is still out there. So what - is there anything to addition that would enable you to make that determination?

Kristine Dorrain: So but the determination in your case then in this last scenario is you want to know the intent? And I don't know that you can get to anyone's intent without a court.

Michael Graham: Right. So what's the closest that we could come to I think - and as I said we were starting out or I was certainly starting out here was pie in the sky. In order to answer the question if the claims service is effective in its intended effect of deterring bad faith registrations I have to find out if bad faith applications have actually been deterred? If people have decided I'm not going to go back and do that because I know I'm going to get a claim notice.

Although I believe the question actually applies not only to deterrence of the application but also deterrence once somebody files something that they're deterred from processing it through to a registration. And I'm reading it in the second way. But how do we answer that question obviously if we were able to identify the bad faith registrations or applications that were not carried through to registration that would be part of our answer.

Kristine Dorrain: Yes, no...

Michael Graham: And the problem is as you say how would you identify intent?

Kristine Dorrain: Yes. I think - I mean and I'm a proponent of the not necessarily criticizing ideas strategy. But I think we are going to run into trouble if we spend time trying to guess at why people are registering domain names and limit ourselves to the types of questions where there may be actual data to be received. So I think to the extent that we would want to do the sort of like cross-sectional analysis to see across TLDs are there obvious cases where, you know, domain names brands are being registered wholesale by groups of people. That could be got that could be received through certain data but I don't know that you're going to get the intent data. So I'll stop cross-examining you there. I'm just trying to get a sense of where the question was going. Thanks.

Michael Graham: Right. And I would just say I'm putting it out there as that I think would be important but I think that's probably in the red zone. If we could find

something that would get us closer to a yellow zone and provide some of the same data I think that would be useful. Kathy Kleiman oh I thought you had your hand up. Now you have it up again.

Kathy Kleiman: I didn't want to interrupt an excellent discussion that was going on. Okay so I'm confused. We have a lot of data in front of us. I know we don't all agree on what it means but everything is being deterred by the trademark claims 94.7% of registrants are turning back and not completing there, you know, are not completing the registration. Only 5.3% the data that - I just wanted to make sure Michael we're only looking at if we move forward with kind of that bad faith analysis we're only looking at the 5.3% of registrations that actually go forward.

And there it would seem like you could get a pretty clear understanding from the URS because that's what it was created for. Someone goes through the trademark claims and has that coined defensible term that arbitrary mark that is so clearly violative of trademark rights and you go straight to the URS. That's the slam dunk case.

So I think we can kind of get, you know, see - and I don't remember if Analysis Group did this but looking at the URS filings for the 90 days and slightly afterwards because as has been pointed out people will wait a little while. You know, we can look and see what's happening and whether people are getting through, you know, blowing through those trademark claims notices for bad faith purposes. But I do think we have to keep in mind that only 5.3% of registrations are actually going through this. And that is a different issue and concern. Thanks.

Michael Graham: Thanks Kathy Kleiman. Yes I think focusing some of the analysis on the 5.3 might be one way of determining - and I think what we'd want to do is put - define what the data is that we're going to find from that. In going back to the 94% figure as well that actually was something I have some questions about. And I hope that (AG) will be able to answer some of them.

But I think that has also data that if there's any way of doing a deep dive on that because I know we've all sort of been frustrated with not knowing, you know, who are those? Where did this figure come from? Is it a result of pinging, you know, or to what extent is it the result of pinging? What are the other figures? Just understand who those 94% are and what those applications are. Unfortunately there is no mean figure that we could go with to compare to this really going forward. Hi, Susan you have your hand up?

Susan Payne: Yes. I just wanted to make a comment about the 94%. Analysis Group themselves were very clear that they couldn't - that it was difficult to draw conclusions from that 94%. It - they were not sure that all of those were genuine registration attempts. It seems like the - or they believe that some of them weren't some of us I know believed that many of those were not genuine registration attempts.

You know, it's very easy to use this process in order to check what's in the Trademark Clearinghouse and receive a claims notice but you were never actually intending to register. I know we're going to keep disagreeing about this but I just, you know, if Kathy Kleiman if you're going to keep quoting the 94% then I'm going to keep pointing out what Analysis Group said about their own data and the conclusions they were able to draw.

And we tried to drill down with them. We asked, you know, many people pointed out additional investigation that we felt they should do between the draft report and the final report. And they whilst I believe they did attempt to do some of it they were unable to do - to get any data that assisted them and that could make their conclusions any clearer.

Michael Graham: Kristine Dorrain, it's Michael. I notice you have your hand up but I'm just going to put my hand up for a couple of things and also to ask Mary Wong if she's about to ask an organizational question which I think is probably appropriate. But I think in discussing any of the data that has been put

forward that sort of is missing the point. We are looking for - to identify what data would be useful to know not knowing any of that data now. We're not doing the analysis, we're not during the application of the data we're just trying to identify what data would be useful to obtain to answer these questions. Then either to confirm that we already have it and what it is or to point towards additional information that we need to get. Mary, were you going to tell me that we're getting close to our time?

Mary Wong: Hi Michael, everybody this is Mary. I wasn't going to and I obviously don't need to. But I was going to note that, you know, following up on certain comments in the chat that the Analysis Group will not be able to do an additional analysis for us but they can answer additional questions. I think I posted to the working group mailing list that those questions if we have any should really be sent to them sooner rather than later because they're not being kept on retainer by ICANN. So, you know, the later we wait it may be really just being dependent on their goodwill to come back with us to say, you know, here we put this data for you and yes we're going to get on a call with you. So that was the organizational comment Michael. Thanks.

Michael Graham: Okay, thank you Mary. And yes I do know that there are several of us who are going back over the GMCH review and putting together some additional questions. And I think certainly from both sides of the use of the 94% figure Susan yours and Kathy Kleiman's I think, you know, to the extent that you could put together some questions for the group if - to determine whether or not they can go further into that information to provide anything that would throw any further light on it would be useful.

Their conclusion and this may be their answer appears to be we can't go any further and we can't utilize this to prove anything because there are so many factors and possible factors in this that we don't actually know. What I'd like to do though because we only have five minutes remaining on this call is to sort of put us in a position going forward.

I think that it would be most useful if we asked all of the members of this sub team to individually go through the updated questions. And obviously question four we'll pause it with the revision that Kristine Dorrain put forward and use that as a working question at this point but comments on that can also be submitted. But we should go through the three well the four questions and individually come up with a list of possible of data that you believe would enable the working group as a whole the larger working group to answer these questions.

And I'm not sure that utilizing the Google Document would be useful in that. I think if you could present it in email, identify which question the data relates to 1A or B, 2A, B, C or D, et cetera, and submit that to the list. Then if we could put that together it would be very useful. Yes I'm afraid that we'll end up with that. We won't have any definitive questions except from the discussion that we've had before on the list. I don't know Amr and Mary if the prior discussion is enough to help you all start identifying source of some of the data? Certainly some of the questions that Kristine Dorrain, Kathy Kleiman and I were discussing today might be a place to start.

But what I'd ask is that everyone present by the end of next week any questions or any data that they believe would be important to gain. And you can identify it just as data if you want to identify it as what you believe might be data that we already have, if you do know that and can identify a source that'd be great. But any data that you think would be useful or necessary in order to answer these questions so we could put that together. Kristine Dorrain?

Kristine Dorrain: Hi thanks. I was actually just going to suggest some more data that we can get. But I will take my hand down. I'll just enter it into the Google Doc. Thanks.

Michael Graham: Okay. Kristine Dorrain do you think we should do that in terms of the data what the best way would be or maybe I'll put this out for Mary and Amr the

best way of submitting proposals of what data would be necessary to answer the question. Mary, you've got your hand up I see.

Mary Wong: Yes. And answer to your specific question Michael I think Amr suggested in the chat that we could add another column in the document the Google Doc that's on screen now what would be helpful to us as staff is to follow-up on what you suggested Michael is sub team members could put in the Google Doc that what data they think is needed. What we can then try to do because not everyone in this team is as familiar with say the Analysis Group report we can then, you know, comment on whether those types of data are already available or whether we know that there are sources so that we can see what the gaps are if any.

The other point that I was going to make is more of a question because there is I believe a working group call next week in a few days but potentially I think none the week following because of the INTA meeting. So the question is whether this sub team feels that it will be in a position to report back with a finalized set of questions regardless of the data collection issues but just what the questions look like by next Wednesday bearing in mind Kathy Kleiman's note that folks need a few days to look at the new tables. So if we could say Tuesday for example folks to either sign off on what's in here or any additional comments to go in so that we can see if that needs to be further discussed. Thanks Michael.

Michael Graham: Thanks Mary. I think that is a great point. And it would be a good way of passing these questions along to the larger group so that we could give them the questions that we've arrived at. Also inform them that we are looking at data that might be necessary or useful to answer those questions and going forward. I'm not sure that I will be available for a call next week. Kristine Dorrain are you?

Kristine Dorrain: Yes. I can chair a call next week. Maybe a show of hands quick or green checkmarks I know it's on the hour right now if you think you can make a call

next Friday at the usual time, green checkmarks? I am not seeing solid support. And I know that (Brian) is probably at INTA. So (Griffin)'s probably at INTA. So I don't know. This doesn't look like a good quorum Kathy Kleiman, (Beth) and I. Oh (Griffin) can make it yes. Is this - Amr, Mary I know people might have to drop is - are we everybody - is everybody that's showing on the list pretty much everybody? J. Scott will probably be at INTA, Scott Austin will probably be at INTA?

Michael Graham: Right. Well I think...

Kristine Dorrain: Yes...

Mary Wong: Hi Kristine Dorrain. This is Mary. I'm trying to pull up the list to check. But I think that you're right that, you know, we may have a few more members who are not on the call today but more likely than not they that they will be INTA annual meeting. But I can double check and cycle an email.

Kristine Dorrain: Okay. Well I think we should maybe tentatively not plan on meeting then and really make a commitment to trying to get this homework done and adding stuff to the Google Doc during the next week or so before you all had out Barcelona.

Michael Graham: Right. And this is Michael. Why don't we ask for any changes or proposed changes in Question 4 by Tuesday so that by Wednesday we'll be able to present the updated questions hopefully. And then I don't know if you want to put a deadline at the end of next week to have proposed data questions? And then basically I guess we could use the list for email to consider further those data points. But then come back together I forget when the next meeting is to actually discuss those. But we may have to do some of that work Kristine Dorrain on list rather than by phone.

Kristine Dorrain: Yes. I think I can support that. I think we don't need a deadline. We'll just continue to work via email until everyone gets back from INTA. Kathy

Kleiman just to answer your question my revisions to Question 4 will be updated on the Google Doc. That'll give everybody until Tuesday to kind of chime in with their comments, or edits or anything else. And then by Tuesday Amr will lock it down assuming that there's nothing major and then we'll have it ready for Wednesday.

Michael Graham: Okay. And just to close out Amr if in putting in the revised four and also preparing the chart with the new column for data suggestions if you would be sure to separate the various questions so that data can be identified to a specific question that would be great. Thank you everyone for participating. Thanks for moving us forward. I think we're in a good position. And now the tough thing what do we need to know? And look forward to talking to you all again soon certainly next Wednesday. Bye now. You can stop the recording I think.

Woman: Thank you so much. Again it has been adjourned. Operator, stop the recordings and disconnect all remaining lines. Have a great remainder of your day everyone.

END